WE *Allow of the Printing and Publiſhing of the* Second Volume *of the Book Entituled,* A General Abridgment of the COMMON LAW, Alphabetically Digeſted under Proper Titles, *&c.* By *Knightley D'Anvers*, of the *Inner-Temple*, Eſq;

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General Abridgment OF THE COMMON LAW,

Alphabetically Digeſted under Proper *TITLES*;

WITH

Notes and References

To the WHOLE.

With Three *TABLES*. The Firſt, *Of the ſeveral Titles*, The Second, *Of the Names of the Caſes*, And the Third, *of the Matter under General Heads*.

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MVSEVM
BRITANNICVM

TO THE

RIGHT HONOURABLE

Sir Thomas Parker Knt.

LORD CHIEF JUSTICE

OF

ENGLAND.

My Lord,

I AM very ſenſible of the Advantage my Firſt Volume *received from that Honour which was allowed me, of prefixing the Name of Your Great Predeceſſor; and can expect no leſs to this my* Second, *if permitted to ſee the Light under the Favour and Protection of Your Lordſhip; the Succeſſor, as well of his Abilities, as Station.*

My Lord,

There is one Circumſtance in Your Lordſhip's Promotion ſo particular, that no Inſtance can parallel; It is, My Lord, That with a juſt Regard to Your early Merits, You was, upon the Firſt Vacancy that happened after your Call to the Bar,

advanced to the higheſt Dignity in the LAW: *In which You have adminiſtred the Juſtice of the Nation to the Satisfaction of the* QUEEN, *and Her People, and thereby ſupported the Honour of that Court, to the great Example of Your Predeceſſor.*

MY LORD,

I have preſumed with the more Aſſurance to beg Your Lordſhip's Patronage, for that it was with Your Lordſhip's Encouragement and Approbation I firſt engaged in this Undertaking; and humbly hope Your Lordſhip will pardon its Imperfections, and excuſe this Preſumption of,

MY LORD,

Your Lordſhip's moſt humble

and obedient Servant,

Knightley D'Anvers.

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I CONDI-

CONDITION. Fol. 407.

(A) To (a) what Perſons it may be reſerv'd.

(a) To the Feoffor, Donor, or Leſſor, and his Heirs, but not to a Stranger. Lit. Sect. 347. Co. Lit. 214.

1. IF Tenant for Life and the Reverſioner join in a Feoffment, the Condition may be reſerved to the Leſſee only, and by his Re-entry he ſhall diveſt but his Eſtate. D. 3 Ma. 127. 55.

2. If *A.* enfeoffs *B.* upon Condition that if the Heir of *A.* pays to *B.* *&c.* 20 *s.* then he and his Heirs may re-enter; this is a good Condition, of which the Heir of *A.* may take Advantage, and yet *A.* himſelf never can. *Co. Lit.* 214. b.

3. If a Man gives Lands to his eldeſt Son in Tail, Remainder to his ſecond Son in Tail, *&c.* upon Condition, that if the eldeſt Son, or any of his Iſſue aliens, the Land ſhall remain to the ſecond, *&c.* the Conſequence of the Condition, that the Land ſhould remain to another, is void, though upon ſuch Alienation the Donor himſelf might enter. (b) *Co. Lit.* 379. a.

(b) Poſt 3. Pl. 6. 1 Rol. Abr. 412. Pl. 6.

(B) When a Perſon is not certainly deſigned, to whom the Law ſhall ſay who it ſhall be.

1. A Man deviſes to A. upon Condition, the Remainder to B. in Tail, having the Fee, and dies; the Condition here is, by Implication of the Law, reſerved to the Heir; for by Intendment he ſhall have the Condition, who is prejudiced by the Deviſe, who is the Heir R. it is to be admitted (a) that the Condition is not deſtroyed by the Remainder. Dy. 3. Ma. 127. 53.

(a) 1 Rol. Abr. 472. Pl. 3, 4.

(C) Condition in Deed.

What (a) Words make a Condition, what not.

(a) Sub conditione, &c. the moſt proper. But vide Co. Lit. 203. a. b. — Proviſo as proper a Word as any, but then it muſt not be dependant upon another Sentence: It muſt be the Words of the Grantor, &c. and compulſory to enforce the Grantee to do ſome Act. 2 Co. 70. b. (b) Co. Lit. 204. a. 4 Leon. 70. Hob. 231. Like Rule in the Caſe of the King. Dal. 58. and vide Lan. 78. (c) Fitz. Condition 7. S. C.

1. (b) AD Effectum in Grants of the King, makes a Condition. 38 *H.* 6. 35. Co. 10. Portington 42.

2. If the King grants an Advowſon in Fee, and further Conceſſit, that the Grantee may amortize this for the Soul of the Progenitors of the King; this is but a Licence, and not a Condition. (c) 43 E. 3. 34. adjudged.

3. The Words ea intentione in the Grant of the King make a Condition. Co. 10. Portington 42.

4. The Words Ad ſolvendum in the Grant of the King, make a Condition. Co. 10. Portington 42.

(d) Co. Lit. 204. S. C. (e) A Man made a Feoffment, ea intentione, that his Wife ſhould have an Eſtate for Life, the Remainder to his youngeſt Son in Fee, and the Feoffee died without making ſuch Eſtate. 4 Leon. 2. It was reſolved the Heir of the Feoffor could not enter, for that there was no Condition, but an Eſtate executed preſently according to the Intent.

5. (d) Ea intentione does not make a Condition, but a (e) Confidence and Truſt, unleſs an expreſs Re-entry be limited. D. 3, 4 Ma. 138. 30. adjudged. Doctor and Student 122. 31 H. 8. S. 152. contra. 27 H. 8. 15. b.

6. Ut inveniat ad inveniendum ſeu perimplendum, &c. make not a Condition. D. 3, 4. Ma. 138. 3. And this is alſo proved by the Writ of Ceſſavit de Cantaria.

7. Bracton Capite de Donationibus upon Condition hath this Verſe.

(f) Where the Words Si modo by the Common Law make a Condition, though 'tis otherwiſe by the Civil Law, as in a Licence from the Archbiſhop to accept another Living, modo ſit within 10 Miles of the former. Dodſon and Lynne, Cro. Car. 475. adjudged. 1 Jon. 304. adjudged. Ow. 152. S. C. cited. (g) Co. Lit. 204. b.

8. (f) Scito quod (ut) modus eſt (g) (ſi) Conditio (quia) Cauſa. This is cited, D. 3, 4. Ma. 138. 31.

(h) Where the Word Proviſo makes no Condition, but only a Qualification or Explication of a Covenant or Grant, vide 2 Leon. 128. 3 Leon. 225, 226. Di. 222. 4 Leon. 70, 71. &c. 3 Leon. 16. Poph. 119. Moor 707. Goulſ. 131. 2 Co. 72. a. b. 1 And. 71, 72. (i) 2 Leon. 128. S. C. adjornatur. 3 Leon. 225, 226. adjornatur. 4 Leon. 70, 71. &c. adjornatur. By the Report of all which Books, the Proviſo was, that if the Leſſee ſhould make his Heir Male his Aſſignee, &c. Moor 707. S. C. cited.

9. Recoverers to an Uſe before 27 *H.* 8. leaſed by Indenture for 99 Years, and the Leſſee, by the ſame Deed, covenanted with the Recoverors to pay the Rent to *Ceſtuy que uſe*, his Heirs and Aſſigns. *Proviſo ſemper*, That if *Ceſtuy que uſe* makes not his Heir Male his Aſſignee, that then he ſhall pay the Rent to the Recoverors, their Heirs and Aſſigns, &c. This (h) Proviſo made no Condition, but only abridged the Covenant. *Mich.* 29 *Eliz.* (i) between *Scot* and *Scot*, *Cr. Eliz.* 73. adjudged.

(D) By what Words it may be created.

By Covenant.

(a) Goulſ. 131. like Point arguendo.

(*) Fol. 408.

(b) In the Caſe of Thomas and Ward, Cro. Eliz. 202. agreed accordingly.

1. (a) If a Man leaſes Land by Indenture, and in this there is ſuch a Clauſe, And it is covenanted between the Parties, or It is agreed between the Parties, That the Leſſee ſhall not do ſuch a Thing upon pain of Forfeiture of his Eſtate: (*) This is a good Condition; for here the Words ſtand indifferently to be the Words of the Leſſee or Leſſor, and ſo ſhall be taken to be the Words of the Leſſor. (b) H. 32 Eliz. B. R. agreed.

(c) Thomas and Ward, S. P. Cro. Eliz. 202. adjudged. 1 Leon. 245. adjudged. Pen and Glover S. P. Moor 402. Pl. 533. Semble per curiam it is no Condition. Cro. Eliz. 421. it is with a proviſo, &c. Dal. 8. per Mountague, the Leſſor may take it as a Covenant or Condition, but not as both. (d) Being by Indenture, they are the Words of both Parties. Cro. Eliz. 202. 1 Leon. 245, 246. (e) Cro. Jac. 398. S. C. adjudged, for another Reaſon, the Court doubting of this Point. 2 Bull. 290. S. C. and S. P. agreed by all, being upon a Leaſe for Years, which may determine, as well as begin, by Contract. 1 Rol. Rep. 68, 69, 390. S. C. and S. P. agreed on both Sides; and vide Poph. 100.

2. (c) If a Man by (d) Indenture leaſes for Years, and therein the Leſſee covenants and grants with the Leſſor, that he, nor his Aſſigns, will not grant, aſſign or ſell, the Land to any preter, &c. upon pain of Forfeiture of the Term; this is a Condition. Mich. 12 Jac. B. R. and Trin. 14 Jac. B. R. between (e) Whitchcock and Fox adjudged.

3. But

3. But if a Man leaſes for Years, and the Leſſor covenant, That the Leſſee ſhall have Houſe-boot, Hay-boot, and Plough-boot, without committing waſte, upon pain of Forfeiture of the Leaſe: This is a Covenant on the Part of the Leſſor, and therefore no Condition. *Hill.* 40 *Eliz.* between *Archdeacon* and *Jenner*, *Cro. Eliz.* 604. by *Walmſly*; and by *Anderſon* and *Beamond*, the Covenant is no more than the Law appoints; therefore that, and (f) all that is ſubſequent to it, is vain.

(f) Where a Proviſo was void, becauſe no more was to be done by it, than what might be done without. Vid. Poph. 116.

(E) Improper Words.

1. IF a Man leaſes for Life, or makes a Feoffment, upon Condition, that if the Leſſee does ſuch an Act, the Eſtate ſhall be void: tho' the Eſtate cannot be void before Entry, yet this is a good Condition, and ſhall give an Entry to the Leſſor by Implication. 2 Mar. Br. S. 465. Co. 3. Pennant 65. admit. Lit. S. 723. M. 37, 38 Eliz. B. R. in (a) Goodale and Wiat's Caſe, agreed by all preter Fenner, who doubted thereof.

(a) 5 Co. 95. b. S. C. and S. P. appears. Cro. Eliz. 384. S. C. and S. P. appears. Moor 708. Pl. 989. S. C. but the Court varied in their Opinion. Goulſ. 176, 177. S. C. and S. P. dubitatur. Poph. 100. S. C. and S. P. doubted by Fenner and Poph.

2. So it is if the Condition be that the Eſtate ſhall ceaſe. L. S. 723. M. 37, 38 Eliz. B. R. per Coke.

3. If a Man makes a Feoffment by deed, upon Condition, that if the Feoffee does not ſuch an Act, then the Feoffment, Charter and Livery, ſhall be void: This is a good Condition, though no Re-entry be reſerved. D. 9, 10 Eliz. 268. 15. admit.

4. So if the Condition be, that the Feoffment ſhall be void: This is a good Condition, and ſhall give a Re-entry without an expreſs Reſervation. 11 H. 7. 22. Eriche's Caſe agreed.

5. So if the Condition be, that the Deed of Feoffment & Seiſina inde habita erit vacua & nullius vigoris; this is a good Condition, for this is all one as if he had ſaid, that the Feoffment ſhall be void, for the Livery takes effect by the Deed. Dubitatur, M. 37, 38 Eliz. B. R. between (b) Goodale and Wiat, two againſt two Juſtices.

(b) 5 Co. 95. b. S. C. and S. P. appears. Cro. Eliz. 384. S. C. and S. P. adjudged upon a Writ of Error. Goulſ. 176, 177. S. C. Poph 100. S. C. and S. P. doubted by Fenner and Poph.

6. (c) If a Man leaſes for Life, or makes a Feoffment in Fee, upon Condition, that if the Feoffee or Leſſee does ſuch an Act, that then his Eſtate ſhall be void and ceaſe, and the Land ſhall remain over to a Stranger: Though it was intended that the Stranger ſhould take Advantage of the Condition, and he cannot by Law, yet the Leſſor or Feoffor may enter by Force of this Condition. Lit. S. 723.

(c) 1 Rol. Abr. 412. Pl. 6. like Point.

7. If a Man makes a Feoffment by Deed, and the Feoffee grants by another Deed made upon Condition, that if the Feoffor does ſuch an Act, the firſt Deed ſhall be of no force; this is a good Condition, and ſhall give a Re-entry, though none be reſerved. (d) 30 Aſſ. 11. admitted. 45 Aſſ. 10. admitted.

(d) Br. Condition 113. S. C. and S. P. admitted, where the Livery is made upon both Deeds. Br. Defeaſance 8. S. C. and S. P. admitted as before; and vide 1 Rol. Abr. 414. Pl. 1, 2.

8. (e) If a Man leaſes for Years, and in the Indenture there is ſuch a Clauſe, Et non licebit to the Leſſee dare, vendere, vel concedere ſtatum & terminum ſuum alicui perſonæ ſine licentia of the Leſſor, ſub pœna forisfacturæ termini præd', this is a good Condition. (f) D. 3 E. 6. 66. 8. per Curiam.

(e) Co. Lit. 204. S. P.

(f) 1 Leon. 246. S. C. cited.

9. (g) So

(g) Co. Lit. 204. S. C. and S. P. cited. Godb. 99. S. C. cited.

9. (g) So if there be such a Clause in the Indenture, and the Lessee shall continually dwell upon the House, upon Pain of Forfeiture of the said Term and Interest. D. 6. 7 E. 6. 79. 46. per. Curiam.

(h) Secus if this had been omitted. 3 Bulst. 155.

10. If a Man makes a Feoffment, rendring Rent, and if the Rent be behind, that it shall be lawful for him and his Heirs to retake (h) the Land, and to make his Profit thereof: This is a good Condition, and shall give a Re-entry, tho' it be not expressly limited. (i) 6 E. 2. Entry Congeable 55. adjudged.

(i) 1 Rol. Rep. 330. S. C. cited; and vide 1 Rol. Rep. 367. 3 Bulst. 154.

Fol. 490.

(F) Obligation Condition.

What Words make a Condition.

1. IF the Condition of an Obligation be made in this manner; Scilicet, The Condition of this Obligation is such, That if R. H. do not grant over the Benefice of D. during his Life, then the said J. H. (the obligor) doth Covenant to grant and assign the said Advowson to the Obligee, and his Assigns, &c. Tho' the Word Covenant be put in here, yet this is Conditional, because it is expressed before in the Commencement of the Condition, The Condition of this Obligation is such, &c. Trin. 38 Eliz. B. R. between Wilsden and Haynes.

2. If the Condition of an Obligation be such, Now therefore if the said Obligor pay 10 l. to the Obligee quarterly, then it is agreed that the Obligation shall be void: This is a good Condition. P. 8 Ja. B. between Simpson and Barnard, per Curiam.

3. If the Condition of an obligation be to stand to the Award of J. S. so as the said Award be made in Writing indented under his Hand and Seal, &c. This is a Condition, so that the Award shall not bind, tho' it be made by Writing under the Hand and Seal of J. S. if the Writing be not Indented. P. 11 Car. B. R. between Holmes and Hoye, adjudged upon a Demurrer. Intratur Hill. 11 Car. Rot. 468.

(G) Obligation Condition.

What shall be said to be Parcel of the Condition.

1. IF the Condition of an Obligation be in such manner; Whereas Robert Cross the Father shall and will, before such a Day, surrender the Moiety of the said Copyhold Tenement unto Robert the Younger, so that Robert the Younger be thereof so seised according to the Custom of the Manor, if they so long live, then the Obligation to be void. The last Words, if they so long live, do not make the Condition only, but the Surrender is part of the Condition also. M. 11 Ja. B. R. between (a) Marker and Crosse.

(a) 2 Bulst. 133. S. C. the Condition by the Reporter being only put in short, thus, viz. Whereas the above-bounden, &c. shall and will, &c. where it should have been, if the above-bounden, &c. shall and will, &c. and per totam Curiam this is a meer void Condition, being altogether insensible, and not compulsory.

2. If the Condition of an Obligation be in such manner; The Condition of this Obligation is such, That if the above-bounden A. B. do discharge the Obligee of such a Recognizance, &c. and whereas also the above-bounden A. B. hath agreed to free and discharge the said Obligee from two several Obligations, &c. Now the Condition of this obligation is such, that if the said A. B. do save and keep harmless the Obligee of and from the said two several obligations, then this present obligation to be void; though in this Case, the Words Prima facie seem to restrain the Condition to the last

laſt Part only, ſcilicet, to ſave him harmleſs from the two Obligations, yet in as much as it appears that the Intent was to extend to the Recognizances, by the firſt Words, The Condition of this Obligation is ſuch; and likewiſe by the Word alſo in the laſt Clauſe, ſcilicet, Whereas alſo; or otherways the firſt Words, The Condition of this Obligation is ſuch, will be void. The firſt Part, as to the Diſcharge of the Recognizance, ſhall be Part of the Condition alſo, for the firſt Part is a perfect Sentence to make it a Condition; but theſe words to be added thereto, ſcilicet, (then the ſaid Obligation to be void:) which words will ſerve well for * both Clauſes, and the intervening Recital, Whereas, &c. will not hinder it. Mich. 1649. betwæn Ingoldesby and Steward, adjudged per Curiam, preter Jermyn. Intratur Trin. 1649. Rot. 1284.

* Fol. 410.

3. If the Condition of an Obligation be, *That whereas divers Suits and Controverſies have ariſen between* A. *and* B. *his Wife, which are now finally ended; if* A. *do not commence any Suit in any Court Spiritual or Temporal againſt* B. *his Wife, but ſhall from henceforth account of, uſe, and maintain* B. *as his lawful Wife, then the Obligation ſhall be void:* The material Part of the Condition conſiſts in the firſt Part only, *viz.* If he does not commence any Suit, which is all before the *but ſhall, &c. Mich.* 39 and 40 *Eliz.* between *Pratt* and *Phanner. Moor* 477. *Pl.* 683. agreed by all the Juſtices, it being pleaded thereto, That *A.* had not commenced any Suit againſt *B.* but that *B.* was before married to *C.* who is yet living, *per quod, A.* could not account, uſe or maintain her as his lawful Wife; and alſo *per totam Curiam* the Plea is good, becauſe the Condition is againſt the Law of God.

4. If the Condition of an Obligation be, to ſave harmleſs certain Lands from all Incumbrances made by the Obligor, and upon the back thereof there is a Memorandum wrote, That the Condition ſhall not extend to the Extent, upon a certain Statute acknowledged by the Obligor: (b) This being wrote before the ſealing of the Obligation, is an Explanation thereof. *Mich.* 44 and 45 *Eliz.* between *Broke* and *Smith. Moor* 679. *Pl.* 930. adjudged by Three Judges.

(b) But for this, vide 2 Rol. Abr. 23. Pl. 4.

5. The Condition of an Obligation was, *That if the Obligor paid ſo much, then the Obligation to be void, or otherways it ſhould be lawful for the Obligee quietly to enjoy ſuch Lands. Mich.* 18 *Car.* 2. between (c) *Ferrers* and *Newton.* 1 *Syd.* 312. *dubitatur,* Whether the Condition ſhould extend to both or not, the Obligor having pleaded that he did quietly enjoy.

(c) 2 Keb. 103. 117. 131. agreed Judgment ſhould be given for the Plaintiff, the Words after the Condition being inſenſible.

(H) By what Words it may be created.

1. IF a Man leaſes to a Woman for 40 Years, upon Condition, That ſi illa tam diu viveret & cuſtodiret ſeipſam a ſole Widow, and ſhould inhabit upon the Premiſſes: This is not any Condition, for the Word (a) ſi makes the Intention uncertain, whether another thing was intended, beſides the Ceſſer of the Term or the Re-entry. Mich. 37, 38 Eliz. B. R. between (b) Sayer and Hardy adjudged.

(a) But if this Word had been omitted, it would have been a Condition; or if ſub conditione quod had been omitted, it would have been a Limitation. Goulſ. 179. (b) Poph. 99. S. C. adjudged; for none can imagine what the Concluſion ſhould be; but it was agreed, That if the Leaſe had been for 40 Yeats, ſi tam diu ſola viveret et inhabitaret upon the Premiſſes, the Leaſe had determined by her Marriage or Death. Cro. Eliz. 414. S. C. adjudged by Three Judges againſt One; for every ſi ought to be anſwered with a tunc. Ow. 107, 108. adjudged. Goulſ. 179. S. C. adjudged. Moor 400. Pl. 525. S. C. adjudged.

2. (c) If a Man leaſes Lands to another, Proviſo ſi the Rent be Arrear: This is not any Condition, becauſe the Word ſi makes the Intention uncertain; for where the (d) Proviſo is hypothetical, it ought to be ſhewed what he would have. Paſch. 14 Jac. B. R. between (e) Moody and Garnon, per Curiam.

(c) Ow. 107. S. P. by two Judges, arguendo. Cro. Eliz. 414. S. P. by three Judges againſt one, arguend'.

(d) Where this being a proper Word of Condition, tho' put in an improper Place, ſhall make the Eſtate conditional. 2 Co. 72. b. (e) 1 Rol. Rep. 367. S. C. & S. P. per cur'.

3. If a Man leaſes Land to another, Proviſo if the Rent be behind, it ſhall be lawful for him to reſtrain; and not being ſufficient, the Ground to re-enter into the Premiſſes, and the ſame to have again in his former Eſtate: This is no good Condition, for the Words are not, that he ſhall reſtrain the Goods upon the Tenement; nor is it known what is intended by the Word ſufficient, ſcilicet, ſufficient Reparation, Rent, &c. and the Words, the Ground to re-enter into the Premiſſes, are without Senſe. Paſch. 14 Jac. B. R. between (f) Moodye and Garnon, per Curiam.

(f) 1 Rol. Rep. 330, 367. S. C. adjudged. 1 Bulſ. 153, 154. S. C. adjudged. Moor 848. Pl. 1151. S. C. adjudged, becauſe not ſaid what ſhall be reſtrained, nor who ſhall re-enter. Cro. Jac. 390. S. C. adjourned; and ſaid, Coke held Reſtrain to be the ſame as Diſtrain.

4. (g) If a Man leaſes for years Lands by Indenture, and after a Covenant on the part of the Leſſor, this Clauſe is contained, viz. Provided always nevertheleſs, and it is covenanted and agreed by and between the ſaid Parties, That he the ſaid Leſſee, his Executors nor Aſſigns, ſhall alien the Premiſes but to, &c. This is a Condition and Covenant at the Election of the Leſſor. Hill. 33 Eliz. B. between (h) Simpſon and Titterell, adjudged upon a ſpecial Verdict, which intratur Paſch. 33 Eliz. Rot. 1609. Co. 2. (i) Lord Cromwell 7. b.

(g) Co. Lit. 203. b. S. P. E. of Pembroke and Sir Fe. Berkely S. P. Poph. 116, 117. adjudged by all the Judges againſt four, ſeems to have been in the Exchequer Chamber. Moor 707. adjudged upon a Writ of Error in the Exchequer Chamber. 2 And. 20. adjudged by the greater Part of the Judges, becauſe all the Words ſhall be taken according to the Intention, ſo as to confound none of them. Cro. Eliz. 384, 385. adjudged upon a Conference by the greater Number of Judges: And Cro. Eliz. 560. upon a Writ of Error, this Point being aſſigned for Error, the Court would hear no Argument. Goulſ. 130, 131. but no Judgment. 2 Co. 71. b. 72. a. cited, and ſaid, that the Judgment was after reverſed for a Fault in the Count, but not for the Matter in Law. Huntington and Lord Montjoy like Point. Moor 174. Pl. 308. dubitatur. Moor 707. dubitatur. Andrews and Blunt like Point. Moor 105. Pl. 249. adjudged. Di. 311. b. adjudged. (h) Cro. Eliz. 242. S. C. adjudged. Moor 707. S. C. cited. Cro. Eliz. 385. S. C. cited. (i) 2 And. 69. S. C. adjudged by the greater Part of the Judges. Moor 471. S. C. Pl. 679. adjudged by Three Judges againſt One. Goulſ. 117. S. C. no Judgment.

5. If a Man leaſes Lands for years, rendring Rent, and the Leſſee covenants to pay the Rent, and not to do waſte; and the Leſſor binds himſelf in an obligation, that the Leſſee ſhall enjoy the Lands (k) for the ſaid Rent, and doing according to the Covenants of the ſaid Indenture: Theſe Words (l) for the Rent make not a Condition, becauſe he hath other Remedy for the Rent, ſcilicet, upon the Indenture of Covenants. Mich. 5 Jac. B. between Tomkins and Tomkins.

(k) 1 Rol. Rep. 367. S. C. and S. P. per cur'.

(l) The Leſſor covenanted, that the Leſſee, paying his Rent, ſhould enjoy the Land. 4 Leon. 50. by Two Judges againſt One: The Covenant is conditional, — but 1 Syd. 280. it is held contrary per curiam: And 2 Mod. 34, 35. it is adjudged con'. — So if a Man leaſes for Years, excepting the Trees, and Liberty to fell and carry them away, reparando ſepes et implendo foveas, the repairing the Ditches, &c. is no Condition, but a Covenant, upon which the Leſſee hath Remedy by Action. 2 Jon. 206. and vide March 9. 2 Rol. Rep. 466.

6. If *A.* enfeoffs *B.* upon Condition that he ſhall render to *C.* and his Heirs an yearly Rent of 20 *s.* and that if *B.* and his Heirs fail of Payment thereof, that then *A.* and his Heirs may enter: This is a good Condition; for tho' a Rent cannot be reſerved to a Stranger, yet yearly

yearly Rent in this Caſe (m) ſhall be intended of an yearly Sum of 20 *s.* in Groſs. *Lit. Sect.* 345. *Co. Lit.* 213. *a.*

(m) If a Man grants a walk in a Foreſt, provided the Grantee ſhall not cut down any Trees ſuper Premiſſa; tho' the Soil is not granted Premiſſa, and hath properly a Relation to the Thing it ſelf, yet ſince in this Caſe it cannot have ſuch Conſtruction, it ſhall be intended of Trees growing within the Walks. Cro. Eliz. 781. adjudged; and vide Moor 526, 527. Dal. 54. Moor 52.

7. If *A.* being ſeiſed in Fee of the Manor of *B.* and of divers Lands in *C.* then in the Poſſeſſion of *D.* for ſeveral Years to come, makes a Feoffment thereof to *E.* to the Uſe of himſelf in Tail-Male, Remainder to *F.* in Tail-Male, *&c.* provided that *F.* or the Heirs-Male of his Body, in whomſoever of them the Inheritance in Tail *of all the Premiſſes* ſhall happen to be, ſhall pay to the Daughter of *A.* 200 *l.* according to the laſt Will of *A.* and *A.* makes a Letter of Attorney to *J. S.* to enter into the Manor of *B.* and the Lands in *C.* and in his Name to take Poſſeſſion, and deliver it to *E.* Whereupon Poſſeſſion is given to *E.* of all but what was in the Poſſeſſion of *D.* and *D.* never attorns, ſo that the Lands in *C.* paſs'd not; and after *A.* by Will bequeaths 200 *l.* to his Daughter, and dies without Iſſue; yet *F.* is not bound by this Condition, becauſe he hath not (n) *all the Land* according to the Purport of the Condition, which was, that he that had *all* ſhould pay, *&c.* and a Condition ought to be taken ſtrictly. *Hill.* 38 *Eliz. Slaning*'s Caſe. *Poph.* 102, 103. certified to the Chancellor accordingly, as the Opinion of Three Judges.

(n) If a Man makes a Deed of Feoffment of Lands in ſeveral Counties, upon condition the Feoffee ſhall re-infeoff him of all the Land within 20 Days after the Date; if Livery is made but of part within the 20 days, the condition is not broke, though all is not re-conveyed within the 20 days according to the Letter of the condition, which is intire. Hob. 24.

8. If the Condition of an Obligation be in this manner, *viz. The Condition of this Obligation is ſuch, That if the Obligor ſhall appear* coram Domino Rege apud Weſtmon' *ſuch a Day*, ad reſpondend', &c. *then the Condition of this Obligation ſhall be void, or elſe the ſame ſhall be in full Power and Vertue:* Yet this is a good Condition, for the Senſe is perfect without theſe laſt Words, and they ſhall be rejected for their Abſurdity and Repugnancy. *Trin.* 21 *Car.* 2. between (o) *Malevrer* and *Hawxby.* 2 *Sand.* 78. adjudged for the Plaintiff upon Demurrer, the Defendant having pleaded the Statute of 23 *Hen.* 6.

(o) 1 Syd. 456. S.C. adjudg'd. 1 Mo. 35, 36. S. C. adjudged. 2 Keb. 625. S. C. adjudged.

(I) Condition by Deviſe.

By what Words a Condition may be created by Deviſe.

1. If a Man deviſes Lands deviſable to his Executor to ſell, and (a) to make diſtribution of the Money for his Soul, and dies: If the Executor does not ſell it, the Heir may enter, for this creates a Condition. (b) 38 Aſſ. 3. adjudged. 39 Aſſ. 17.

(a) A Man deviſes 5 l. yearly out of his Land to his younger Son, towards his Education in Learning: This creates no Condition, ſo that he ſhall have the Rent if not educated in Learning. 2 Leon. 154. 3 Leon. 65. and vide Dal. 116. (b) Br. Condition 215. S. C.

2. If a Man ſeiſed of Soccage Lands, having two Daughters, deviſes it to one of the Daughters, to have and to hold to

to her and her Heirs, (c) to pay to her other Sister a certain Sum of Money at a certain Day: These Words make a Condition; so that the other Sister, if the Money is not paid, may enter in one Moiety for the Condition broke, because * otherways she shall be remediless. Mich. 31, 32 Eliz. B. R. (d) Crickmere's Case adjudged.

*Fol. 411.

(c) These Words, ad faciendum, faciendo, ea intentione, ad effectum, &c. in a Will, create a Condition. Co. Lit. 204. a. Dow. 32. Dal. 58. Moor 57. Pl. 162. Poph. 8. Hard. 10, 11. — reddendo et solvendo. Cro. Eliz. 454. — And vide the Case of Bohenham and Yerlackenden. Ow. 92. Goulf. 75. (d) Co. Lit. 236. b. S. C. cited. Cro. Eliz. 146. S. C. adjudged. 1 Leon. 174. S. C. adjudged. Goulf. 134. S. C. cited.

3. If a Man devises Lands to B. for Life, paying to C. 6 l. Rent yearly, which he Wills to be paid at two Feasts half yearly; and if it be Arrear, that then it shall be lawful (e) to C. to Distrain: It seems this word paying makes not any Condition in as much as a Distress is limited upon Non-payment thereof. P. 8 Jac. Scaccario, between (f) Streete and Beale, dubitatur.

(e) This is misprinted in the Original, for there it is, al Seignieur a Distreiner.

(f) Lan. 56, 57. S. C. and S. P. dubitatur: And vide Lane 78.

4. If a Man leases for Years rendring Rent, and the Lessee Covenants to repair, &c. and after the Lessor Devises to the Lessee for more Years yielding the like Rent, and under such Covenants as were in the first Lease: Yet this makes no Condition; for tho' after the first Lease is ended the Lessee shall not be bound by the Covenants, yet the Will expressing, that the Lessee should have the Lands observing the first Covenants, it shall not be taken to be a Condition by any Intent to be collected out of the Will, for Covenants and Conditions differ much. *Hill.* 30 *Eliz.* between (g) *Michel* and *Dunton*. *Ow.* 54. 92. adjudged.

(g) 3 Leon. 33. S. C. adjudged per totam Curiam. Godb. 99. S. C. dubitatur; and per Gaudy, by the Devise to him to do such things as he was to do by the Lease, the Estate is conditional, which was in a manner agreed by all the Justices; but Periam and Rhodes said that the first Lease was not defeasible upon Breach of the Covenants, nor was it the Intent the second should be so, though the Meaning was, that the same things should be done. Goulf. 74. S. C. adjudged per totam Curiam. Poph. 8. S. C. cited. Cro. Eliz. 288. S. C. cited. 1 And. 230. S. C. adjudged.

5. If a Man devises Lands to several and their Heirs, to the Use of them and their Heirs, upon this Trust and Confidence, That they shall out of the Profits erect a Free-School, &c. The Estate is not Conditional, for the Words (h) shew, That he reposed a Trust in them, and (i) would not have the Lands return for Non-performance; and there cannot be apter Words to shew his Intent not to tie the Land with a Condition. *Mich.* 34 and 35 *Eliz.* between (k) *Mortidal* and *Martin*. *Cro. Eliz.* 288. adjudged.

(h) So where a Man devised to his Wife for 30 years, for and to the Intent and Purpose, that his Wife should pay 30 l. yearly to A. and others; and further devises, that his Wife should be bound to A. and others to perform the Will: This is no condition, for to what purpose should his wife be bound, if this was a condition? 2 And. 50. per Curiam; but no Judgment was given, because the Parties agreed. (i) A man devises Lands to his wife, provided if she departs out of London, that she shall have a Rent out of the same, &c. This makes a condition, though there be no words that the Estate shall cease, &c. Allen and Hill. Cro. Eliz. 238. agreed per Cur'. 3 Leon. 152. admit. per Cur'. (k) Gibons and Mortingal S. C. Poph. 6, 7. adjudged. Moor 594. Pl. 806. adjudged.

(K) Con-

(K) Condition, or Limitation.

What ſhall be ſaid a Condition, and what a Limitation.

1. IF a Man deviſes Lands to his Daughter in Tail, with divers Remains over; Proviſo, That his Daughter, and every one in Remainder, ſhould permit and ſuffer T. (who then enjoyed the ſaid Land) to enjoy the ſaid Land during his Life: This ſhall not be any Limitation upon the Eſtate of the Daughter, though ſhe be Heir General, and ſo ſhe her ſelf is to have the Advantage thereof, if it be a Condition: It ſeems (z) becauſe this is the proper Word for a Condition. Mich. 37 Eliz. B. (a) Thomas's Caſe per Curiam admit.

(z) 2 Syd. 152. 2 Brow. 68,69. Goulſ. 134.

(a) 1 Rol. Abr. 843. Pl. 1. S. C.

2. If a Man leaſes to a Woman for 40 Years, (b) upon Condition if ſhe tam diu viveret, & cuſtodiret ſeipſam a ſole Widow, & inhabitaret upon the Premiſſes; this is not any Limitation, becauſe the Words, Upon Condition that (c) if ſhe, make the Intention uncertain, and therefore the Leaſe determines not by the Death of the Leſſee. Mich. 37, 38 Eliz. B. between (d) Sayer and Hardy, adjudged.

(b) If the Leaſe had been found by the Verdict (as in truth it was) for 30 Years, ſi tam diu viveret, et cuſtodiret ſeipſam a Widow, it had determined by her Death or Marriage. Cro. Eliz. 414. Poph. 99. Moor 400. Goulſ. 179. (c) If this had been omitted, it would have been a Condition; or if the Words, Sub conditione quod, had been omitted, it would have been a Limitation. Goulſ. 179. (d) Poph. 99. S. C. adjudged. Cro. Eliz. 414. S. C. adjudged upon a Special Verdict. Moor 400. Pl. 525. adjudged, becauſe ſub conditione, &c. are conditional Words. Ow. 107, 108. S. C. adjudged. Goulſ. 179. S. C. adjudged.

3. (e) If a Man, having three Sons, deviſes his Lands to the eldeſt, upon Condition, That he ſhall pay 20 l. to every of the other Two Sons; and that if he fails in Payment thereof to any of the Sons, that (f) then they may enter, and have the Land: This is a Limitation, ſo that if the eldeſt does not pay the Money, the Two Sons may enter into the Land. Trin. 43 Eliz. B. R. between (g) Haynſworth and Pretty; adjudged per Curiam.

(e) Spitle, and Davis S. P. Ow. 8. 55. adjudged. 2 Leon. 38. adjudged. Moor 271. Pl. 324. appearts. Et vide Cro. Jac. 56. 592.

Cart. 93. 171. (f) But vide Dal. 117. (g) Cro. Eliz. 833, 919, 920. S. C. adjudged, becauſe it is as an immediate Deviſe to the younger Children, if the eldeſt does not pay. Moor 644. Pl. 891. S. C. adjudged; and the Non-payment is a Condition precedent to the Deviſe to the younger Children, and no Condition or Limitation to the Eſtate of the elder Son. Noy 51. S. C. adjudged. Vaugh. 271. S. C. cited.

4. If the King leaſes for Years, rendring Rent, and by the ſame Deed the Leſſee convenit & concedit with the King, his Heirs, and Succeſſors, not only de novo to repair the Mill leaſed within one Year after, but alſo to keep it in repair during the Term: This is a Limitation in the King, inaſmuch as it is an executory Conſideration; ſo that by the Non-performance thereof, the Leaſe ſhall be void. Paſ. 10 Jac. Scaccario, between (h) Sawyer and Eaſt, for Croſhe Mills, adjudged.

(h) Lane 74, 79, 80. S. C. adjudged, for this and other Reaſons, by Three Judges againſt One. 2 Rol. Abr. 200. Pl. 7. S. C. which vide, with the Notes there.

5. If a Man hath Iſſue Two Sons, ſcilicet, R. the eldeſt, and H. the youngeſt, and alſo Two Daughters, and deviſes certain Lands to H. in Tail when he comes to 24 Years of Age, upon Condition, That he ſhall pay unto my two Daughters 20 l. a Year at their full Age: And if the ſaid H. dies before 24,

then I will, that R. my Son and Heir shall have the said Land to him, and to his Heirs, he giving and paying to my said Daughters the said Money, in such manner as H. should have done if he had lived: And if my Sons H. and R. (if the said Lands come to the said R. by the Death of H.) do not pay the said Money to my said Daughters, as aforesaid, then I will my said Land shall remain to my Daughters and their Heirs for ever; and after the Devisor dies. This is a Limitation upon the Estate of H. and not a Condition: So that if H. does not pay the Money to the Two Daughters after his Age of 24 Years, and at the full Age of the Daughters, R. shall have it by way of Limitation; and cannot enter as for a Condition broke, because that * otherwise, scilicet, if this shall be a Condition, it would defeat the Portions given to the Daughters, and the future Devise to them, which is against the Intent of the Devisor. Mich. 38, 39 Eliz. B. R. between (i) Wiseman and Baldwin; adjudged in a Writ of Error per totam Curiam, and the Judgment given to the contrary in Banco reversed.

* Fol. 412.

(i) Cro. Eliz. 376. S. C. as first adjudged. Goulst. 152. S. C. adjudged; and the first Judgment reversed accordingly by Three Judges against One. Ow. 112, 113. S. C. and the first Judgment reversed accordingly.

6. (k) If a Man devises Lands to another in Tail, upon Condition, That he shall not alien, and that if he dies without Issue, it shall remain over to another in Fee; and after the Devisee aliens; yet he in Remainder cannot enter for the Condition broke, but the Heir at the Common Law; for this is not any Limitation, but a Condition. Mich. 10 Jac. B. between Skirne and Dame Bond, per Coke and Warburton

(k) 1 Rol. Abr. 408. Pl. 6. like Point.

6. If a Copyholder in Borough *English* surrenders to the Use of his Will, and after devises to his Wife for Life, Remainder to his eldest Son, (l) paying 40 *s.* to each of his Brothers and Sisters within Two Years after the Death of his Wife, *&c.* This is a Limitation, and not a Condition; for if it should be a Condition, it would extinguish in the Heir, and there would be no Remedy for the Money. *Mich.* 32 & 33 *Eliz.* between (m) *Wellock* and *Hammond*, *Cro. Eliz.* 204, 205. adjudged.

(l) For this word, vide Stil. 294. 2 Syd. 152.

(m) 2 Leon. 114. S. C. adjudged. Cro. Jac. 592. S. C. cited. 3 Rep. 21. a. S. C. cited. 2 Brownl. 68, 69. S. C. cited.

8. If a Copyholder in Fee in Borough *English*, having Three Sons, surrenders to the Use of his Will, and devises to his Second Son, upon Condition to pay 20 *l.* apiece to his Daughters, and dies: This is a Condition, and not a Limitation; for there is no Necessity to expound it otherwise, (n) as where a Man devises to his eldest Son upon Condition, *&c.* *Hill.* 2 *Jac.* between *Curtis* and *Woolverston*, *Cro. Jac.* 56. adjudged *per totam Curiam*, *preter Williams*, who held it was a Limitation, and that the Land should go to the youngest Brother, who is inheritable by the Custom, for that otherwise he would be prejudiced.

(n) Cart. 93. 171. S. P. adjudged. Cro. Jac. 592. S. C. cited. 1 Rol. Abr. 411. Pl. 3.

9. If *A.* devises Lands to *B.* provided that if *B.* marries without the Consent of *C.* and others, or dies without Issue, then to *D.* *&c.* This is a Limitation, and not a Condition, in Respect the Remainder is limited over to a Stranger, and not to the Heir; for though the Words *Proviso & si* (o) are express Words of Condition, it would be an unreasonable Construction of the Intent of the Devisor, that *B.* should do an Act by which the Estate of *D.* should be forfeited. *Mich.* 23 *Car.* 2. between (p) *Williams* and *Fry*, 2 *Lev.* 21, 22. adjudged.

(o) Dier 316. b. S. P. dubitatur. 1 Leon. 283. S. P. dubitatur. 10 Co. 41. a. S. P. con. but in 1 Vent. 203. (as in several other Books) this Opinion of Coke is taken notice of: And it is said by Hales, there is no other Authority to warrant it. Et vide 2 Brownl. 65, 66. &c. 138. &c. Vent. 322. (p) Ray 236, 237. S. C. adjudged. 1 Mod. 86, 87. S. C. adjudged. 1 Vent. 199, 200. &c. S. C. adjudged; the words in all these Books being, Provided always, and upon Condition, That if B. marries, &c.

(L) Upon

(L) Upon what Conveyance it may be annexed.

1. (a) A Releaſe of all his Right may be upon Condition. 17 Ed. 3. 2. b. (a) Co. Lit 274. b. 30. b S. P.

2. If a Copyholder ſurrenders to the Lord to make his Will, upon Condition to pay 15 l. This is a good Condition. Mich. 2 Jac. b. Garden's Caſe, per Curiam.

3. A Leſſee may ſurrender upon Condition. (b) 14 Ed. 4. 6. adjudged. Co. 4 Andrew Corbet 82. B. (c) 44. Aſſ. 3. (b) Br. Condition 156. S. C.

4. A Confirmation may be upon Condition. Co. 5. Ford. 81. B. (c) Br. Surrender 37. S. C. Fitz Aſſiſe 355. S. C.

5. A Deviſe of Lands deviſable, was good at Common Law upon Condition. D. 3. Ma. 127. 52.

6. A Deviſe of an Uſe at Common Law was good upon Condition. D. 3. Ma. 127. 52.

7. A Deviſe within 32 and 34 H. 8. may be upon Condition, becauſe the Statute gives Liberty to deviſe at Pleaſure. D. 2, 3. Ma. 127. 52.

8. A Man cannot releaſe a Perſonal Thing as an Obligation upon a Condition Subſequent; but the Condition will be void, becauſe (d) a Perſonal Thing being once ſuſpended, is perpetually extinguiſhed. Hill. 9 Car. B. R. between Barkly and Parkes, per Curiam agreed. (d) For this, vide 1 Rol. Abr. 940.

9. But a Man may releaſe a perſonal Thing, as an Obligation, or ſuch like, upon a Condition precedent; for there the Action is not ſuſpended till the Condition performed. P. 10 Car. B. R. between Barkly and Parkes, adjudged upon Demurrer, where the Releaſe was of an Obligation with a Proviſo, That he who releaſed might enjoy 120 l. due by J. S. at a Day then after to come, which was a Condition precedent, as the Court then adjudged it.

(M) Upon what Act it may be created.

1. (a) The Tenant cannot (b) attorn to the Grant of a Seigniory, (c) upon Condition, becauſe this is but a Conſent, and no Intereſt paſſes from him. Vide 15 Ed. 3. Aſſiſe 95. (a) Co. Lit. 300. b. S. P. and vide 1ſt Part 620.

Pl. 1. margine. So Executors cannot agree upon Condition to a Legacy. 4 Rep. 28. b. (b) Becauſe a bare Aſſent without any Intereſt. Co. Lit. 300. b. But a Patron, in reſpect of his Intereſt, may aſſent upon Condition to charge the Glebe of the Parſon. Co. Lit. 300. b. (c) Viz. upon a Condition ſubſequent, ſecus upon a Condition precedent. Co. Lit. 274. So a Licence to alien cannot be upon a Condition ſubſequent, ſecus as to a Condition precedent, becauſe in ſuch Caſe 'tis no Licence till the Condition performed. Poph. 106.

2. (d) A Diſſeiſee may releaſe his Right to the Diſſeiſor upon Condition. *Co. Lit.* 274 b. (d) Kelw. 88. a. 89. a. S. P. con. by Fineaux and Tremail.

3. (e) But a Condition cannot be releaſed upon Condition. *Co. Lit.* 274. b. (e) 9 Co. 85. b. S. P.

4. An expreſs Manumiſſion of a Villein cannot be upon Condition, for once free and ever free. *Co. Lit.* 274. b.

5. Let-

(f) But a Naturalization by Parliament cannot be upon Condition, for it is against the Absoluteness, Purity, and Indebility, of natural Allegiance. Co. Lit. 129. a. But for this, vide 1st Part 323. Pl. 2.

5. Letters Patents of (f) Denization of an Alien, may be upon Condition precedent or subsequent. *Co. Lit.* 274.

6. A Parson cannot resign upon Condition, because it is a judicial Act, to which no Condition can be annexed, any more than an Ordinary can admit, or a Judgment be confessed, upon Condition. 34 *Eliz. Ow.* 12. *Gayton's* Case adjudged.

(N) To what Things Conditions may be annexed.

1. Feoffment of Two Acres upon Condition, and for Breach that he may re-enter but in One: This is good. D. 3. Ma. 127. 55.

2. A Tenth may be granted by the Clergy to the King upon Condition. 21 Ed. 4. 46.

Fol. 413.

3. If a Copyholder surrenders to the Lord to make his Will, upon Condition that he shall pay to him 10 l. This is a good Condition.

(a) Br. Condition 28. S. C.

4. A Contract may be upon Condition. (a) 44 Ed. 3. 28.

(O) (a) How to be created.

(a) Where a Proviso inserted in an improper Place shall have Reference to the Estate, and make it conditional. 2 Co. 72. b. (b) So of a Condition wrote upon the Back of a Lease, before the Execution thereof. Cro. Jac. 456. said upon a Tryal at Bar, and not denied by any. But for this, vide 2 Rol. Abr. 22. Pl. 1. (c) Br. Condition 19. Fitz Bar 189. S. C. Br. Faits 7. S. C.

1. A Condition of an (b) Obligation is good, if it be writ upon the Back. (c) 41 Ed. 3. 10. b.

2. A Condition to perform a Matter in Fact, without Writing, is good. 11 H. 6. 25. b.

3. As in an Indenture, a Man may bind himself upon a Condition to perform all the Covenants between them made for the Permutation of a Benefice, of which there is no Writing. 11 H. 6. 25. b.

4. So if the Obligation be indorsed upon Condition to stand to the Award of J. S. This is good. 11 H. 6. 25. b.

5. A Man may aver a Lease for Years to be upon Condition, and plead the Condition without shewing the Deed thereof, because it is but a Chattel. 7 H. 4. 11. Hill. 15 Car. B. R. between Potter and Oldreeme, adjudged upon Demurrer; but not moved to the Court. Intratur, Mich. 15 Car. Rot. 375.

6. A Man may plead, That a Lease for Years of Land, or a Grant of a Ward, was made by Gardian in Chivalry upon Condition, &c. without shewing any Writing of the Condition (d), because it is but a Chattel Real. Lit. S. 365.

(d) But a Man by Plea shall not defeat a Freehold by Force of such a Condition, without shewing a Deed. Lit. Sect. 365. Co. Lit. 225. But for this, vide the Pleadings after Title Faits. — Otherwise, if a Condition annexed to a Freehold be found by Jury. Lit. Sect. 366. Co. Lit. 226. Kelw. 137. a.

7. So

7. So it is of Chattels Perſonal, and Perſonal Contracts. Lit. S. * 165.

8. If a Condition have falſe Latin in it, yet if any Senſe may be intended in it by the Words within the Condition, it ſhall be good. 20 H. 6. 32.

(*) This is miſprinted in the Original, and ſhould be 365.

(P) How it may be created.

1. IF a Man grants a Rent for Life, a Condition cannot be annexed to this, unleſs it be by Deed. (a) 33 Aſſ. 2. Curia.

2. If a Man agrees with me to make a Feoffment to me upon Condition, and after makes a Charter of Feoffment without any Condition, and after makes Livery ſecundum formam chartæ, without any Condition: this is abſolute without any Condition; for the Livery is not made according to the Agreement, but according to the Charter. (b) 34 Aſſ. 1. dubitatur.

3. But if *A.* agrees to enfeoff *B.* in Surety of the Payment of certain Money, and after makes Livery to him and his Heirs generally, the Eſtate is holden by ſome to be upon Condition, inaſmuch as the Intent of the Parties was not changed, but continued at the Time of the Livery. *Co Lit.* 222. b.

4. If a Man makes a Charter of Feoffment to another, and in the Deed there is no Condition; but when the Feoffor would make Livery of Seiſin to him by Force of the Deed, he expreſſing the Eſtate, makes Livery of Seiſin unto him upon Condition, the Feoffment is of like Force as if no ſuch Deed had been made. *Lit. Sect.* 359. *Co. Lit.* 222. b.

(a) Br. Verdict 64. S. C. Fitz Verdict 42. S. C.

(b) Fitz. Aſſiſe 311. S.C.

(Q) Condition in Deed.

How.

1. A Corody granted for Life, ſecundum quod prius per J. H. & alios (a) uſitat' fuit; and avers the uſe to have been, that every one that hath it ſhall attend upon the Maſter four times in the Year, otherwiſe ſhall forfeit it: this is a good Condition, which refers to other Matters, though not ſhewed in certain that they were done. 20 Ed. 4. 12. (b) 18. B.

2. If an Annuity be granted pro concilio & auxilio habendis, and does not mention in what Matter it ſhall be, yet it may be averr'd he was a Phyſician, or Man of the Law, and it was granted for his Council and Aid therein. (c) 41 Ed. 3. 6.

3. So if the Grantee be learned in two Sciences, yet he may aver the Grant was for one in certain. (d) 41 Ed. 3. 6. b.

(a) In the Original it is miſprinted, for there it is viſitatum.

(b) Br. Condition 167. S. C.

(c) Br. Annuity 7. S.C. Fitz Annuity 19. S. C.

Fol. 414.

(d) Fitz Annuity 19.S.C.

(R) How it may be created.

In what Caſes (a) without Deed, and in what not.

1. A Condition cannot be reſerved without Deed (b) indented. D. 2, 3. Ma. 127. 52.

(a) 1 Rol. Abr. 413. Pl. 5, 6, 7. Pl. 1.

(b) If by Deed Poll, and the Feoffor, &c. gets it into his Cuſtody, he may plead the Condition againſt the Feoffee, &c. Lit. Sect. 375. Co. Lit. 231.

(S) At what Time it may be created.

(a) Co. Lit. 236. b. S. P. (b) For Inheritances executed cannot be defeated by a Subsequent Defeasance. Co. Lit. 236. b. — But a Release, Feoffment, &c. may be defeated by Indentures of Defeasance made at the same time. Co. Lit. 236. b. (c) Br. Defeasance 11. Br. Release 39. S. C. (d) Br. Condition 122. S. C. Fitz Condition 18. S. C. (e) Br. Condition 103. S. C. Fitz Condition 14. S. C.

1. (a) If a Disseisee releases to his Disseisor all his Right, and at a Day after the Disseisor by Indenture grants, That if he pays so much at a Day certain, the Release shall be void: This is a void Condition (b) as to revive the Right to the Disseisee. Br. Conditions 115. (c) 43 Ass. 12. per Curiam, (d) 44. per Curiam, contra (e) 17 Ass. 2. contra, 31 Ass. 32. adjudged: But Quære dubitatur, 32 Ass. 11.

(f) 2 Co. 74. a. S. P. (g) 1 Rol. Abr. 408. Pl. 7. (h) By the Deed declaring the Uses of the subsequent Fine and Recovery. 2 Co. 71. b. (i) Br. Condition 122. S. C. Fitz Condition 18. S. C.

2 (f) But such a Condition may well be created (g) at (h) the same time that the Release was made, tho' it be by another Deed. Br. Conditions 115. 32. Ass. 11. (i) 43 Ass. 44.

(k) But in Case of a Feoffment, &c. where the Estate is executed, it is not to be defeated by Condition or Defeasance, unless contained in the same Deed, or in another executed at the same time. 2 Sand. 48. (l) Cro. Eliz. 623. adjudged in Case of a Defeasance to a bond: But 2 Sand. 47, 48. adjudged con. by Twisden; but it is said per Sanders, minus consulte, for the Law is clear, That an Obligation, Judgment, &c. may be defeated by a subsequent Defeasance, and so is the Common practise: but for this, vide 1 Rol. Abr. 590.

3. Rents, Annuities, Warranties, &c. (being Inheritances (k) Executory) may be defeated by a Defeasance made at the same time, (l) or at any time after. *Co. Lit.* 237. a.

(T) Condition Precedent.

(a) What shall be said a Condition Precedent, and what Subsequent.

(a) For this, vide the Subdivision of Averment, under Title Pleading, viz. By whom an Averment shall be taken. (b) Br. Count 5. S. C. (c) Br. Count 5. S. C. 1 Bulst. 168. S. C. cited. Poph. 161. S. C. cited. (d) But for this vide the Subdivisions of Averment, Title pleading, viz. By whom the Averment shall be taken. (e) Cro. Car. 515. S. C. adjudged.

1. If I grant, That if you will go to such a Place about my Business, you shall have 10 l. This is a Condition Precedent. 3 H. 6. 7. b.

2. If I retain a Man for 40. s. to go with me to Rome: This is a Condition Precedent, for the Duty commences by going to Rome. (b) 3 H. 6. 33. b.

3. So if a man retains another to be his Counsel for two Years next ensuing, taking every Year 20 l. This is a Condition Precedent. (c) 3 H. 6. 33. b.

4. If A. by his Bill Obligatory acknowledges, That he debet to B. 20 s. and for Payment thereof at a Day, he binds himself in 40 s. by the same Bill, in an Action of Debt upon this Bill for the 40 s. He (d) ought to aver, that A. did not pay the 20 s. otherwise it is not good. Mich. 14 Car. B. Regis, between (e) Danes & Bret, adjudged upon a Demurrer

5. (f) If

5. (f) If by Charter-Party G. and three others, covenant with P. and C. to let to Freight a certain Ship of which they are Owners, to the said P. pro usu & ex parte of one B. for a Voyage, modo & forma sequente, G. and the other Three covenant and grant with B. that the Ship shall go from Lynn and take such Freight, and thence to Yarmouth, and thence to Ginchego, and thence to return to the Thames, and C. covenants with G. and the other three that (*) P. shall cause Lading to be put in the Ship at Yarmouth, Ginchego, &c. within so many Days, and covenants that the said (†) P. shall pay to the said G. and the other Three, pro tota transfretatione, 147 l. at such a Day; G. and the other Three may have an Action of Covenant against C. for Non-payment of the said 147 l. (g) without Averment of the Performance of the Covenants of their Parts; for this is not a Condition Precedent, (h) but Covenants distinct of the other Part. Mich. 7. Jac. B. between (i) Gurnel and others, against Clarke, adjudged.

(f) 2 Jon. 216. like Point adjudged.

(*) In the Original it is B. but I suppose it misprinted.

(†) In the Original it is B. but I suppose it misprinted.

(g) But for this, vide the Subdivisions of Averment, Title Pleading, viz. By whom the Averment shall be taken.

(h) For this, vide Stil. 186, 187. 2 Mod. 75, 76. Palm. 397, 398. Poph. 161. 1 Vent. 41. But for this, vide the Subdivisions of Averment, under the Title Pleading, viz. By whom the Averment shall be taken. (i) 1 Bulst. 167, 168. S. C. con. by Three Judges upon a Writ of Error in B. R. but the Court not being full, the Reversal of the Judgment was not pronounced, but adjornatur.

6. If A. by Indenture covenants with C. to serve him with three Esquires in the War; and C. covenants for this to pay to A. 42 Marks: Here * each hath an equal Remedy, and therefore in Debt for the 42 Marks: The Plaintiff may count generally or specially. (k) 48 Ed. 3. (l) 3. b. Co. 7. Ugtred. 10. b.

* Fol. 415.

(k) 1 Bulst. 168. S. C. cited. (l) This is misprinted in the Original, for there it is 31. 4.

(m) 8. If (n) by Articles of Agreement, made between A. on the behalf of B. and C. by which A. covenants, That B. for the Consideration after in the Deed expressed, shall convey certain Lands to C. in Fee, and after C. covenants on his Part (o) pro considerationibus (p) prædictis to pay to B. 160 l. &c. In this Case, tho' B. does not assure the Land to C. yet C. is bound to pay the Money, for the Assurance of the Land is not a Condition Precedent; but these are distinct and mutual Convenants. Mich. 15 Car. B. R. between Caton & Dixon, adjudged upon a Demurrer. Intratur 15 Car. Rot. 137.

(m) In the Origial there is no Pl. 7.

(n) Dunlock and Blacklow, like Point. 2 San. 155, 166. adjudged. 1 Mod. 64. adjudged nisi. 1 Syd. 464. adjudged. 2 Keb. 674. 2 Mod. 33, 34. like Point adjudged.

(o) Where the Word pro makes a Condition, vide Hob. 41. 10 Rep. 42. a. 1 Rol. Rep. 122. 2 Leon. 128. 4 Leon. 70. 1 Bulst. 167. Poph. 198. Godb. 8. 217. 2 Sand. 350, 351. 1 Vent. 177, 178. But for this, vide the Subdivisions of Averment, Title Pleading, viz. By whom an Averment shall be taken.

(p) By 2 Leon. 211, 212. 3 Leon. 219. there is a Diversity, where in Consideration of the Covenants of the other Side performed, and where in Consideration of the Covenants to be performed.

9. If A. releases to B. an Obligation, in which B. is bound to him with a Proviso, That he, Scilicet A. might have and enjoy 120 l. due by J. S. to B. at Lady-day next ensuing: This is a Condition Precedent, and not Subsequent, because the 120 l. was not due at the Time of the Release, but at a Day to come; and if it should be Subsequent, the Condition would then be void, the Release being of a Personal Thing. P. 10 Car. B. R. between Barkeley & Parker, adjudged upon a Demurrer, per Curiam. Intratur P. 9 Car. Rot. 262.

10. If an Award be made by Arbitrators, between A. and B. That A. shall pay 10 l. to B. and that in consideratione inde B. shall be bound in an Obligation to A. to release all his Right in certain Land: In this Case, B. is obliged to be bound in the

the Obligation though A. hath not paid him the 10 l. though that is first to be done by the Intent of the Arbitrators, (q) for there is a mutual Remedy of each Part, if the Award is not performed, for the Consideration was the only Motive of the Arbitrators to make the Award; and it is not a Condition Precedent between (r) Vivian & Shipping, per Jones & Barkley against Croke, this being moved in Arrest of Judgment: But Hill. 11 Car. B. R. between (s) Hayes & Hayes, the same Case in effect was adjudged upon Demurrer, That it is not any Condition Precedent; but that B. is bound to perform his Part, tho' A. does not perform his Part. Intratur Hill. 10 Car. Rot. 1045. contra M. (t) 10 Car. B. R.

(q) As the Case is reported in Cro. Car. there was a mutual Assumpsit upon the Submission to perform the Award.

(r) Cro. Car. 384, 385.

S. C. and S. P. con. by Barkley and Jones against Croke: Q. therefore, if the Original in Rolls is not misprinted. (s) Cro. Car. 433. S. C. and S. P. appears. (t) I suppose the Case in Cro. Car. 384, 385. is intended.

11. If a Man by his last Will devises any Thing, &c. and after he devises all the Residue of his Estates, &c. to his Executor, after his Debts paid, and Funeral Expences discharged (u): This is a good Condition Precedent; so that the Executor cannot have it before they are paid and discharged. Hill. 10. Car. B. R. between Wilkinson & Merdam, per Curiam, upon a special Verdict adjudged: But in a Writ of Error, as I have heard, this was a Doubt between the Judges, and they inclined to Reverse it. Hill. 7 Car. B. R. between Briscoe & Baker, adjudged upon a special Verdict, where the devise of Land was to a Woman, his Debts and Legacies first paid and his Funeral Expences discharged

(u) Dike and Ricks S. P. 1 Jon. 327. admit. per curiam. Cro. Car. 335. appears.

12. If A. Tenant for Life, and R. in Reversion in Fee, covenant to levy a Fine, and that it shall be to the Use of A. and his Heirs, si R. does not pay 10 s. to A. the Tenth of September after; and if he does pay then, to the Use of A. for Life, and after to the Use of R. in Fee: In this Case this Word si, &c. is a Condition Subsequent, and not Precedent; (x) so that A. hath an Estate in Fee, till R. pays the 10 s. because there is a Day limited for Payment of the 10 s. and the Subsequent Words explain the Intent to be a Subsequent Condition, Scilicet, and if he pays it then, it shall be to A. for Life, and after to the Use of R. in Fee, which shews the Intent to be that A. shall have an Estate in Fee till the 10 s. paid. Trin. 13 Car. B. R. in a Writ of Error upon a Judgment in Banco, between (y) Spring & Cæsar, * the last Master of the Rolls, per totam Curiam adjudged, and the Judgment given in Banco affirmed, where it was adjudged accordingly. Intratur Mich. 11 Car.

*Fol. 416.

(x) A Copyholder in Borough English surrenders to the Use of himself for Life, and after to the Use of his eldest Son and his Heirs, if he lives to 21, provided and upon Condition, that if he dies before 21, That it shall remain to the Surrenderor and his Heirs; tho' by the first Words it seems to be a Condition Precedent, yet upon all the Words taken together it is not, but a Surrender to the Use of the eldest Son, to be defeated upon a Condition Subsequent. 3 Lev. 132. adjudged; but Q. if the Book is not misprinted when it mentions a Devise. (y) 1 Jon. 389, 390. S. C. adjudged. Cooper and Edgar. S. C. Winch. 103, 105. &c. 115, 118, 119. with the Argument at large, but no Judgment. 3 Lev. 132. S. C. cited.

12. (z) If the Condition of an Obligation be to stand to the Award of J. S. ita quod fiat de & super Premissis, by Writing under the Hand and Seal of the Arbitrators, and published and ready to be delivered to the Parties before such a Day: All this is a Condition Precedent, for if it be not in Writing, under the Hand and Seal of the Arbitrators, and published before the Day, and also though it be made and published, yet if it be not ready to be delivered to the Parties before the Day, it is not a good Award. Mich. 16. Car. B. R. between (a) Burbridge & Raymond, adjudged in a Writ of Error, and the Judgment given in Banco reversed,

(z) This should have been Pl. 13. but it is printed according to the Original.

(a) 1 Part 531. Pl. 13. S. C.

reverſed, becauſe he did not aver, that it was made under the Seal of the Arbitrators, and publiſhed before the Day. Intratur, Trin. 15 Car. Rot. 1657.

13. Mich. 15 Car. B. R. between Capps and Pennye, per Curiam, where he averred, that it was ready to be delivered to the Parties before the Day, for it might be that he made it, but kept it ſecret; and for this Cauſe, Judgment was arreſted after a Verdict for the Plaintiff.

14. Trin. 1649. between Conduit and Damper adjudged, where the Condition being to ſtand to the Award of J. S. ita quod Arbitrium be by Deed indented under the Hand and Seal of the ſaid J. S. ready to be delivered to each of the Parties before ſuch a Day, &c. and the Plaintiff in an Action upon the obligation for Non-performance of the Award, pleads in his Replication, that J. S. ſuch a Day, which was before the day aforeſaid, before which it ought to be made by the Condition, accepto ſuper ſe onere Arbitrii prædicti, per quoddam Scriptum indentatum, Quod idem querens ſub manu & ſigillo prædict' J. S. ſignatum, & utrique partium predictarum deliberari paratum hic in Curia profert, cujus datum eſt eiſdem die & anno arbitratus fuit, &c. this is not good, becauſe as this is alledged, it does not appear that the Award was made under the Hand and Seal of the Arbitrator, and (a) ready to be delivered to the Parties before the Day, as it ought to appear, or otherwiſe it is not good; for the Word ſo diſjoyns the Sentence, that it is to be intended, that when it was ſhewed in Court, it was under the Hand and Seal of the Arbitrator, and ready then to be delivered to the Parties. Adjudged it is not good. Intratur, Hill. 24 Car. Rot. 636. and then the Record of Burbidge's Caſe before mentioned was ſhewed to the Court, which was all one with this, and Judgment there given accordingly as here.

(a) For this, vide 1 Part 557. Pl. 4.

15. If A. leaſes by Indenture a Meſſuage to B. in December, 22 Car. for twelve Years, and covenants with B. to repair it with all neceſſary Reparations before Midſummer following; and B. covenants of his Part, quod ab (b) & poſt tale tempus quale A. repararet & emendaret præd' Meſſuagium, (c) quod tunc predictus B. ſufficienter repararet predictum Meſſuagium ad omnia tempora durante dicto termino, in an Action of Covenant by A. againſt B. for not repairing of the Meſſuage after Midſummer, according to the Covenant of B. and declares, that altho' he hath performed all the Covenants of his Part to be performed (without any particular Averment that he hath repaired before Midſummer, according to the Covenant, with all neceſſary Reparations) yet the Defendant hath not repaired it after the ſaid Feaſt, &c. this is a good Declaration; for the Covenant of A. to repair it before Midſummer, is not a Condition Precedent, but only the time divided and mutual between A. and B. Scilicet, that A. ſhall repair it before Midſummer, and B. after during the term; for which, each of them may have their Remedy by an Action againſt the other, for the ultimate time limited for A. to repair is Midſummer, and the Covenant of B. refers to the ſaid extream time limited to A. and not to the Fact, Scilicet, the Reparation, for the * Words are poſt tale Tempus, &c. Paſch. 1649. between (d) Bragg and Nightingal. Intratur Trin. 24 Car. B. R. Rotulo 601. adjudged upon a Demurrer, per Curiam.

(b) But where, upon ſuch Covenant, the Leſſee is not bound to repair, till the Leſſor hath repaired an Houſe which happens to decay after Commencement of the Leaſe. Slater and Slone, Cro. Jac. 645. 2 Rol. Rep. 248.

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(c) If a Merchant covenants with a Maſter of a Ship, That if he will bring his Freight to ſuch a Port, then he will pay him ſuch a Sum: If the Maſter is after robbed of Part of the Goods by Pirates, and brings the Reſidue, the Merchant is not bound to pay the Money. 1 Brownl. 21. adjudged. (d) Stil. 140, 141. S. C. one Judge againſt one, et adjornatur.

16. If *A.* leaſes Land to *B.* for Five Years, upon Condition, That if *B.* pays to *A.* within the firſt Two Years 40 Marks, that then he ſhall have the Fee, or otherwiſe but for five Years, and makes Livery of

Seiſin thereupon. (e) Now *B.* hath a Fee Simple Conditional, *&c. Lit. Sect.* 350. *Co. Lit.* 216. b. for the Livery muſt paſs a preſent Freehold to ſome Body, and cannot give a Freehold *in futuro. Co. Lit.* 217. a. b. where the ſeveral Books which ſeem to the contrary, are reconciled. 218. a.

(e) But if A. leaſes Land to B. for five Years, and B. enters, and after A. by Deed grants to B. That if he pays to A. 10 l. during the Term, that then he ſhall have the Land to him and his Heirs: This enures as an executory Grant, by increaſing the eſtate; but the Fee Simple paſſes not before the Condition performed. Co. Lit. 217. b.

17. But in caſe of a Leaſe for Life with ſuch a Condition, the Freehold paſſes not before the Condition performed, becauſe the Livery may preſently work upon the Freehold. *Co. Lit.* 217. b.

18. But if a Man grants an Advowſon, *&c.* (which lie in Grant) for Years, upon ſuch a Condition the Grantee ſhall have no Fee till the Condition performed. *Co. Lit.* 217. b.

19. If a Man deviſes a Term to *A.* and that if his Wife ſuffers the Deviſee to enjoy it for Three Years, that ſhe ſhall have all his Goods as Executrix; but if ſhe diſturbs *A.* then he makes *B.* Executor, and dies: His Wife is Executrix preſently; for tho' in Grants the Eſtate ſhall not Veſt till the Condition Precedent is performed, yet it is otherways in a Will, which muſt be guided by the Intent of the Parties; and this ſhall not be conſtrued as a Condition Precedent, but only as a Condition to abridge the Power of being Executrix, if ſhe perform it not. *Hill.* 33 *Eliz.* between (f) *Jennings* and *Gower. Cro. Eliz.* 219. adjudged *per totam Curiam*, though *Anderſon* at firſt inclined *Con.*

(f) 1 Leon. 229. S. C. adjudged per totam Curiam, Anderſon changing his Opinion. Wind. 115, 116. S. C. cited.

(U) What ſhall be ſaid a (a) Condition againſt Law.

(a) Where Bonds, Covenants, &c. are made void by Statutes, as in caſe of Simony, Non-reſidence, &c vide under the reſpective Titles.

1. (b) If the Condition of an Obligation, in which A. is bound to B. is, That whereas A. in a ſhort time is to be Preſented, Inſtituted and Inducted, to the Church of D. if A. after his Admiſſion, Inſtitution and Induction to it, at all Times, upon Requeſt of B. his Heirs, Executors or Adminiſtrators, reſigns the ſaid Rectory and Church to the Ordinary or Guardian of the Spiritualties for the Time being, by which B. his Heirs or Aſſigns, Patrons of the ſaid Church, may preſent de novo to the ſaid Church, diſcharged of all Charges and Incumbrances made or ſuffered by A. This is a good Condition of it ſelf without an (c) Averment that it was (d) for a (e) Simoniacal Purpoſe. Mich. 14 Car. between Carey and Yeo, adjudged upon a Demurrer. Intratur Hill. 13 Car. Rot. 445. And another Action be-

(b) John and Lawrence, S. P. Cro. Jac. 248. 274. adjudged and affirmed upon a Writ of Error, the Condition reciting, That it was intended the Son of the Obligor ſhould be preſented, when capable. Cro. Car. 180. cited. Babington and Wood, S. P. Cro. Car. 180. adjudged. Hut. 111. S. C. adjudged. 1 Jon. 220. adjudged. Matſon and Baker, S. P. Raym. 175. adjudged upon a Writ of Error. 2 Keb. 445. adjornatur; but ſaid, that it had above a dozen times been adjudged a good Condition. 1 Syd. 389, 390. appears, but no Judgment, for it was agreed. (c) Where the Condition of the Obligation was to pay Money, and the Obligor was not permitted to aver, that is was agreed it ſhould be paid for the Reſignation of a Benefice, to the intent that another ſhould be preſented. Moor 564. Pl. 769. Cro. Car. 553. cited. — But if a ſpecial Averment may be, that an Obligation was made for a Matter againſt Law, vide 1 Leon. 73. 203. Godb. 29. Moor 158. and for this, vide the Diviſions, Title Eſtoppel. (d) So a Bond conditioned for the Payment of Money to the Son of the laſt Incumbent, ſo long as he ſhould continue a Student in Cambridge unpreferred, &c. is good. Noy. 142. (e) An Aſſumpſit in Conſideration that he would procure him to be Rector of a Donative, is void. 1 Part 43. Pl. 13.

tween

twæn the ſame Parties, adjudged the ſame Term upon the like Condition. Intratur Hill. 13 Car. Rot. 438, 432.

2. So if the Condition of ſuch Obligation be, That he, after Inſtitution and Induction into the ſaid Church, ſhall at all Times after ordinarily be reſident, and ſerving the Cure of the ſaid Benefice without Abſence by 80 Days in any one Year, during the Time that he ſhall be Parſon of the ſaid Church: This is a good Condition, without any Averment taken to be for any Simoniacal Purpoſe. Mich. 14 Car. B. R. between Carey and Yeo, adjudged upon Demurrer. Intratur Hill. 13 Car. Rot. 445.

3. (f) If the (g) Sheriff of a County makes B. his Under-Sheriff, and takes a Covenant from his Under-Sheriff, that he will not ſerve Executions above 20 l. without his ſpecial Warrant: This is a void Covenant, becauſe it is againſt Law and Juſtice, inaſmuch as when he is made Under-Sheriff, he is liable by the Law to execute all Proceſs, as well as the Sheriff is. Hobart's Reports 18. Trin. 12 Jac. B. R. between (h) Norton and Syms, per Curiam.

(f) 1 Brownl. 65. bis like Point adjudged. 2 Brownl. 281, 282. like Point adjudged.

(g) But for Bonds and Covenants to Sheriffs, Gaolers, &c. vide the Diviſions, Title Sheriff.

(h) Hob. Fol. 12. S. C. Moor 856. Pl. 1175. S. C. and S. P. per Curiam. Godb. 212, 213. S. C. adjornatur. 1 Brownl. 65, 66. bis S. C. and therein ſaid it was otherways where he voluntarily covenanted.

4. If the Condition of an Obligation be, That the Obligor ſhall be always ready to give Evidence, and to teſtifie the Truth, in any of the King's Courts, in all Things which ſhall be demanded of him, *&c.* and that he ſhall not hurt, endanger or moleſt the Obligee, in his Lands or Goods, *ratione alicujus rei*: This is a good Condition, and not againſt Law: For as to the firſt Part, if he had not been obliged thereto, he had been compellable by Law; and by the laſt Part it ſhall be intended that he ſhall not hurt, *&c.* tortiouſly, but not to reſtrain him from purſuing the Obligee for Felony, or other juſt Cauſe. *Mich.* 41 *Eliz.* between *Dobſon* and *Crew*. *Cro. Eliz.* 705. adjudged upon Demurrer, without Argument.

5. (i) If the Condition of an Obligation be, That if the Son of the Obligor, before a certain Time, do, as Apprentice, Servant or Maſter, or otherwiſe, uſe the Trade of an *Haberdaſher* within the County of *K.* then if the Obligor do upon requeſt pay 20. *l.* to the Obligee, the Bond ſhall be void: This Condition is againſt Law; for a Man (k) ought not to be reſtrained (l) from his Trade and Livelihood; and if he might be reſtrained for a certain Time or Place, he might be reſtrained for longer Time or more Places. *Mich.* 43 and 44 *Eliz.* between (m) *Colgat* and *Batchelor*. *Cro. Eliz.* 872. adjudged

(i) Moor 115 Pl. 259. S. P. adjudged. 242. Pl. 379. S. P. adjudg'd. 2 Leon. 210. S. P. adjudg'd. 3 Leon. 217. S. P. adjudg'd. March 191, 192. S. P. adjornatur.

3 Lev. 241. S. P. adjudged con. in B. R. but after, upon a writ of error in Cam. Scac. reverſed by the unanimous conſent of all the Juſtices, becauſe this being a penal Obligation, to prevent the exerciſe of a Trade, though in a particular place only, 'tis void; otherways of an Aſſumpſit, in which Damages only are to be recovered. (k) For this vide 11 Co. 53. b. 1 Part 42. Pl. 6. (l) But where a Man upon a conſideration may be reſtrained by covenant or aſſumpſit, becauſe all being to be recovered in Damages, the Jury may aſſeſs them with regard to the conſideration. Vide 3 Lev. 242. — But ſecus of a bond, covenant, or aſſumpſit, to pay Money if he trades, &c. becauſe then the whole Sum muſt be recovered be the damage or conſideration never ſo ſmall. 3 Lev. 242. and vide All. 67. March. 193. 1 Part 42. Pl. 6. (m) Ow. 143. S. C. adjudged per totam Curiam. And it was ſaid by Anderſon, That he might as well bind himſelf that he would not go to church. Noy 98. S. C. cited.

6. If an Under-Sheriff covenants with the High-Sheriff, to diſcharge and ſave him Harmleſs from all Eſcapes of Priſoners, arreſted by the Under-Sheriff, or any by him appointed: This is a good Covenant; for ſince the High-Sheriff transfers his Authority, 'tis but reaſonable he ſhould take Security for the faithful Execution of it; and there is nothing intended againſt Law, but rather to prevent then connive at Eſcapes. *Trin.* 12 *Jac.* (n) between Sir *Daniel Norton* and *Syms*. *Hob.* 12, 13. reſolved *per totam Curiam.*

(n) Moor 856 Pl. 1175. S. C. & S. P. ſeems to be admitted per Curiam. Godb. 212. S. C. & S. P. appears 1 Brownl. 65, 66. bis.

7. If

7. If *A.* is impriſoned for Felony, and *B.* bound by Recognizance to proſecute, if *B.* after gives Bond to *C.* conditioned, That *B.* will not give Evidence againſt *A.* the Condition is againſt Law, and the Bond void. *Mich.* 1 *Will. & Mar.* between *Maſon* and *Watkin.* 1 *Vent.* 109. adjudged upon the firſt opening: And the Court recommended it to Serjeant *Pawlet*, who was a Judge in *Wales*, where the Plaintiff lived, to have him proſecuted for taking ſuch Bond

(X) What Condition ſhall be ſaid againſt Law, and what ſhall be void, *& e contra.*

1. COndition of an Obligation to releaſe and ſet over an Office for the War in Calice to whomſoever he pleaſes: the obligation is void; but there the Principal Caſe is, to whom it ſhould pleaſe the Lieutenant; and it ſeems this is good: But Br. intends the Obligæ. 15 Ed. 4. 15.

(a) Br. Condition 65. S. C.

2. (a) Condition to renounce an Adminiſtration, is good. 15 Ed. 4. 30.

(b) Cart. 229, 230. S. P. admitted per curiam. All. 60. S. P. adjudged.

3. (b) Condition to do a thing which will be Maintainance, is void, as to ſave J. harmleſs from ſuch an Appeal of Robbery that B. hath againſt him: this is againſt Law. 18 Ed. 4. 28.

4. The Condition of an Obligation was, that if the Obligee in an Action in the Name of C. recovers againſt R. at the Coſts of the Obligee, C. ſhould Enfeoff him of the Land; and if he does not Enfeoff him, then the Obligor ſhall be bound by the Obligation in 20 *l.* this is a Condition againſt the Law, for it is Maintainance. (c) 42 Ed. 3. 6. b. Quere; but after (d) 23. the Condition is admitted good; for the Defendant had other Matter to help him.

(c) Br. Condition 22. S. C. Fitz Barr. 190. S. C.

(d) Br. Condition 24. S. C.

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5. A Tenth granted by the Clergy to the King, Proviſo, That no Parſon * that is Indicted in the Court of the King ſhall pay any Fine; and if he doth, that he ſhall be diſcharged of the Tenth; and a good Proviſo. 21 Ed. 4. 46.

6. Leaſe for Life upon Condition, that if the Leſſee marries without Licence, he ſhall Re-enter; is a good Condition. 43 Ed. 3. 6.

7. If the Condition of an Obligation be not ſo ſell the Apparel of the wife: This is good. *Hill.* 13 *Jac.* between *Smith* and *Watſon.* 1 *Rol. Rep.* 334. *per. Coke.* Tho' it was objected it was againſt Law, becauſe againſt the Liberty of the Baron.

(e) Co. Lit. 206. b.

(f) But if the condition be to enfeoff his wife, 'tis void, becauſe againſt a Maxim in Law, and yet the bond is good. Co. Lit. 206. b.

8. (e) So if a Man gives bond to a Stranger, conditioned for the Payment of (f) 20 *l.* yearly to his wife: This is good. *Hill.* 13 *Jac.* 1 *Rol. Rep.* 334. *per Coke.*

(Y) The

(Y) The Effect of a Condition againſt Law.

1. IF a Feoffment be of Land, upon Condition to kill J. S. this Condition is againſt Law, and void; but the Feoffment is good, and not made void by it. Co. Lit. 206. b.

2. If the Condition be to do a thing againſt Law, the Obligation is void. (a) 2 H. 4. 9. Co Lit. 206. b.

(a) Br. Condition 34. S. C. Br. Obligation 20. S. C. Fitz 13. S. C. Br. Dette 51. S. C.

3. As if it be to kill or rob J. S. (b) 2 H. 4. 9. Co. Lit. 206. b.

(b) Br. Condition 34. S. C. Fitz Obligation 13. Br. Dette 51. S. C.

4. So if it be to ſave harmleſs a (c) Sheriff, if he imbezils a Writ that he hath againſt him. (d) 2 H. 4. 9.

(c) For Bonds to the Sheriff, vide the Diviſions, Title Sheriff. (d) Br. Condition 34. S. C. Fitz Obligation 13. Br. Dette 51. S. C.

5. So if the Condition be to ſave harmleſs a Sheriff for the Delivery of the Cattle, taken in Withernam, to one of the Parties; for the Sheriff ought to keep them till, &c. (e) 2 H. 4. 9. Com. (f) Dyexman 64. b.

(e) Br. Condition 34. S. C. Fitz. Obligation 13. S. C. Br. Dette 51. S. C. (f) I ſuppoſe this is miſprinted in the Original, and ſhould be Dyve and Manningham. Hob. 14.

6. If the Condition be for doing a Thing that is malum in ſe; this is void, and makes the Obligation void. Co. Lit. 206. b.

7. But if it be for doing a Thing that is againſt Law, becauſe it is repugnant to the Eſtate, or againſt ſome Maxim or Rule in Law; it makes not the Obligation void. *Co. Lit.* 206. b.

8. (g) If *A.* being a Cuſtom-Houſe-Officer by Patent, makes *B.* his Deputy, and covenants, *inter alia*, to ſurrender the old Patent, and procure a new one to *B.* and himſelf before a Day; and that if *B.* dies before *A.* that *A.* ſhall pay 300 *l.* to the Executors of *B.* and gives Bond for the Performance thereof: Admitting theſe Covenants void (h) *per* (i) 5 *Ed.* 6. *Cap.* 16. the whole Bond is void, though ſome of the Covenants are not void or illegal. *Paſch.* 38. *Eliz.* between (k) *Lee* and his Wife and *Colſhill*. *Cro. Eliz.* 529. adjudged

(g) By the Report of the Caſe, 2 And. 55, 56. and as cited 3 Co. 82, 83. it appears, That by the Agreement, B. was to pay 600 l. and to allow A. 100 l. yearly for this Deputation. (h) So where a Sheriff takes a Bond for a Point againſt 23 H. 6. and alſo for a juſt Debt, the whole Bond is void, according to the Letter of the Statute; for a Statute is a ſtrict Law, but the Common Law divides according to common Reaſon; and having made that void which is againſt Law, lets the reſt ſtand. Hob. 14. per Cur. Moor 856. Pl. 1175. per Cur. Godb. 213. 10. Co. 100. b. Lat. 143 1 Mod. 35. 2 Brownl. 282. 1 Vent. 237. Cart. 230. (i) But for the Expoſition of this Statute, vide the Diviſions, Title Offices. (k) 2 And. 55, 56. S. C. adjudged, becauſe the Obligation is one entire act and deed of the Party; & vide 2 And. 207, 208. 3 Co. 82, 83. S. C. cited to be adjudged, though the breach was aſſigned in the Non-payment of the 300 l. and it ſhould be admitted that was a good Covenant.

(Z) What Condition ſhall be ſaid Repugnant.

(a) Repugnant to the Eſtate.

(a) As that the Feoffee, Grantee, Deviſee, &c. ſhall not alien. Co. Lit. 223. a. b. — But he may be reſtrained for a particular time. 2 Leon. 82. 3 Leon. 182. (b) 6 Co. 41. a. S. P. (c) Fitz Condition. 12. S. C.

1. (b) A Gift in Tail, or in Fee, upon Condition that the Feme ſhall not be endowed, or that the Baron ſhall not be Tenant by the Courteſy, is repugnant. Co. 10. 38. b. (c) 22 Ed. 3. 19. b.

(d) A Liberty inſeparable from the Eſtate cannot be reſtrained by Proviſo. Hob. 170. (e) Co. Lit. 223. b. S. P. con. for this Power is not incident to his Eſtate, but given to him collaterally by the Statute. (f) Co. Lit. 224. a. S. P. 6 Co. 41. a. S. P. Et vide 1 Rep. 86. a. 9 Rep. 128. a. b. (g) For this, vide Moor 601. Pl. 831. Moor 633. 1 Rep. 14. a. 85. a. 10 Co. 38. b. Cro. Jac. 697. 1 Jon. 58, 59. 1 Vent. 322. (h) 1 Brownl. 65, 66. &c. 138. &c.

2. (d) So upon Condition, that he ſhall not make (e) a Leaſe within 32 H. 8. or levy a Fine within 4 H 7. or (f) that he ſhall not ſuffer a Common Recovery, or that he ſhall not make any (g) Concluſion to ſuffer a Recovery, is repugnant. (h) Co. 10. 38. b.

(i) Co. Lit. 224. S. P. 6 Co. 41. a. S. P.

3. (i) So upon Condition that he ſhall be puniſhed in Waſt, or that Tenant after Poſſibility ſhall, or that a Collateral Warranty ſhall not bind, is void. Co. 10. 39.

(k) Lit. Sect. 362, 363. Co. Lit. 223. b.

4. (k) But a Condition that he ſhall not alien in Fee in Tail, or for Life of (l) another, is good. Co. 10. 39. Mich. 3 Jac. B. R. Mildmay's Caſe, reſolved. (m) 33 Aſſ. 18. (n) Curia.

Moor 39. Pl. 126, 224. a. S. P. 1 Vent. 322. Cro. Eliz. 35. 1 Leon. 292. (l) So if for his own life; for though the Eſtate be lawful, yet the Condition is good, becauſe the Reverſion is in the Donor. Co. Lit. 223. (m) Fitz Condition 16. S. C. Br. 116. S. C. (n) This is miſprinted in the Original as here, and ſhould be 11.

5. So to reſtrain a Fine by the Common Law. Co. 10. 42.

(o) Co. Lit. 224. b. S. P.

6. (o) A Gift in Tail, upon Condition that the Donee may alien for the Profit of the Iſſue, is a good Condition. 46 Ed. 3. 4. b.

7. A Condition upon a Feoffment in Fee, that his Daughters ſhall (p) not inherit, is not good. Da. 1. 34. b.

(p) This Word, not, is wanting in the Original, but ought to have been inſerted there, as appears by the Senſe, and Dav. Reports 34. b. from whence taken.

(q) Q. how this ſhould be render'd into Engliſh and if the year-Book whence taken be not miſprinted.

8. It is a good Condition of a Statute, that he (q) alienera null terre a vendre, nor do other Thing que luy poit turuer in Vileny, without his Council. 46 Ed 3. 32. b.

9. If a Man leaſes a Mill for Years, upon Condition that he ſhall not leaſe it to any, except to one of the Villeins of the Leſſor, or to a Miller. 38 Ed. 3. 33. b. admit.

10. If A. being ſeiſed in Fee of Land, leaſes it to B. for 99 Years, if he ſo long lives; the Remainder to C. for 99 Years, if he ſo long lives; And after, A. demiſes it to C. and D. for 99 Years, if Three others, or any of them, ſo long live, to begin after the Determination of the firſt Eſtate; upon Condition that if C. and D. both * die either before the Beginning of the Term, or before the End of the Term, that then it ſhall be lawful to the Leſſor to re-enter: This is a good Condition, for this is not repug-

* Fol. 419.

repugnant to the Eſtate, nor to the Limitation; but this is a collateral contingent Thing, that ſhall give cauſe of Re-entry. Hill. 15 Car. B. R. between Potter and Oldreeve, per Cur. adjudged upon Demurrer. Intratur, Mich. 15 Car. Rot. 375.

11. If a Feoffment be made, upon Condition that the Feoffee ſhall not alien in Mortmain; this is a good Condition, (r) becauſe ſuch Alienation is prohibited by Law, and regularly (s) what is prohibited by Law, may be prohibited by Condition. *Co. Lit.* 223. b.

(r) So if a Feoffment be made to Baron and Feme, upon Condition that they ſhall not alien: This is good to reſtrain any Alienation by Deed, becauſe ſuch Alienation is tortious and voidable; but to reſtrain their Alienation by Fine, it is repugnant and void. Co. Lit. 224. a. (s) As the Alienation of an Infant, or of a Biſhop without his Chapter. Co. Lit. 224. a.

12. (t) Before the Statute of *quia Emptores Terrarum*, a Man might have made a Feoffment, upon Condition that if the Feoffee, or his Heirs ſhould alien without Licence, they ſhould pay a Fine, and this had been good. *Co Lit.* 223. a.

(t) 1 Leon. 298. S. P. per Cur.

13. The Lord might have reſtrained the Alienation of his Tenant by Condition, becauſe the Lord had a Poſſibility of Reverter. *Co. Lit.* 223. a.

14. So it is in the Caſe of the King at this Day, becauſe he may reſerve a Tenure to himſelf. *Co. Lit.* 223. a.

15. (u) If *A.* hath Iſſue Two Sons, *B.* and *C.* and (w) covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to *B.* in Tail, Remainder to *C.* in Tail, *&c.* Provided that if *B. &c.* or any of the Heirs Males of his Body, ſhall alien, *&c.* the Uſes to him limited ſhall ceaſe only in Reſpect of him as if dead, *&c.* This *Proviſo* is repugnant, impoſſible, and againſt Law; for the Eſtate of the Tenant in Tail does not ceaſe by his Death, but by his Death without Iſſue. *Paſ.* 4 *Eliz.* (x) *Corbet's* Caſe. 1 *Co.* 84. a. adjudged, though *B.* had no Iſſue the Time of the Breach of the *Proviſo.*

(u) Sir Anth. Mildmay's Caſe S. P. 6 Co. 40. adjudged. Moor 632. Pl. 868. the court divided. Hob. 170. cited. Cholmley and Humble S. P. Cro. Eliz. 379. adjudged. Moor 592. Pl. 799. adjudged. 1 And. 346, 347. adjudged. 1 Co. 86. a. cited. (w) So in caſe of a Deviſe, Germin and Aſtcot, Moor 364. Pl. 495. adjudged and agreed by all the Judges of England, That the Proviſo was repugnant. 1 And 186. debated no Judgment. 2 And. 7. adjudged by all the Juſtices. 4 Leon. 83, 84. adjudged Con. But 1 Co. 85. a. cited to have been adjudged as in Moor and And. & vide Cro. Jac. 696, 697. 1 Jon. 58, 59. Godb. 102. Moor 543. Pl. 721. and vid. Poph. 97. 1 Brownl. 45. Godb. 351. 2 Rol. Rep. 467, 477, 484. (x) Moor 601. Pl. 831. S. C. adjudged. 2 And. 134, 135. S. C. adjudged.

(A) Repugnant (a) to the Grant.

(a) 2 And. 141. ſeveral Caſes cited arguendo.

1. A (b) Tenth granted by the Clergy, Proviſo, That no Perſon that is indicted in the Court of the King, ſhall pay any Fine; and if he does, he ſhall be diſcharged of the Tenth; is a good Proviſo. So if ſuch Grant be made, Proviſo the Collectors ſhall not account in the Exchequer before the Barons, but before Special Auditors aſſigned by the King; this is a good Proviſo. 21 Ed. 4. 46.

(b) in the Original it is 15, but perhaps miſprinted.

2. (c) If a Man makes a Feoffment in Fee, provided that the (d) Feoffor ſhall have the profits; this Condition is void, becauſe it is repugnant to the Grant. (e) 17 H. 6. 43. b.

(c) Co. Lit. 206. b. S. P. & vide Cro. El. 35. 107. (d) So if there be a Leaſe to Three, during their Lives; provided that One ſhall not take the Profit during the Life of the other Two. 2 Leon. 132. adjudged: & vide Hob. 170. 1 Bulſ. 42. (e) This is miſprinted in the Original, as here, and ſhould be 7 H. 6.

3. If a Man, for himſelf and his Heirs, warrants Lands to another and his Heirs againſt all Men, Proviſo tamen, That the Warranty ſhall be void: This Proviſo is altogether repugnant

nant to the Grant; and therefore the Grant is good, and the Proviso void. Contra, 7 H. 6. 43. b.

4. So it seems in the Case aforesaid, if the Proviso had been, that he to whom the Warranty was made, nor his Heirs, should not have in Value by Force of the Warranty, that the Proviso is not good; yet he may rebut, if the Proviso be good; and so the Warranty not wholly defeated. But it seems it is not a good Proviso, because then the Words, Against all Men, would be wholly defeated; for the other Words will give a Rebutter without them. Contra, (f) 7 H. 6. 43. b. by all the Justices, preter June & Hank.

(f) Br. Garranty 30. S. C.

5. If a Man grants a Rent-Charge out of the Manor of *D* (in which the Grantor hath nothing) with a *Proviso*, That it shall not charge his Person: (g) Though the Repugnancy does not appear in the Deed, yet the *Proviso* is void, else it would take away the whole Effect of the Grant. *Co. Lit.* 146. a.

(g) So if he grants a Rent out of Land to which he hath Title, without a Clause of Distress; provided that it shall not charge his Person: This is void and repugnant, if he gives not Seisin upon the Grant. 6 Rep. 58. b.

(h) Poph. 87. S. P. per Poph.

6. (h) If a man grants a Rent-Charge out of Land, provided it shall not charge the Land; though the Grantee might notwithstanding charge his Person, yet the *Proviso* is repugnant, because the Land is expresly charged. *Co. Lit.* 146. a.

(i) 6 Co. 41. b. S. P.
(k) I suppose this case put in the Book as at common Law; for the Executors of such Tenant for Life may at this day distrain, per 32 H. 8. cap. 37.

7. (i) If a Man grants a Rent-Charge out of Land to another for Life, provided it shall not charge his Person, and the Grantee dies, his Executors may bring Debt for the Arrears (k); for they cannot distrain, because the Estate in the Rent is determined, and the *Proviso* cannot leave the Executors without Remedy. *Co. Lt.* 146. b.

(B) Condition Repugnant.

1. If the Condition be, that if the Obligee shall pay to J. S. 10 l. such a Day, then the Obligation, being 100 l. shall be void, otherwise not. Though this was not the Intent of the Parties, yet the Condition is good; for if the Obligee does not pay the 10 l. the Obligation is forfeited. 39 H. 6. 9. b.

2. So if the Condition be, that if the Obligor does not pay to the Obligee such a Day 10 l. then the Obligation, being 100 l. shall be void: This is a good Condition; and the Obligee in an Action upon the Obligation, may say, that he did not pay the 10 and so avoid the Obligation: For though the Intent was not so, yet because the Words were so, he ought to adjudge according to the Words. (a) 39 H. 6. 10. cited to be adjudged.

(a) Br. Condition 98. S. C. Br. Obligation 42. S. C. Vide postea, Pl. 4. 2. Mod. 285. S. C. cited; and said by the Chief Justice, He doubted whether it was Law. 1 Sand. 66. S. C. cited.

(b) 1 Rep. 84. b. S. P. 1 Jon. 59. S. P. cited; & vide Moor 450. Pl. 614.

3. (b) If a man makes a Lease for Years, upon Condition that if the Lessor grants over his Reversion the Lessee shall have a Fee; if the Lessor grants his Reversion by Fine, the Lessee shall not have a Fee: for when the Fine transfers the Fee to the Conusee, it would be absurd, and against Reason, that the same Fine should work an Estate in the Lessee. *Co. Lit.* 378. b.

(c) 2 Mod. 285. S. P. adjudged

4. (c) If an Obligation is conditioned for the Payment of 7 *l.* by 2 *s.* *per* Week, till 7 *l.* is paid, and that if he fails of Payment of the 2 *s.* at any of the Days on which it ought to be paid, that the Obligation shall

ſhall be void, or elſe remain in Force: This Condition ſhall be taken diſtributively, *reddendo ſingula ſingulis*; *viz.* That if he pays the 7 *l.* the Obligation ſhall be void; but that if he fails in Payment of the 2 *s.* at any of the Days, it ſhall be in full Force; for the Obligation ſhall not be taken to be of no Effect, if by any Means it may be made good. *Mich.* 14 *Car.* 2. between (d) *Vernon* and *Alſop*, 1 *Lev.* 77. adjudged upon Demurrer to the Defendant's Plea, That he did not pay 2 *s.* at one of the Days.

(d) Raym 68 S. C. adjudged, becauſe the Condition is ſenſeleſs, and therefore the Obligation is ſingle. 1 Syd. 105. S. C. adjudged; and that the Obligation was ſingle, and the condition repugnant and void; and ſaid, That it was contra the 39 Hen. 6. 10. which vide ante, Pl. 2. 1 Keb. 356. 415. 451. adjudged niſi.

5. If the Condition of an Obligation be made in this Manner, *viz.* *The Condition of this Obligation is ſuch, That if the Obligor ſhall appear* coram Dom' Rege apud Weſtmonaſterium *ſuch a Day*, ad reſpondend' *&c. then the Condition of this Obligation ſhall be void, or elſe the ſame ſhall be in full Force and Vertue:* Yet this is a good Condition; for the Senſe is perfect without theſe laſt Words, and they ſhall be rejected for their Abſurdity and Repugnancy. *Trin.* 21 *Car.* 2. between (e) *Malevrer* and *Hauxby*, 2 *Saund.* 78. adjudged for the Plaintiff upon Demurrer, the Defendant having Pleaded the Statute of 23 *H.* 6.

(e) 1 Syd. 456. S. C. adjudged. 1 Mod. 35, 36. S. C. adjudged. 2 Keb. 625. S. C. adjudged.

6. If the Condition of an Obligation be, *That if the Obligor ſhall die without Iſſue, that then if he, by his laſt Will, or otherwiſe in his Life-time, ſhall lawfully aſſure and convey certain Lands to the Obligee, and his Heirs, that then the Obligation ſhall be void*, &c. This Condition is not repugnant, but ſhall be conſtrued according to the Intention of the Parties, to be collected out of the Words of the Condition. *Trin.* 4 *Car.* between (f) *Eaton* and *Butler*. 1 *Jon.* 180. *per totam Curiam contra Dodderidge.*

(f) Palm. 552. 557. S. C. & S. P. per Cur. contr. Dodderidge.

(C) What ſhall be ſaid a Condition Impoſſible.

1. IF a Woman makes a Feoffment to a Man that is married to another, upon Condition that he ſhall marry her: this is a good Condition; for his Wife may die, and then he may marry her. (a) 40 Aſſ. 13. adjudged by Admittance; but quere.

(a) Br. Condition 119. S. C. Fitz. 19. S. C.

2. If the Condition of an Obligation be, that the Obligor ſhall aſſign to the Obligee a Commiſſion of Bankrupts: this is an impoſſible Condition, and therefore void, and the Obligation ſingle; for it is impoſſible to aſſign the Commiſſion. Mich. 14 Car. B. R. between Street and Daniel; adjudged per Curiam, upon a Demurrer.

Fol. 420.

(D) What ſhall be ſaid a Condition Impoſſible and Void, and what not.

1. IF the Condition be, quod debet pluere cras: This is a good Condition; for though the Obligor is not certain thereof, yet if he will take this upon himſelf, and run the Hazard thereof, he may at his Peril, for this is not impoſſible of it ſelf. 22 Ed. 4. 26.

2. So, for the ſame reaſon, if the Condition be, That the Pope ſhall be at Weſtminſter to morrow; this is a good Condition. 22 Ed. 4. 26.

3. If the Condition be, That the Obligor ſhould go from the Church of St. Peter's in Weſtminſter, to the Church of St. Peter's in Rome, within three Hours; this is impoſſible, and void. Co. Lit. 206. b.

4. If by the Condition, a thing is to be done within a Franchiſe; this is a good Condition, for it may be tried here. Contra, (a) 10 H. 6. 14. b. Curia.

(a) Fitz Condition 2. S. C. Br. 196. S. C. Br. Tryal 144. S. C.

5. If by the Condition a thing is to be done beyond Sea; this is a good Condition, for it may be tried here. Contra, (b) 21 Ed. 4. 10. Quere 4 H. 6. 23. b.

(b) Br. Condition 170. S. C. Br. Obligation 70. S. C.

(c) This is miſprinted in the Original, for there it is 9.

(c) 6. If the Condition be to ſave harmleſs the Obligee againſt a Stranger, from an Obligation, in which the Obligee ſtood bound to the Obligor; this is a good Condition; for though by no Poſſibility the Stranger could have any thing to do with it, yet if he ſaves him harmleſs againſt him, 'tis within the Condition, for it may be that he hath ſome Fear of Damage by him. Contra, (d) 21 E. 4. 53. b. but quere.

(d) Br. Condition 175. S. C.

(E) Condition Impoſſible.

The Effect of a Condition impoſſible at the making thereof.

1. IF the Condition of an Obligation or Feoffment be impoſſible at the making thereof, this is a good Condition; but the (a) Obligation or Feoffment is not void, but ſingle. (b) 14 Ed. 4. 3. Co. Lit. 206. becauſe the Condition is ſubſequent.

(a) Mod and Avery, S. P. Sav. 96. adjudged. 1 Leon. 189. adjudged. (b) Br. 155. S. C.

2. But if the Condition Precedent be impoſſible at the making thereof, there all is void, becauſe nothing paſſes before the Condition is performed. Co. Lit. (c) 20. b.

(c) This is miſprinted in the Original as here, and ſhould be 206.

3. As if a Man leaſes for Life, upon Condition that if he goes from the Church of St. Peter's in Weſtminſter, to the Church of St. Peter's in Rome, within three Hours, to have a Fee, which is impoſ-

impoſſible; yet becauſe it is precedent, no Fee can accrue. Co. Lit. 206. b.

4. If the Condition of an Obligation be to ſuſtain and maintain an Houſe in ſufficient Repairs, and ſo to leave it at the End of the Term: If at the Time of the Entry into the Bond, the Timber was ſo rotten, that it was impoſſible to ſuſtain and maintain it in Repairs, yet the Obligation is good. *Trin.* 31 *Eliz.* between (d) *Wood* and *Avery. Sav.* 96. adjudged.

(d) 2 Leon. 189. S. C. adjudged, becauſe tied by his own Act: But the Law never binds Men to Impoſſibilities.

(F) What Perſons may perform it.

1. IF A. and B. leby a Fine to the Uſe of A. in Fee, if B. does not pay 10 s. at Michaelmas after; and that if he doth then pay the ſaid 10 s. that then it ſhall be to the Uſe of A. for Life, and after to B. in Fee; and after B. dies before Michaelmas; it ſeems the Heir of B. may pay the 10 s. for this is not more perſonal, being the Payment of Money, than in the (a) Caſe of Lit. upon a Mortgage, Tr. 13 Car. B. R. between (b) Spring and Sir Julius Cæſar Walker of the Rolls, in a Writ of Error upon a Judgment in a Quare impedit. The Court divided on this Point, ſcilicet, Croke and Jones inclined that it was not perſonal, but the Heir might perform it; but Brampſton and Berkley e contra.

(a) Co. Lit. 205. b. 206, a.

(b) 1 Jon. 390. S. C. and the Court divided accordingly.

Cooper and Edgar, S. C. Winch. 103, 104. &c. 116, 118, 119. with the Arguments at large; but no Judgment.

2. If a Man makes a Feoffment in Fee, upon Condition to be void if the Feoffor pays a certain Sum of Money to the Feoffee, and the Feoffor dies before Payment, his Heir cannot pay it, becauſe the Time of Payment is paſt; for the Condition being general, If the Feoffor pays, *&c.* it is as much as to ſay, If the Feoffor during his Life pays, *&c. Lit. Sect.* 337. *Co. Lit.* 208. a.

3. (c) But when a Day of Payment is limited, and the Feoffor dies before the Day, his Heir may tender the Money, becauſe the Time of Payment was not paſt by the Death of the Feoffor. *Lit. Sect.* 337. *Co. Lit.* 208. b.

(c) Poph. 10.

4. So may his Executors or Adminiſtrators, becauſe they repreſent the Perſon of their Teſtator. *Lit. Sect.* 337. *Co. Lit.* 208. b. 209. a.

5. If *A.* mortgages his Lands to *B.* upon Condition that if *A.* and *C.* pay 20 *s.* at a Day to *B.* that then he ſhall re-enter. (d) *A.* dies before the Day; *C.* may pay the Money, *&c.* and yet the Letter of the Condition is not performed. *Co. Lit.* 219. b.

(d) So if C. dies before the Day, A. may pay it. Co. Lit. 219. b.

6. But if *A.* had been living at the Day, and would not have paid the Money, but had refuſed to pay it, and *C.* had tender'd it, *B.* might have refuſed it. *Co. Lit.* 219. b.

7. If a Man deviſes his Land to his Daughter, at her Age of 18 Years, and that his Wife ſhall take the Profits to her own Uſe until his Daughter comes to 18, provided ſhe ſhall keep and bring up his Daughter at School, *&c.* and dies; and the Wife marries again, and dies; the Intereſt in the Lands accrues to the Husband; for the Keeping and Education of the Child is not of ſuch particular Privity, but it may be effectually performed by another. *Trin.* 17 *Jac.* between (e) *Balder* and *Blackburn. Hob.* 285. adjudged.

(e) Hut. 36. S. C. adjudged.

(G) To

(aG) To whom it may be performed.

Fol. 421.

1. If a Man makes a Feoffment in Fee, upon Condition that if he pays 100 l. to the Heirs, Executors, or Adminiſtrators, of the Feoffee within an Year after his Death, that then it ſhall be lawful for him to re-enter; and after the Feoffee makes a Feoffment to J. S. and dies, and the Feoffor pays the Money to the Heir of the Feoffee: this is a good Performance of the Condition; for the Heir is (b) within the expreſs Words of the Condition. Mich. 37, 38 Eliz. B. R. between (c) Goodale and Wiat, reſolved. Co. 5. 96. ſame Caſe.

(a) This is miſprinted in the Original, for there it is A.

(b) So if the Condition be to pay to the Feoffee, his Executors or Aſſigns, and the Feoffee makes his Sons Executors, and dies, and Adminiſtration is committed during their Minority, it is the ſafeſt Way to pay the Money to the Executors, or one of them; for the Adminiſtrator is but as a Bayliff to them. 3 Leon 103. (c) Cro. El. 384. S. C. & S. P. admitted. Moor. 708. Pl. 989. S. C. & S. P. appears. Goulſ. 177, 178. S. P. adjudged per totam Curiam, præter Fenner. Poph. 100. S. C. adjudged.

2. And in this Caſe, if the Money had been paid to the Aſſignee, it had been no Performance of the Condition, (d) becauſe the Aſſignee is not named. Co. 5. (e) Goodale 97.

(d) But if the Condition had been to pay it to the Feoffee, his Heirs or Aſſigns, it might have been paid to either. Co. Lit. 210. a. (e) Cro. El. 384. S. C. & S. P. Per Gaudy con. becauſe he is the Party who is to have the Loſs. Goulſ. 178. S. C. & S. P. Per Gaudy con.

3. If a Man makes a Feoffment in Fee, by Way of Mortgage, upon Condition to be void upon Payment of the Money by the Feoffor at a Day: If the Feoffee dies before the Day, the Money ſhall be paid to the Executors, and not to the Heirs of the Feoffee; becauſe it ſhall be intended the Eſtate was made by Reaſon of the Loan of the Money, or for ſome other Duty. *Lit. Sect.* 339. *Co. Lit.* 209. b.

(f) 5 Co. 97. a. S. P. cited to have been adjudged. 1 Brownl. 66. S. P. adjudged.

4. (f) But if the Condition be, That if the Feoffor pays, *&c.* to the Feoffee, or his Heirs; if he dies before the Day, the Payment ought to be made to his Heir, and not to his Executors, for *Deſignatio unius eſt Excluſio alterius. Lit. Sect.* 339. *Co. Lit.* 210. a.

(g) For this, vide 1 Rol. Abr. 916. Pl. 3.

5. If the Condition of an Obligation be to pay 10 *l. per Annum* after the Death of the Obligee, to the Executors of the Obligee, for the Uſe of his Children, and he dies without making any Executors, the (g) Money ſhall be paid to his Adminiſtrators. *Trin.* 4 *Car.* (h) *Mannigham's* Caſe. *Hetl.* 115, 116. adjornatur.

(h) Lit. Rep. 156. S. C. adjornatur.

6. If *A.* pawns a Jewel to *B.* for 25 *l.* but no certain Time is appointed for the Redemption thereof; and after *B.* being ſick, his Wife, in his Preſence, and with his Aſſent, delivers it to *C.* and *B.* dies; the Money muſt be paid to the Executors of *B.* and not to *C.* becauſe by the Delivery of the Feme, with the Aſſent of the Baron, there paſſed no Intereſt, but a Cuſtody only. *Trin.* 8 *Jac.* between (i) Sir *John Ratcliff* and *Davis. Cro. Jac.* 244, 245. adjudged

(i) Yelv. 178. S. C. adjudged; and ſaid it would be ſo, though it be delivered over upon a Conſideration: And that it was not like a Mortgage, for that there he that hath the Intereſt, ought to have the Money. 1 Bulſt. 29, 30. S. C. adjudged; though it appears that B. wiſhed C. to keep it ſafely till the Money was paid. But 31. by Fleming, chief Juſtice, it had been otherwiſe, if C. had paid the Money, &c. Noy 137. S. C.

(H) Aſſigns

(H) Aſſigns.

1. IF the Condition be to leaſe certain Lands for 3 Lives, to the Obligæ, or his Aſſigns, and after the Obligæ demands a Leaſe to be made to Three Strangers for their Lives; he ought to make it to them accordingly, or otherwiſe the Condition is broke, for here by the Word Aſſigns, is intended Aſſigns by Nomination; for he cannot have other Aſſigns, inaſmuch as the Eſtate is not Aſſignable before he hath it. Paſch. 14 Jac. B. between (a) Allen and Wedgewood, per Curiam.

(a) 1 Rol. Rep. 373. S. C. & S. P. reſolved per curiam. 3 Bulſ. 168. S. C. & S. P. admitted per curiam. Bridg. 39, 40. &c. S. P. appears.

2. (b) If a Man be bound in 20 l. upon Condition to pay 10 l. to ſuch Perſon as the Obligee ſhall name by his Laſt Will, and after the Obligæ names no Perſon by his Will; the Obligor is not bound to pay it to his Executors, becauſe the Condition hath Reference to his Nomination. Mich. 10 Jac. B. per Curiam, & Trin. 12 Jac. B. between (c) Peaſe and Mead, per Curiam.

(b) Lit.Rep. 173, 174. like Point dubitatur. (c) Hob. 9. S. C. adjudged. 1 Rol. Abr. 915. Pl. 2. S. C. Godb. 192. S. C. adjudged; and per Coke there is a Diverſity, where the Condition is to pay 10 l. to the Aſſignee of the Obligee, and where to the Obligee or his Aſſigns; for in the laſt Caſe it veſts as a Duty in the Obligee, and ſhall go to his Executors. Moor 855. Pl. 1172. adjudged.

3. (d) If a man makes a Feoffment in Fee, upon Condition that the Feoffee ſhall pay 20 *l.* to the Feoffor, his Heirs, or Aſſigns, at ſuch a Day, and before the Day the Feoffor dies; the Feoffee may pay it either to the Heir, (e) or to the Executors of the Feoffor, for they are his Aſſigns in Law to this intent; for the Feoffor having a bare Condition in the Land, and no Eſtate, could have no Aſſigns in Deed. *Co. Lit.* 210. a.

(d) 5 Co. 97. a. S. P. cited to have been reſolved by Wray, Dier, and all the court of Wards.

(e) But what Things Executors ſhall have as Aſſignees, vide under Title Executors. 1 Rol. Abr. 915.

4. (f) But if a Man makes a Feoffment in Fee, upon Condition that if the Feoffor pays 20 *l.* to the Feoffee, his Heirs, or Aſſigns, before ſuch a Day, *&c.* and before the Day the Feoffee dieth; the Money cannot be paid to his Executors, becauſe the Aſſignees of the Eſtate only were intended by the Condition; and where there may be Aſſignees in Deed, the Law will never ſeek out or appoint Aſſignees in Law. *Co. Lit.* 210. a.

(f) Randal and Brown like Point, 5 Co. 96, 97. cited to have been reſolved by Wray, Dier, and all the court of Wards.

5. If *A.* ſeiſed in Fee by Indenture inrolled, Covenants with B. That if *B.* pays to *A.* his Heirs, or Aſſigns, 400 *l.* at a Day, that then *A.* and his Heirs will ſtand ſeiſed to the Uſe of *B.* and his Heirs; and *A.* deviſes to his Wife, during the Minority of his Son, and dies; the Money ſhall not be paid to the Wife, for ſhe is not Aſſignee, the Reverſion being in the Heirs of *A.* *Mich.* 23 *&* 24 *Eliz.* between (g) *Randal* and *Brown.* 5 *Co.* 97. cited to be adjudged.

(g) 1 Leon. 252. S. C. cited.

6. But if *A.* had made a Leaſe for Life, the Remainder to another in Fee, the Leſſee for Life had been an Aſſignee. *Mich.* 23 *&* 24 *Eliz.* in the Caſe of *Randal* and *Brown.* 5 *Co.* 97. cited to have been adjudged.

7. And it was ſaid, That if *A.* had conveyed over his whole Eſtate in Part, yet ſo long as *A.* had any Part remaining, the Tender ought to be made to him. 5. *Co.* 97. a.

(I) What Perſons ſhall be bound by a Condition.

(a) Moor 92. Pl. 229. S. P.

1. (a) IF an Eſtate be made to a Feme Covert, ſhe ſhall be bound by the Condition, becauſe this does not charge her Perſon, but the Land. 45 Ed. 3. 12. D. 28 H. 8. 13. 6. 5.

(b) 8 Co. 44. b. S. P.

2. (b) If an Eſtate be made to an Infant upon an (c) expreſs Condition, the Infant (d) ſhall be bound to perform it.

(c) But where an Infant ſhall be bound by a Condition in Law, or not: vide Co. Lit. 233. b. 234. a. 8 Co. 44. b. Hard. 11. (d) So where an Eſtate is deviſed to an Infant upon Condition, he is bound to take notice thereof, and perform the Condition. William and Fry, 2 Lev. 21, 22. adjudged. 1 Mod. 86, 87. adjudged. 1 Vent 200, 201. &c. adjudged.

(e) 1 Jon. 390. like Point per Curiam.

3. (e) So if an Eſtate be made to another in Fee upon Condition, his Heir after his Death, though he be within Age, ſhall be bound by the Condition. Trin. 13 Jac. B. R. between (f) Slade and Thompſon, adjudged and agreed.

(f) Cro. Jac. 374. S. C. and S. P. appears. 1 Rol. Rep. 136, 198. S. C. and S. P. agreed per curiam. 3 Bulſ. 58, 59. S. C. and S. P. admitted per curiam.

(K) Who may perform it.

1. IF two are infeoffed to reinfeoff, if one refuſes to reinfeoff, the other cannot perform the Condition by a Feoffment of the whole. Contra, 49 Ed. 3. 16. b.

2. If the Condition of an Obligation be to pay a leſs Sum, if (a) my Servant, by my Command, tenders it to the Obligee, this is ſufficient. 2 Hen. 6. 3. b.

(a) So if a Stranger tenders for and by the Aſſent of an Infant above 14. Moor 222. Pl. 137. per curiam.

(b) Watkin and Aſtwick, S. P. though tendered for an Infant. 1 Leon. 34. agreed per Curiam. Moor 222. Pl. 3. 61. admit per Curiam. Cro. Eliz. 132. ſaid by Coke to be adjourned. Ow. 34. S. P. per Coke.

3. (b) If a Man makes a Feoffment in Fee by way of Mortgage, upon Condition to be void upon Payment of Money by the Feoffor at a Day; if a Stranger of his own Head tenders the Money, the Feoffee is not bound to receive it. *Co. Lit.* 206. a. b.

4. But if the Feoffee accepteth it, this is a good Satisfaction, and the Mortgageor or his Heirs agreeing thereto afterwards, may Reenter; but the Mortgageo may diſagree thereto if he will. *Co. Lit.* 206. b. 207. a.

(c) Watkin and Aſtwick S. P. 1 Leon. 34. agreed per Curiam; but it being found, That the Tender was made by his Mother, and that he was within Age, generally, it was preſumed he was above 14, and out of her cuſtody. Ow. 137. agreed, but found as before. Moor 222. Pl. 361. admit per Curiam; but found the mother was not Guardian in Soccage. Ow. 34. S. C. cited to have been adjudged; That the Tender of the mother was not good, becauſe it did not appear within the Verdict of what Age the Infant was. (d) But if the Heir be an Ideot, a Stranger may of his own Head tender the money for him. Co. Lit. 206. b.

5. Guardian (c) in Soccage, or by Knight-Service, may upon ſuch Mortgage tender Money in the Name of the (d) Heir. *Co. Lit.* 206. *b.*

(e) 5 Co. 96. b. S. P. cited.

(e) 6. If *A.* infeoffs *B.* upon Condition, That *B.* ſhall pay Money at a Day, and *B.* before the Day enfeoffs *C.* Now *C.* hath an Intereſt in the Condition, and may tender the Money at the Day for the Safeguard of his Eſtate. *Lit. Sect.* 336. *Co. Lit.* 207. *b.*

7. And ſo alſo may *B.* being Party and Privy to the Condition. *Lit. Sect.* 336. *Co. Lit.* 207. b.

(L) To

(L) To whom it may be performed.

1. IF the Condition of an Obligation be to pay 10 l. &c. it is a good Performance if he pays it to his (a) Deputy. 42 Ed. 3. 13. b.

(a) A Bond was conditioned for the Delivery of 40 Pair of Shoes at Holborn-bridge within a Month to J. S. a common Carrier, for the Use of the Obligee, and J. S. did not come to London within the Month, but the Obligor delivered them to his Porter. 2 Mod. 309. It was adjudged a good Performance, for that the Delivery to the Man, was a Delivery to the Master, within the Intent of the Condition.

2. If the Condition of an Obligation is to pay 20 *l.* to the Obligee, and other the Parishioners of *D.* it may be paid to any two of them. *Trin. 6. Eliz. Moor* 68. *Pl.* 183. where the Defendant (b) pleaded Payment to the Obligee and two others; and the Plaintiff replied, They were not all the Parishioners; and it was held by *Dier* and *Welsh*, that this was not a good Replication.

(b) Where the Condition is to pay Money to Baron and Feme, it may be pleaded to have been paid to the Baron only. Goulf. 73. and vide 2 Syd. 41.

(M) To whom the Condition shall be said to extend to be bound by it.

Fol. 422.

1. IF a Man devises Lands to H. his Son, and to the Heirs of his Body, the Remainder to T. and the Heir Males of his Body, upon Condition, That he or they, or any of them, shall not alien, discontinue, &c. This Condition shall extend only to restrain T. and the Heir Males of his Body, and not H. and his Heirs. Co. 5. (a) Lord Cheny, 68. resolved.

2. (b) If a Man leases Lands for Years, upon Condition, That the Lessee, nor his Assigns, shall not alien the Term to any but to one of his Brothers; and after the Lessee aliens to one of his Brothers: This Assignee is not within the Condition, but he may alien to whom he pleases. Mac. 12 Jac. B. R. Trin. 14 Jac. B. R. between (c) Whitchcock and Foxe, per Coke.

(a) Moor 727. Pl. 10 4. S. C. no Judgment.

(b) Dier 152. a. S. P. two Judges against three.

(c) Cro. Jac. 398. S. C. adjudged. 2 Bulf. 290. S. C. adjudged. 1 Rol. Rep. 68. 389. S. C. adjudged.

3. If a Man devises part of his Lands to his eldest Son in Tail, and the rest of his Land to his younger Son in Fee, provided that neither of his Sons should sell or lease before he comes to the Age of 30 Years; and that if either of the Sons should, *&c.* the other Son should have his Lands, *&c.* The eldest before his Age of 30 leases, and the younger enters upon him: He shall hold these Lands discharged of the Proviso, for that extends only to the immediate Estate expresly devised, and not to the new Estate arising upon the Limitation. *Trin. 29 Eliz.* between (d) *Spitle* and *Davis*, 2 *Leon.* 38. adjudged.

(d) Ow. 8. 55. S. C. adjudged. The Proviso being, That if either of his Sons, or any of their Issue, should sell or lease any of the said Lands, before, &c. Moor 271. Pl. 324. S. C. but no Judgment.

4. If a Man devises his Land to his Wife, during the Minority of his Son, upon Condition that she shall do no Waste, and dies; and the Wife marries again, and dies, and after the Husband commits Waste: The Con-

(e) Lat. 20. S. C. adjudged, because a condition to avoid an Estate shall be taken strictly. — And per Moor 11. Pl. 40. Dier 65, 66. a Proviso, That the Lessee shall not alien, extends not to his Executors.

Condition is not broke. *Mic.* 33 *Eliz.* between (e) *Cob* and *Prior.* 2 *Leon.* 35. 48. adjudged *per totam Curiam*

5. If *A.* being seised in Fee of the Manor of *B.* and of divers Lands in *C.* then in the Possession of *D.* for several Years to come, makes a Feoffment thereof to *E.* to the Use of himself in Tail-Male, Remainder to *F.* in Tail-Male, *&c.* provided, That *F.* or the Heir-Male of his Body, in whomsoever of them the Inheritance in Tail *of all the Premisses* shall happen to be, shall pay to the Daughter of *A.* 200 *l.* according to the Last Will of *A.* and *A.* makes a Letter of Attorney to *J. S.* to enter into the Manor of *B.* and the Lands in *C.* and in his Name to take Possession, and deliver it to *E.* whereupon Possession is given to *E.* of all but what was in Possession af *D.* and *D.* never attorns, so that the Lands in *C.* passed not; and after *A.* by Will bequeaths 200 *l.* to his Daughter, and dies without Issue; *F.* is not bound by this Condition, because he hath not all the Land according to the Purport of the Condition, which was, That he that had *all*, should pay, *&c. Hill.* 38 *Eliz. Slaning*'s Case. *Poph.* 102, 103. certified to the Chancellor accordingly

(N) To what (a) Things it shall be said to extend.

(a) Lease for Years, rendring for the two first Years 10 l. and after 30 l. yearly, provided That if the Rent of 30 l. or any Part thereof, be behind, the Lessor may enter. 4 Leon. 8. it was said, That if the 10 l. is behind, the Lessor may enter, for the 10 l. is Part of the Rent, for it is but one Rent. (b) But not that which is excepted out of the Deed, and upon which the Deed hath no Operation. 1 Rol. Abr. 431. Pl. 1. (c) Earl of Pembroke and Sims, seems to be S. C. Cro. Eliz. 781, 782. adjudged. Hob. 276. S. C. cited. 11 Rep. 51. a. S. C. cited. 1 Rol. Rep. 102.

1. If a Man that hath certain Walks within a Forest of Inheritance, gives one Walk called B. to J. S. in Tail, and dies, and his Heir recites the said Grant and confirms it, and by the same Deed grants another Walk called S. in the same Forest to him and his Heirs, Proviso, That the said J. S. shall not cut any Trees in aliqua parte premissorum in indentura predict' specificatorum; the Condition shall extend to the Walk called B. So that if he cuts any of the Trees in this Walk, the Grantor may enter, for the Condition broke, into the Walk called S. for the Word Premisses comprehends as well that which is (b) confirmed, as that which is granted. Trin. 41 Eliz. B. R. between (c) Evans and Labram adjudged.

2. If A. be in Execution at the Suit of B. and B. upon good Consideration assures to J. S. that he will not discharge A. without his Consent, and after A. and B. agree, that B. shall make a Release to him of the Execution, and deliver him; and that A. shall enter into an Obligation with Condition to save harmless B. from all Suits, &c. that may arise upon the Release of the said A. being in Execution at the ensealing thereof, at the Suit of the said B. in such a Sum, from all Persons which may any way trouble the said B. touching or concerning the said Release, that then, &c. and after all this is done accordingly, and J. S. brings an Action upon the Case against B. upon his Promise, and recovers, A. ought to save him harmless, otherways the Condition is broke, for this arises by reason of the said Release, and so within the Words, tho' the Promise made to J. S. was the Cause of the

the Action of J. S. Paſch. 17 Jac. B. between Wyldin and Wilkinſon, adjudged.

3. If a Man makes a Gift in Tail to *A.* the Remainder to *A.* and his Heirs, upon Condition that he ſhall not Alien: The Condition is good as to reſtrain any Diſcontinuance of the Eſtate Tail, but as to the Fee Simple it is void and repugnant; and therefore ſome are of Opinion, that this is a good Condition, and ſhall defeat the Alienation (d) for the Eſtate Tail only, and leave the Fee Simple in the Alienee. *Co. Lit.* 224. a.

(d) By ſpecial Words the condition may extend to the particular Eſtate, or to the Remainder only. Co. Lit. 230. b.

(O) When a Thing is limited to be done, by whom collateral Things which conduce to the Performance thereof ſhall be done.

By whom they ſhall be done.

1. When a Man is bound to do a Thing, he ought to do all that which depends thereupon in the Performance of the Thing. 11 Hen. 4. 25. b.

2. If the (a) Condition be to levy a Fine to the Obligee, and it is not determined at whoſe Coſts it ſhall be done; it ſhall be at the Coſts of him that ought to levy the Fine, for this depends upon the other. (b) 11 Hen. 4. 25. b. Curia.

3. (c) Upon ſuch a Condition, the Obligor ought to ſue out a Writ of Covenant in the Name of the Obligee, and (d) the Obligee is not bound to do it. (e) 11 Hen. 4. 25. b.

(a) So in Caſe of a Covenant. Stil. 280.
(b) Br. Coſts 9. S. C.
(c) 1 Rol. Abr. 458. Pl. 1. S. P. con. Lit. Rep. 14. S. P. per Hutton. (d) But vide 1 Bulſ. 90. (e) Br. Coſts 9. S. C.

4. (f) If the Condition be to levy a Fine upon Warning, a Warning by the Sheriff upon a Writ of Covenant is not ſufficient, (for perhaps he cannot know by this, whether it be to levy a Fine or other Action) but it ought to be upon Warning by the Obligee himſelf. (g) 11 Hen. 4. 18.

(f) 1 Rol. Abr. 458. Pl. 2. S. P. con.
(g) Br. Condition 39. S. C.

(P) (a) Condition (b) for (c) Aſſurance.

Fol. 423.

How (d) it ſhall be (e) performed.

1. (f) If a Man covenants to make ſuch Aſſurance of the Manor of D. as the Council of the other ſhall deviſe; and the

(a) If a Man aſſumes to make a Surrender of a Copyhold upon Requeſt, he is not bound to make it into the Hands of Two Cuſtomary Tenants, for that is but a particular Way of Surrender grounded upon a particular Cuſtom. Freeborn and Pincras, All. 68. adjudged. Stil. 107. adjudged. — So if a Man be bound to make an Aſſurance as the Obligee ſhall deviſe, he is not bound to acknowledge a Fine by dedimus, for that is but a Special Way of taking the Conuſance. All. 69. — Secus, if there is a Proviſo that he ſhould not go above 5 Miles from his Houſe, and his Houſe is above 5 Miles from Weſtminſter. All. 69. (b) 1 Rol. Rep. 106. (c) A Releaſe with Warranty, whether ſuch an Aſſurance as may be required. 2 Leon. 130. dubitatur. (d) Covenant to make an Eſtate to A. and it is made to B. to the Uſe of A. and whether good. Godb. 95. per curiam dubitatur. And vide Cro. Eliz. 825, 826. (e) If one Man is bound to make to another a ſure, ſufficient and lawful Eſtate, in certain Lands, by the Advice of J. S. if he makes an Eſtate to him according to the Advice of J. S. be it inſufficient or not lawful, he is excuſed of the Obligation. 5 Co. 23. b. &c. But vide 1 Part 675. Pl. 12. (f) Cro. Jac. 115. like Point adjudged.

Council deviles, that he ſhall be obliged in a certain obligation, That the other ſhall occupy the Manor peaceably, &c. he is not bound to perform it, for this is no Aſſurance within the Intent of the Covenant. (g) Hill. 37 Eliz. B. R. per Curiam.

(g) Cro.Eliz. 370. S. C. and S. P. per curiam.

(h) Pudly and Newſam, like Point. Yelv. 45. held con. 1 Brownl. 84. held con.

2. If a Man be obliged to do (h) ſuch Acts for the Aſſurance of the Manor of B. as the Council of the other ſhall devile; and the Council deviles, that he ſhall make an Obligation or Statute, that the other ſhall enjoy it; he ought to perform it, otherways he hath broke his Covenant. (i) Hill. 37 Eliz. B. R. per Popham.

(i) Cro. Eliz. 371. S. C. and S. P. per Poph.

3. If a Man covenants to make ſuch Aſſurance as the Council of the Covenantee ſhall devile of an Annuity of 30 l. and of 200 l. in Money; and the Council deviles, that he make an Obligation, in which he ſhall oblige himſelf, his Heirs, Executors and Adminiſtrators, to pay to the other the Annuity, and alſo the 200 l. at certain Days; he is not bound to perform it, for this obligation is not any Aſſurance of the Annuity. (k) Dubitatur, Hill. 37 Eliz. B. R.

(k) Thornborough and Monpenſon. Cro. Eliz. 370. S. C. dubitatur; but ended by Arbitrament.

4. If A. covenants to make ſuch Aſſurance for the Payment of 100 l. to B. as his Council ſhall devile; and his Council deviſes, that A. ſhall make an obligation of 1000 l. for the Payment of 100 l. he ought to perform it. Hill. 37 Eliz. B. R. per Popham.

(l) Godb. 445. S. P. per Poph.

5. (l) But if the Covenant in this Caſe had been to make ſuch reaſonable Aſſurance as the Council of the Covenantee ſhould devile, it had been otherwiſe; for it is not reaſonable to make an obligation of 1000 l. for the Payment of 100 l. Hill. 37 Eliz. B. R. per Popham.

6. If A. covenants with B. to make ſuch reaſonable Aſſurance to B. in Fee of ſuch Lands, reſerving to A. and his Heirs 20 s. Rent per Annum, as the Council of B. ſhall adviſe; and after B. tenders to A. a Deed-Poll, by which A. enfeoffs B. of the Land in Fee, reſerving the ſaid Rent to A. in Fee: This is not ſuch reaſonable Aſſurance to bind A. to ſeal, for this is a Rent-Seck, and the Deed appertains to the Feoffee, and then A. without the Deed cannot have any Remedy for the Rent. Mich. 11 Car. B. R. between Guppage and Aſcue, per Curiam.

7. But if A. by Indenture grants and ſells Lands without Livery or Inrolment to B. in Fee, reſerving 20 s. Rent to him and his Heirs, and covenants to paſs any other reaſonable Aſſurance, as the Council of B. ſhall adviſe; and after the Council adviſes a Feoffment by Deed-Poll, reſerving the ſaid Rent in Fee: This is a good Aſſurance within the Covenant; ſo that A. is bound to ſeal it, for there the Reſervation does not depend only upon the Deed-Poll, but upon the Indenture, which directs the Uſe of the Feoffment, by which A. may recover the ſaid Rent-Seck without ſhewing the Feoffment. Mich. 11 Car. B. R. between Guppage and Aſcue, per Curiam, upon a Demurrer; but ordered the Parties to make a new Feoffment by Indenture rendring the Rent. Hill. 10 Car. Rot. 1337. But after the Parties could not agree, and ſo this Judgment was given againſt the Plaintiff, Scilicet, againſt their Opinion before, becauſe the Deed tendered was a Deed-Poll, the which ſhould be after the Execution there-

of

of in the Poſſeſſion of the Plaintiff; and * then the Defendant could not without the Deed have his Rent, not being able to prove the Feoffment. * Fol. 424.

8. If the Condition of an Obligation be to make to the Obligee or his Aſſigns, as good a Leaſe as Council could adviſe; and after, the Obligee comes to the Obligor and appoints him to make a Leaſe to J. S. he ought to make it accordingly, tho' no Council adviſed it but the Obligee himſelf; for by the Words, it is not neceſſary to have the Advice of Council, but only that the Leaſe ſhould be as good as Council could adviſe. Paſch. 14 Jac. B. R. between (m) Allen and Wedgewood, per Coke; but Dodderidge e contra.

(m) 1 Rol. Rep. 473.

S. C. and S. P. by Coke con' Dod' 3 Bulſ. 170. S. C. and S. P. per Coke. Bridg. 39, 40. &c. S. P. appears.

9. If the Condition be to aſſure certain Lands to ſuch Perſons as the Obligee ſhould name, and after he Aſſures it to the Obligee himſelf: This is a good Performance of the Condition, tho' it be not alledged that the Obligee named himſelf, for this Acceptance is a Nomination of himſelf. Mich. 13 Ja. B. between Howſego and Wild, per Curiam.

10. (n) If the Condition be to make ſuch Aſſurance in the Law of certain Land to the Obligee, as by the Council of the obligee upon Requeſt made ſhall be adviſed; and after J. S. was of Council with the obligee, and gave his Advice to the obligee, That the obligor ſhould make a certain Aſſurance; (o) and the obligee gave notice to the obligor of the ſaid Advice, and required him to perform it: He ought to perform it, or otherways the Condition is broke; for it is more convenient that the Councellor ſhould give the Advice to the obligee, than to the obligor, for the obligor does not know whether he be of his Council in this Matter, for he may be of his Council in one thing, and not in another. Co. 5. (p) Higgen-bottom's Caſe, 19 B. adjudged. Vide (q) 11 Hen. 7. 21.

(n) Cro. Eliz. 9. S. P. adjudged; 97. S. P. per Anderſon.

(o) But if the Condition had been to make ſuch Aſſurance as his Council ſhould deviſe, then his Council ought to have drawed and engroſſed it ready to be ſealed. Moor 595, 596. Pl. 811. per Poph.

(p) Moor 595. Pl. 811. S. P. appears. Cro. Eliz. 298, 299. S. C. adjudged.

(q) Br. Condition 247. S. C. 5 Co. 20. a. cited.

11. If the Condition be to make ſuch Aſſurance, &c. to the obligee as the obligee ſhall deviſe; and after the obligee deviſes an Indenture, &c. and tenders it to him, and he requires (r) Time to ſhew it to his Council to be adviſed thereupon, which is denied to him; yet if he does not ſeal it preſently, the Condition is broke, becauſe the (s) Condition is peremptory, Scilicet, to be performed preſently. D. 16 Eliz. 338. S. 39. between (t) Wotton and Cooke, Co. 2. (u) Manſers 3. adjudged.

(r) Where a Man ſhall not have Time to adviſe with his Council. 4 Leon. 190. Cro. Eliz. 9.

1 Rol. Abr. 441. Pl. 1. 3. —Diverſity, where the Aſſurance is to be made at a certain Time, and not, per Anderſe and Eden's Caſe, Moor 143. Pl. 284. adjudged. 1 And. 122, 123. adjudged. Moor 183. cited. (s) In the Original 'tis Covenant, and ſo appears to be miſprinted. (t) 4 Leon. 62. S. C. adjudged, the Aſſurance being to be made before a certain Day, and the Tender a little before Sun-ſetting the Day before. 1 And. 53, 54. S. C. but S. P. does not appear. 1 Rol. Abr. 440. Pl. 5. S. C. (u) Moor 182. Pl. 326. S. C. and S. P. debated and argued, the Caſe was much the ſtronger, becauſe the Obligee was bound, That a Stranger ſhould make ſuch Aſſurance, &c. 4 Leon. 62. S. C. adjudged, the Aſſurance being to be made before a Day certain, and the Tender being a little before Sun-ſetting the Day before. 1 Rol. Abr. 440. Pl. 4.

12. (x) If a Man aſſumes to be obliged in an obligation to J. S. and an obligation is tendered, in which he, his Heirs and Executors, are bound, he ought to ſeal it, becauſe this is the common Courſe to make obligations in ſuch manner, tho' the Heir or Executor was not named in the Promiſe. (y) Mich 12. Jac B. R. per Coke and Dodderidge.

(x) Cro. Eliz. 371. like Point dubitatur.

(y) 1 Rol. Rep. 71. S. C. and S. P. by the ſame Judges.

13. If

13. If a Man be bound to make a (z) Conveyance of certain Lands; if a (a) Warranty or Covenant be (b) put in the Deed, he is not bound to seal it. (c) Mich. 12 Jac. B. R. per Coke.

(z) So if to make a reasonable Assurance, tho' ordinary Covenants only are inserted. Coles and Kinder. Cro. Jac. 571, 572. adjudged. 2 Rol. Rep. 191. adjudged. But in the Case of Lassels and Chatterton, Raym. 190, 191. 1 Syd. 467. 1 Mod. 67. it was said per Twisden, the Law was altered since this Case, as to Covenants, if reasonable and usual, but not as to a Covenant that he is seised of an absolute Estate in Fee, et similia; but the principal Case of Lassels and Chatterton was determined upon another Point; which vide also 2 Keb. 685. (a) 2 Rol. Rep. 191. Lat. 186. (b) A. bargained and sold Land to B. and B. covenanted, That if A. paid 100l. at a Day, that he would make such Assurance thereof back to A. as the Council of A. should advise; and A. paid the Money, and his Council advised, That B. should execute a Conveyance, in which the Receipt of the 100l. was acknowledged. Ow. 65. by Coke and Gaudy, B. must execute it; but Poph. doubted, for B. was not bound to execute a Receipt only, nor by the same Reasons when joined with the Assurance. (c) 1 Rol. Rep. 71. S. C. and S. P. per Coke.

14. If a Man assumes to become bound with J. S. and J. D. to B. in a certain Sum, and B. tenders an obligation, in which they should be obliged jointly and severally: He is not bound to seal this, for by the Assumpsit a joint obligation is intended. Mich. 12 Jac. B. R. between (d) Malcot and Deane adjudged.

(d) 2 Bulst. 287. S. C. adjudged. 1 Rol. Rep. 71. S. C. adjudged.

15. So if a Man assumes to become bound with J. S. and J. D. to B. per hujusmodi Scriptum, and payable at such a time as two Strangers should agree between them; and the Strangers agree, That the obligation should be Joint and Several; yet he is not bound to seal it, for by the Promise, a Joint obligation is intended, and the Word hujusmodi gives not Power to alter that which the Law made Joint, but only refers to the Sum and Time. Mich. 12 Jac. B. R. between (e) Malcot and Deane adjudged. It seems that this Exposition is most strict.

(e) 1 Rol. Rep. 71. S. C. adjudged; but at the latter End of the Case there is a Nota by the Reporter, That in as much as it was not expresly agreed that it should be Joint, but implied by Law only, perhaps the Words, per hujusmodi Scriptum, should relate whether Joint or Several, which is more agreeable with the Manner of the Obligation, (as hujusmodi imports) than the Sum or Time. 2 Bulst. 287. S. C. adjudged; but the Case not clearly stated.

16. If a Man covenants for further Assurance to levy a Fine of all his Land in D. and at the time of the Covenant he is seised only of two * Houses in D. and after two other Houses descend to him, and the Covenantee tenders him a Fine of Four Houses to be levied by him: He is not bound to levy it, for this will comprehend the other two Houses, of which he is not bound to levy a Fine; and tho' the Use of these two Houses which are not within the Covenant shall be to the Conusor, (f) yet he is not bound to levy a Fine of them, for perhaps he is Tenant in Tail of them, and this will dock the Intail. Mich. 12 Jac. B. R. between (g) Wilson and Welch, adjudged.

* Fol. 425.

(f) Boulny and Curtis seems to be S. P. con. Cro. Jac. 251. adjudged, 1 Bulst. 90. 1 Rol. Rep. 103, 117. cited. 2 Bulst. 318. cited. (g) 1 Rol. Rep. 103, 117. adjudged. 2 Bulst. 317. S. C. adjudged; but note, it appears by the Report in both Books, that the Plaintiff declared, That the Defendant sold four Houses, &c. and the Defendant pleaded, That he sold but two, &c. so that the Plaintiff would extend the Covenant, and by consequence the Fine, to more than was comprehended in the Covenant.

17. If the Condition of an obligation be, That if he makes a good, perfect, and absolute Assurance in Fee to the Obligee, of certain Copyhold Lands, then, &c. if he after surrenders it upon Condition of Payment of Money, and the Surrender is presented accordingly: This is not any Performance of the Condition, because the Assurance ought to be absolute without a Condition. Pasch. 8 Jac. B. between Risbonne and Gary, per Curiam.

18. So

18. So if a Covenant be with a Purchaser to make further Assurance; if he makes an Assurance upon Condition, this is not any Performance of the Covenant. Pasch. 8 Jac. B. per Curiam.

19. If A. in Consideration that B. at the Request of A. would surrender a Copyhold tenement, Parcel of the Manor of D. to A. in due Form of Law, according to the custom of the Manor, to the Use of A. and his Heirs, assumes to B. to pay him 20 l. in an Action upon the Case by B. against A. for the 20 l. If he avers the Performance of the consideration, that he after at the Request of A. surrendered by a Straw to one J. S. a customary tenant of the said Manor, the said Tenement into the Hands of the Lord of the said Manor, according to the custom of the said Manor, to the Use of the said A. and his Heirs, and yet the Defendant A. had not paid the 20 l. this is not a good Performance of the Consideration, which is a condition Precedent, for he is bound to make an effectual Surrender to the Use of A. and his Heirs at his own Costs; and he hath made a Surrender here into the Hands of a tenant of the Manor, which is a good Beginning of a Surrender, yet it is not a compleat Surrender till it is presented in Court, and he hath (h) taken upon him to make a (i) perfect Surrender; and therefore he ought to procure the tenant to present it at the Court according to the custom, and to procure a court to perfect it, which does not appear to be done. T. 1651. between (k) Shan and Beilby, adjudged per Curiam. This being moved in Arrest of Judgment, quod querens nil capiat per (l) billam. Intratur Hill. 1650. Rot. 1605. For if a Man be bound to make a Feoffment to me upon Request, if I request him to make a Deed of Feoffment, with a Letter of Attorny, to B. to make Livery to me, and he does it accordingly, this is a good beginning; yet if Livery is not made, this is a Forfeiture of the Condition.

(h) When he that covenants to make an Assurance, must take Care to do it at his Peril. Lat. 126. 3 Lev. 319. but vid. 1 Lev. 44.

(i) So if the Condition of an Obligation be to plead an issuable Plea in such a Term, it is not enough to deliver a Plea in Paper, but Care must be taken that it be entered of Record. Goulst. 50. (k) Still. 280. S. C. adjudged. (l) 'Tis bellam in the Orignal, and so appears to be misprinted.

20. If a Man by Indenture bargains and sells his Lands to another in Fee, and covenants to make thereof to the Vendee a good and sufficient Estate before *Christmas* next, and before *Christmas* the Vendor causes this Deed to be enrolled: Yet this is not a good Performance, for by the Intention of the Covenant some other Assurance was to be made. (m) *Mich. 6 Edw. 6. 1 And.* 27. adjudged, *per totam Curiam.*

(m) Bendl. 36. Pl. 32. S. C. adjudged. 3 Leon. 1. S. C. adjudged.

21. (n) If *A.* covenants to make such assurance of Lands to *B.* as the Council of *B.* shall devise, *B.* himself, tho' Learned in the Law, cannot devise the Assurance, but it ought to be devised by some of his Council. *Pasch.* 35 *Eliz.* between (o) *Moor* and *Roswell.* 5 *Co.* 19. b. for if the Party himself might advise it, then it would be no Plea to say, *Quod Consilium non didit advisamentum.*

(n) 1 Rol. Abr. 466. Pl. 35. like point con. Cro. Eliz. 9. S. P. per Anderson.

(o) Cr. Eliz. 297, 298. S. C. adjudged.

22. (p) If *A.* covenants with *B.* to (q) assure certain Lands to *B.* before a certain Day, at the Costs of *B. A.* must notify to *B.* what manner of Conveyance he will make, *viz.* Fine, Feoffment, *&c.* and his Rea-

(p) Frank and Foster S. P. 1 And. 300. adjudged; and by some, the covenantor ought also to give notice of the costs, for that otherways the covenantee cannot tell what to tender. Cro. Eliz. 517. S. C. cited. Ow. 157. S. C. cited. — But vide Moor 22. Pl. 76. con. (q) Diversity, where the covenant is general to assure, &c. and where to make a Feoffment, &c. All. 24, 25. Stil. 61.

dineſs to do it, (r) that *B.* may know what Coſts he is to tender. *Trin.* 38 *Eliz.* between (s) *Hallings* and *Connard*, *Cro. Eliz.* 517. adjudged.

(r) And if by Feoffment, that B. may be upon the Land to take Livery of Seiſin. All. 24, 25. Stil. 61. (s) 5 Co. 22. b. S. C. adjudged. Ow. 157. S. C. adjudged; and by Walmſley, the charges ought to precede the Aſſurance, though it ought firſt to be declared what manner of Aſſurance ſhall be made. Moor 454. Pl. 622. 457. Pl. 631.

23. So where the Covenant is to make a particular Aſſurance, as a Feoffment, *&c. A.* muſt tender it. (t) *Trin.* 38 *Eliz. Cro. Eliz.* 517. *per Warburton.*

(t) 5 Co. 22. b. S. C. and ſaid, it was all one where the covenant was general, and where particular. Moor 457. Pl. 631. S. C. and S. P. per Curiam.

24. A Man, 22 *Jan.* 38 *Eliz.* aſſumed to make ſuch Aſſurance of all his Lands in *Y.* as *S.* ſhould appoint, and *S.* the ſaid 22 *Jan.* appointed that he ſhould make a Bargain and Sale of all his Lands in *Y.* and the 14 *Sept.* 39 *Eliz.* a Bargain and Sale of all his Lands in *Y.* was tendered; and whether he was bound to execute it, was a doubt, (u) becauſe he might (x) have other Lands in *Y.* 14 *Sept.* 39. *Eliz.* which he had not, 2 *Jan.* 38 *Eliz. Paſch.* 41 *Eliz.* between *Keble* and *Brown*, *Cro. Eliz.* 660. *adjornatur*; and after ended by Compromiſe.

(u) Cro. Eliz. 682.

(x) Where the conveyance was more extenſive than the covenant, vide Laſſel's and Catterton's caſe. Raym. 190. 1 Mod. 67. 1 Syd. 467. 2 Keb. 685. and vide 1 And. 56, 57.

25. (y) If one be obliged to aſſure 20 Acres of Lands, the Acres (z) ſhall be accounted according to the Eſtimation of the Country where the Land lies, and not according to the Meaſure limited by the Statute. *Paſch.* 41 *Eliz. Cro. Eliz.* 665. ſaid by *Popham* to have been reſolved by all the Juſtices.

(y) Cro. Eliz. 476. S. P. arguendo, ſaid to have been adjudged; and vide 6 Co. 67. a.

(z) Diverſity, where the Acres lie in an open Field, and the parcels are known by metes and bounds, and where they lie in a great cloſe, and the number of the Statute-acres therein contained are certainly known. Poph. 55. by ſix Judges.

26. If *A.* covenants with *B.* to make ſuch Aſſurance of all his Lands at the Coſts of *B.* as *B.* or his Council ſhall adviſe, *B.* may require one Aſſurance for one Parcel, and another Aſſurance for another Parcel, for being to be made at the Coſts of *B.* it is no prejudice to *A. Trin.* 41 *Eliz.* between (a) *Waſhington* and *Morden*, *Cro. Eliz.* 681. *per Popham* and *Gaudy.*

(a) Moor 570. Pl. 780. S.C. and S.P. by Poph. and Fenner.

27. But if the Aſſurance is to be made at the Coſts of the Covenantor; if an Aſſurance of Part only is required he muſt make it, but then he is diſcharged from making any Aſſurance of the Reſidue. *Trin.* 41 *Eliz.* between (b) *Waſhington* and *Morden*, *Cro. Eliz.* 681. *per Popham* and *Gaudy.*

(b) Moor 570. Pl. 780. S. C. and by Popham and Fenner: In ſuch caſe there can be but one Aſſurance of all required without neceſſity.

28 If the Condition of an Obligation be, That the Obligor before *Michaelmas* ſhall make, *&c.* all and every reaſonable Act and Thing, for aſſuring the Manor of *D.* to *J. S.* and his Heirs; and the Obligee requeſts him generally to Convey, the Obligor muſt make an Aſſurance; and if thereupon the Obligor makes a Feoffment, and the Obligee after requeſts a Fine, the Obligee muſt acknowledge it, and ſo upon every Requeſt he ought to make ſeveral Aſſurances. *Hill.* 1 *Jac.* between (c) *Pudſy* and *Newſon*. *Yelv.* 44. adjudged.

(c) Moor 682. Pl. 938. S. C. adjudged: The condition being to do all acts, &c. to be required by the Obligee; but ſaid, if it had been to be deviſed by the Obligee or his council, he ought to have ſhewed he had deviſed and required ſuch a particular Feoffment or Fine, &c. 1 Brownl. 84. S. C. adjudged, but ſeems to be only a Tranſlation of the caſe from Yelverton.

29. If

29. If a Man covenants to make further Aſſurance, and to do any Act or Acts, *&c.* as ſhall be deviſed, *&c.* and a Note of a Fine is tendered, and he is required to acknowledge it before a Judge of Aſſize; he muſt acknowledge it, (e) tho' no Writ of Covenant is depending, for he hath covenanted to do every Act, and (f) this Note of a Fine is an Act, and whether it be well levied, or to no Purpoſe, is not material: Between (g) *Boulny* and *Curtis*, *Cro. Jac.* 251. adjudged *per totam Curiam.*

(e) Lat. 186
(f) 1 And. 56
(g) Moor 810. Pl. 1096. S. C. adjudged; becauſe the Note is an act preparatory for the Fine, and the writ of covenant may be ſued out after; and ſo it is an act for further aſſurance, though the writ of covenant is not depending. 1 Bulſ. 90. S. C. adjudged.

30. If a Man covenants to make a Jointure to his Wife, within one Year after his Marriage, of Lands in *England* of they early Value of 500 *l. per Annum, ultra reprizas*, ſo as *A.* and *B.* Councellors ſhould deviſe and adviſe, he muſt give Notice to *A.* and *B.* what Lands he is determined to ſettle, and of what Eſtate therein he is ſeiſed. *Trin.* 21 *Jac.* between (h) Sir *Arthur Gorge* and Sir *Robert Lane. Godb.* 338. adjudged; and in Pleading, it muſt be ſhewed the Lands lie in *England*, and are of the Value of 500 *l.* yearly, *ultra reprizas*: But it was ſaid by *Ley* Chief Juſtice (i), That if a Man is bound to make ſuch Aſſurance of Land as *J. S.* ſhall adviſe, he is not bound to ſhew his Evidence, but the Obligee muſt ſeek it out at his Peril; and then *J. S.* may adviſe Conditionally, if he hath a Fee, ſuch an Aſſurance; and if a Tail, ſuch an Aſſurance; and if a Remainder over, then a Recovery.

(h) 1 Rol. Rep. 333. S. C. adjudged.
(i) 1 Rol. Rep. 333. S. C. and S. P. per Ley, where the Land is certainly named; but he inclined it was otherways where the Land was not certainly named; and Dod' agreed to the firſt caſe, but not to the ſecond.

31. But if the Covenant be to make a Jointure, *&c.* as the Council of the Covenantee ſhall deviſe, he muſt give Notice to the Covenantee what Lands he is determined to ſettle, and he muſt inform his Council. (k) *Trin.* 21. *Jac. Godb.* 338. *per Dodderidge.*

(k) 1 Rol. Rep. 333. S. C. and S. P. per Cur.

32. If a Man aſſumes to ſeal two Inſtruments for the Aſſurance of a Reverſion, according to two Draughts between them before agreed upon, he muſt execute them without any Tender. *Mic.* 13 *Car.* 2. between *Webb* and *Bettel.* 1 *Lev.* 44. adjudged; and that in Pleading they need not be ſhewed to the Court.

33. If an Obligation be conditioned to ſeal and execute ſuch a Releaſe as ſhall ſatisfie the Council of the Obligee, the Obligor muſt tender a Releaſe to the Council of the Obligee, to know whether it will ſatisfie him. *Mic.* 25 *Car.* 2 between (l) *Baker* and *Bulſtrode.* 2 *Lev.* 95. adjudged: And it was ſaid, it was not like the Caſe where the Condition was to ſeal ſuch Releaſe as the Council of the Obligee ſhould adviſe, for there the Obligee is to procure his Council to (m) draw the Releaſe, and then to tender it to the Obligor to ſeal.

(l) Raym. 282. S. C. adjudged. 1 Mod. 104. S. C. adjudged; tho' objected the condition was not to make, but only to ſeal and execute; but per Curiam, the word Execute comprehends the making. 1 Vent. 255. S. C. adjudged; the condition being to perform an award, and it was awarded the Obligor ſhould execute ſuch Releaſe, &c. And vide 1 Rol. Abr. 465. Pl. 29. (m) But per Moor 595, 596. Pl. 811. per Poph. his council ſhall not draw it where the words are, as his Council ſhall adviſe; Secus if as his Council ſhall deviſe.

34. *A.* covenanted to make ſuch Aſſurance to *B.* according to an Agreement made between them as Council ſhould direct and adviſe; and whether this Covenant ſhould not be taken according to the general Intendment, and that therefore the Council of *B.* ſhould adviſe. *Paſch.* 4 *Jac.* 2. between *Heyward and Sappy.* 3 *Mod.* 191, 192. *dubitatur & adjornatur.*

(Q) How

(Q) How and in what manner it ſhall be performed, and in what not.

(a) In reſpect of the (b) Words.

(a) Poph. 146.
(b) Vide Title Parol throughout: And 2 Rol. Abr. 245. &c. 397.
(c) 2 Rol. Abr. 397. Pl. 1. S. C.

1. (c) D. 8, 9 Eliz. 255. 4. The Condition of the obligation was, That he ſhould ſuffer his Leſſee for Years to enjoy the Land during the Term, and that without trouble of him or of any other Perſon, a Stranger enters by an elder Title, per Curiam the Condition is not broke, becauſe this Word ſuffer is a Paſſive, and all the reſt is to be referred thereto; but if any Procurement or occaſion of Diſturbance be by the Leſſor, his Executors or Aſſigns, then he hath forfeited his obligation, 2 Ed. 4. 2. b. per Lit. and agreed per Aſht. I am obliged that I ſhall demiſe to my Son, after my Deceaſe, Land to the Value of 20 l. my Son is outlawed of Felony in my Life-time, and after I die, I have not forfeited my obligation *: And this Caſe was agreed per Curiam, 10 Jac. my Reports, Gray and Gray: Where the principal Point was in an Action upon the Caſe, the Plaintiff declared, in Conſideration that his Teſtator vellet permittere his Land to deſcend to his Son, the Defendant allumed to pay him 20 l. and he alledges that he did permit it to deſcend, not averring that it had deſcended, yet good per Curiam. Vide ſuch Caſe of a Covenant. (d) D. 7 Eliz. 240. 43.

* Fol. 426.

(d) 2 Rol. Abr. 397. Pl. 2. S. C.

2. If the Condition be performed in Subſtance, it is good, altho' it differs in Words; as where it is to deliver the Teſtament of the Teſtator, if he pleads that he hath delivered Literas Teſtamentarias, yet it is good. (e) 7 Ed. 4. 3.

(e) This ſhould be 17. which vide, Br. Condition 158.

3. So if the Condition is to deliver Letters Patents, and he loſes them, and delivers an Exemplification. (f) 17 Ed. 4. 3.

(f) Br. Condition 158. S. C.

4. (g) So if a Condition be to make a Feoffment, a Leaſe for Years and Releaſe is a good Performance: Quære. (h) 17 Ed. 4. 3.

(g) Co. Lit. 207. a.
(h) Br. Condition 158. S. C.

5. If the Condition be to grant the Reverſion of tenant for Life or Years, and he enters upon the Leſſee, and makes a Feoffment, and the Leſſee re-enters; the Condition is performed, for the Effect is performed. 21 Ed. 4. 39. b. an Opinion contra, and they ſaid it was all one with the principal Caſe there, which was after ruled per Curiam, as it is here; and ſo this is a good Authority that it is performed.

6. If the Condition be to give Licence to the Obligee to carry Trees that he hath bought of him, or other things if he gives him Licence; yet altho' a Stranger who hath Right thereto diſturbs him, the Condition is performed; for it extends but to the Perſon of the Obligor by the Words. (i) 18 Ed. 4. 20. b.

(i) Br. Licence 13. S. C.

7. But otherways it had been, if the Words had been, That he ſhould have Licence, &c. For this extends to all Strangers. (k) 18 Ed. 4. 20. b.

(k) Br. Licence 13. S. C.

8. If a Man covenants to give Licence to J. &c. and he and Strangers are bound; the Condition being to perform, or cauſe to be performed (l) the Covenants of the Strangers, he ought to procure the Licence, otherways it is broke, altho' he gives Licence. (m) 18 Ed. 4. 18. b.

(l) I ſuppoſe it is rightly tranſlated, but it is very dark in the Original: Vide.

(m) Br. Condition 13. S. C.

9. A Condition ought to be performed in Substance; as if the Condition be to withdraw such a Suit, a Discontinuance thereof is not a Performance, because it differs in Substance; for a Retraxit is a Bar in another Action, and not a Discontinuance. 20 Ed. 4. 8. dub.

10. If a Man bargains and sells a Manor, and covenants, That it is free from all former Bargains, *&c.* and Incumbrances made by any Person, except the Estate of *J. S.* and such Estates as he hath made, as will determine by his Death; and *J. S.* after grants Part of the Manor for Three Lives by Copy of Court-Roll: This Grant by Copy made after the Bargain and Sale, is no former Incumbrance; and though it does not determine by the Death of *J. S.* according to the Intent of the Exception, yet an Exception in its Nature being added to qualify the Covenant, it shall not be expounded so as to extend it further than the Words. 26 *Eliz.* between *Lovel* and *Luttrel. Sav.* 74. adjudged; though it was agreed, that a Grant by Copy was an Incumbrance.

11. If an Obligation be conditioned, That the Obligor shall procure a Grant of the next Avoidance of the Archdeaconry of *S.* to be made to *B.* so that the Obligee, at such next Avoidance, may present, if he does procure the Grant of the next Avoidance to be made to him: But before the Church becomes void, the present Archdeacon is made a Bishop, so that it appertains to the King to present; the Condition is broke, by reason of these Words, (n) *So that the Obligee may present. Hill.* 29 *Eliz.* between (o) *Bingham* and *Squire.* 3 *Leon.* 151. adjudged.

(n) 2 Rol. Abr. 396. Pl. 2.

(o) 4 Leon. 61, 62. S. C. adjudged. Goulf. 45. S. C. and the court inclined accordingly; though objected, the condition was become impossible.

12. If a Man leases for Six Years, and covenants, That if he shall be disposed to lease the Land after the Expiration of the Term of Six Years, that the Lessee shall have the Refusal; and within the Six Years he leases (p) to another: This is no Breach, because (q) out of the Words of the Covenant. *Trin.* 21 *Jac.* between (r) *Waterer* and *Mountague. Godb.* 335. adjudged by Three Judges.

(p) By the report of the case in 2 Rol. Rep. this Lease was made for 21 years, to commence immediately.

(q) If A. leases Lands to B. for Six years, and covenants that he shall enjoy it during the Term, without Interruption, discharged from Tithes, and after the Six years he is sued for Tithes: This is a breach; for the meaning was, That he should be freed from suits, and the payment of Tithes; and a suit after the Expiration of the Term, is as prejudicial as if before. Cro. Eliz. 916. 2 Brownl. 22.

(r) 2 Rol. Rep. 332, 347. S. C. adjudged.

13. If Two Men lease for Years, and covenant, That the Lessee shall enjoy, free from all Incumbrances made by them; and after the Lessee is disturbed by *J. S.* to whom one of the Lessors had made a Precedent Lease: This is a Breach; for *them* shall be taken severally, and not jointly only. (s) *Meriton's* Case, *Lut.* 161. adjudged.

(s) Noy 86. S. C. adjudged; but the book seems to be much misprinted. Poph. 200. S. C. adjudged, the covenant being to discharge from Incumbrances done by them, or any other person.

14. If a Man leased for 9 Years, by Indenture dated 1 *Jun.* 16 *Car.* 2. and covenanted to save the Lessee harmless from all Evictions during the Term; but this Deed was not delivered till 1 *Jun.* 17 *Car.* 2. If he was in Possession, and evicted before the Delivery, this was a Breach; for during the Term, shall be construed, During the Term in Computation, and (t) not only from the Time of the Delivery of the Deed, when it first commenced, in Point of Interest. *Trin.* 20 *Car.* 2. between *Lewis* and *Hillard.* 1 *Syd.* 374. adjudged, the Conviction being laid the 2d *Jun.* 16 *Car.* 2. and the Defendant pleading the Deed was (u) *prius deliberat.* 17 *Car.* 2.

(t) For this vide under Title Faits; & 1 Rol. Abr. 433. Pl. 2.

(u) For this, vide under Title Faits.

15. If *A.* leaſes Three Meſſuages to *B.* for 41 Years, and *B.* covenants to pull them down, and erect Three other in their Place, *ac etiam de tempore in tempus* to maintain the Meſſuages agreed to be erected in ſufficient Repair, *ac etiam* to repair the Pavements, *&c. ac etiam dicta Premiſſa & Domos ſuperinde fore erect.* at the End of the Term to leave in good Repair; and after *B.* pulls down the Three Houſes, and builds Five; he muſt leave them all in good Repair at the End of the Term: For though by the firſt Covenant he is bound only to repair, *&c.* the Meſſuages *agreat. fore erect.* yet by the laſt Covenant he is obliged to leave in good Repair *Domos ſuperinde erect.* indefinitely, which extends to all Houſes which ſhall be built upon the Premiſſes during the Term. *Mich.* 1 *Will. & Mar.* between (w) *Douſe* and *Earl.* 3 *Lev.* 264. adjudged.

(w) 2 Ven. 126, 127. S. C. adjudged, becauſe taken as ſeveral covenants; but Rokeby doubted, it ſeeming to him to be all one covenant; and that the ſubſequent matter, concerning leaving the Houſes in good repair, muſt be reſtrained to, and underſtood of, thoſe agreed to be built.

If a Man takes a Leaſe of an Houſe and Land, and covenants to leave the demis'd Premiſſes in good Repair at the End of the Term; and he erects a Meſſuage upon Part of the Land, beſides what was before; he muſt keep or leave this in good Repair alſo. *Mich.* 1 *Will. & Mar.* 3 *Lev.* 265. *per Cur.*

(R) How it ſhall be performed.

(a) The (b) Intent (c) ought to be performed.

(a) Condition to pay Money when the King ſhall be reſtored to his Crown. Glinſtal and Sir Anthony Archer, 1 Syd. 314. 1 Keb. 820.

1. If a Sheriff arreſts a Man upon a Latitat, at the Suit of J. S. iſſuing out of B. R. and lets him to Bail, and takes an Obligation for his Appearance, of which the Condition is, That if he appears in B. R. ſuch a Day the next Term, that then the Obligation ſhall be void; and the Obligor appears at a Day in the ſame term, before the Day mentioned in the Condition, at the Suit of another Man, which is an Appearance in Law for all Suits which ſhall be commenced againſt him the ſame term; yet becauſe this is an Appearance by a Fiction in Law, and not an actual Appearance at the Day, the Condition is broke; for, perhaps if he had actually appeared, Special Bail would have been required. Paſch. 15 Jac. B. R. Sir Richard Bullar's Caſe, per Curiam.

(b) For this, vide Lit. Rep. 94, 105, 106, 128. the ſeveral Arguments of that Caſe. Winch. 30. — In reſpect of the Words, vide Tit. condition, by what Words it may be created. (c) But yet the Intent of the Condition cannot by any Averment be ſtretched further than the Words will allow. Dal. 71.

2. If A. and B. ſubmit themſelves to the Award of J. S. of all Actions, &c. and A. hath an Action depending againſt B. of which there is a Continuation de Termino P. uſque ad Terminum Trinitatis; and the Submiſſion and Award are * made between P. and ----- Trinitatis; and the Award is, that he ſhall retract his ſaid Suit: And after A. at Trinity Term, does not further purſue his Action, but ſuffers it to be diſcontinued: this is a good Performance of the Award; for the Intent of the Arbitrator was not that he ſhould make a legal Retraxit, but that he ſhould not (d) proſecute the Suit further. (e) 21 Ed. 4. 38. adjudged.

* Fol. 427.

(d) If the Condition of an Obligation be, not to proſecute a Suit then depending before a Day, an Entry of a Continuance from one Term to another is no Breach. Gray & Gray, 2 Rol. Rep. 62. Cro. Jac. 525. 1ſt Part 523. Pl. 7. marg. (e) Br. Condition 173. S. C.

3. If

3. If the Condition of an Obligation be to ſtand to the Award of J. S. who awards, that he ſhall pay 20 l. to the Obligee, and he pays it to the Wife of the Obligee, and ſhe accepts it; yet this is not any Performance, without alledging more. Hill. 32 Eliz. B. R. between Froud and Batte, adjudged.

4. If a Lellor covenants with his Leſſee for Years, That it ſhall be lawful for the Leſſee peaceably, &c. to enjoy the Land; and after the Lellor enters tortiouſly upon the Leſſee, and ouſts him; yet this is a Breach of the Covenant; for the Intent was, that he ſhould enjoy it without the Interruption of the Lellor. H. 39 Eliz. B. R. (f) Core's Caſe adjudged.

(f) 1 Rol. Abr. 430. Pl. 11. S. C. Cro. Eliz. 427. S. C. adjudged.

5. If a Man leaſes an Houſe and Land, upon Condition, That the Leſſee ſhall not parcel out the Land, nor any Part thereof, from the Houſe; and after the Leſſee leaſes the Houſe and Part of the Land to A. and after leaſes the Reſidue of the Land to C. this is a Breach of the Condition; for by the Word Parcelling, is intended a Diviſion or Separation of the Land from the Houſe; and if the firſt Grant be not a Forfeiture, the ſecond is. Hill. 41 Eliz. B. R. between (g) Curtis and Marſh, adjudged in a Writ of Error.

(g) 1 And. 42, 90. S. C. adjudged. 1 Moor 425. S. C. adjudged, that the firſt Grant was a Breach of the Condition, becauſe every Diviſion and Severance of the Houſe and Laud is within the Words and Intent of the Condition.

6. If a Man makes a Feoffment in Fee to B. of all his Lands, and after bargains, and ſells the (h) ſame Lands to him for further Aſſurance; and after the Feoffor covenants with the Feoffee to make ſuch further Aſſurance of all ſuch Lands that he hath bargained and ſold to him, as the Council of the Feoffee ſhall deviſe, and binds him to perform the Covenants: And after the Council deviſes, that he ſhall ſuffer a common Recovery, he is bound to perform it: For though he covenanted to make an Aſſurance of all Lands that he had bargained and ſold, and he hath not bargained and ſold any Land, for the Bargain and Sale was void, being made after the Feoffment, and ſo no Bargain omnino in ſtrict Expoſition of Law; yet it is a Bargain and Sale in Appellation to which the Covenant ſhall have Reference. P. 43 Eliz. B. R. between (i) Hodges and Lane, adjudged.

(h) Naming them particularly, ſecus if the Bargain and Sale was by general Words only. Cro. El. 833. S. C. & S. P. per cur.

7. If a Leſſee of an Houſe covenants not to leaſe the Shop, Yard, or other thing belonging to the Houſe, to one who ſells Coals, nor that he himſelf will ſell Coals there; and after he leaſes all the Houſe to one who ſells Coals, he hath broke the Condition. M. 8 Jac. B. R. between Chinſley and Bonner, Plaintiffs, and Langley Defendant, adjudged, for he hath broke the Intent.

(i) Cro. Eliz. 833. S. C. & S. P. per curiam.

8. If *A.* (k) enfeoffs *B.* upon Condition that *B.* ſhall make a Gift in Tail to *A.* and his Wife, and the Heirs of their Two Bodies, Remainder to the right Heir of the Feoffor, and *A.* dies, *B.* ought to make an Eſtate for Life to the Wife, (l) without Impeachment of Waſte, Remainder to the Heirs of *A.* (m) for the Eſtate ſhall be made as near the Intent of the Condition as it can be. *Lit. Sect.* 352. *Co. Lit.* 219. a. b.

(k) but if the condition of a bond be to enfeoff Two before a day, and one dies, the Obligee is not bound to enfeoff the other. N. Bendl. 35. per Mountague, chief Juſtice: but for this, vide Eaton & Buller, Palm. 552, 553. &c. 1 Jon. 180. Abr. 1 Rol. 451. Pl. 15. (l) And yet if the Wife accepts the eſtate for Life, without this clauſe, it is good, becauſe the eſtate for Life is the ſubſtance of the Grant, &c. Co. Lit. 219. b. (m) Co. Lit. 219. b. Two like caſes.

9. If *A.* enfeoffs *B.* upon Condition that if *A.* within a Month after the Death of *B.* ſhall pay 100 Marks to the Heirs, Executors, or Adminiſtrators, of *B.* then the Feoffment ſhall be void; and *B.* enfeoffs *C.* and dies; and after it is agreed between *A.* and the Heirs of *B.* That *A.* ſhall

ſhall pay but 32 *l.* of the 100 Marks; but that in Appearance, and for the better Performance of the Condition, the Whole ſhall be paid to the Heir, and after repaid to *A.* which is done accordingly: This is not a good Performance of the Condition; for the Eſtate ſhall not be diveſted out of the Aſſignee, without an effectual and real Payment: But this Payment was guided by the Precedent Agreement. *Mich.* 39 & 40 *Eliz.* between *Goodal* and *Wiat.* (n) 5 *Co.* 95. b. 96. a.

(n) Cor. Eliz. 383, 384. S. C. adjudged. Moor 708. Pl. 989. S. C. adjudged. Goulſ. 177. S. C. adjudged. Poph. 99, 100. S. C. adjudged. Co. Lit. 209. b. S. C. Godb. 299. S. C. cited.

10. (o) If *A.* is bound to *B.* in an (p) Obligation, conditioned that *A.* ſhall deliver to *B.* before ſuch a Day an Obligation in which *B.* is bound to *A.* if *A.* ſues *B.* upon the Obligation, and recovers, and after, before the Day, delivers it to *B.* This is no Performance of the Condition; for notwithſtanding the Delivery of the Obligation, he may take Benefit of the Judgment, and ſo the Intent of the Condition is not performed. *Trin.* 24 *Eliz. Cro. Eliz.* 7. adjudged *per totam Curiam.*

(o) Moor 709. Pl. 989. S. P. cited. Goulſ. 177. S. P. cited. arguend. Et vid. 1 Leon. 52, 53.

(p) Robinſon and Aunts. like point in caſe of a covenant. 1 Syd. 48. adjudged. Raym. 25. appears to be admitted. 1 Keb. 103. 118. adjudged.—So in caſe of a promiſe. 1 Rol. Abr. 448. Pl. 1.

11. (pp) If the Condition of an Obligation be, that the Obligor ſhall permit his Wife to make a Will, and to diſpoſe in Legacies of any Sum not exceeding 500 *l.* and that he will pay what ſhe ſo appoints to be paid: This is a good Condition; for though the Feme Covert (q) cannot in Strictneſs of Law make a Will of the Goods of her Husband, yet ſhe may make ſuch a Will or Diſpoſition (r) within the Intent of the Condition that the Obligor muſt perform. *Mich.* 5 *Car.* between *Marriot* and *Kinſman. Cro. Car.* 219. adjudged.

(pp) Cro. El. 27. S. P. adjudged.

(q) 1 Rol. Abr. 608. Pl. 8. vide, and the Notes there.

(r) So if Leſſee for years covenants for him and his Aſſigns to pay the Rent ſo long as he continues the poſſeſſion, and after aſſigns, and the aſſignee continues the poſſeſſion, &c. he muſt pay the Rent after in Canc. Stil. 407. adjudged niſi.

If *A.* (being a common Brewer) covenants, That *B.* ſhall have Seven Parts of all his Grains made in his Brewhouſe for Seven Years; and after *A.* puts in great Quantities of Hops into his Malt, of which the Grains were made, by Means whereof the Grains are ſpoil'd: This is a Breach, becauſe in all Contracts, the Intention of the Parties is to be conſidered; and here it was the Intention of the Parties, that *B.* ſhould have the Grains for the Uſe of his Cattle, and they will not eat them when Hops are put into them. *Paſch.* 34 *Car.* 2. between (s) *Griffith* and *Goodland. Raym.* 464 adjudged.

(s) 2 Jon. 191, 192. S. C. adjudged, (though objected, caſe would lie, and not covenant, for that was perform'd by the Delivery of the Grains;) the plaintiff ſhewing for a breach, That the Defendant had, ſubdole & callide to deceive the plaintiff of the benefit of the covenant, mixed Hops with his malt, by which he had diſabled himſelf to perform the Intent of the agreement.

So if I covenant to deliver ſo many Yards of Cloth, and I cut it in Pieces, and then deliver it: This is a Breach; for the Law regards the (t) real and faithful Performance of Contracts, and diſcountenances all ſuch Acts as are done *in Fraudem Legis. Paſch.* 34 *Car.* 2. *Raym.* 464. *per Cur.*

(t) If the condition of a bond be to pay 50 *l.* Though it is not ſaid of money, yet it muſt be ſo intended; and the Obligee cannot tender 50 pound weight of Stone. 1 Syd. 151. ſaid by Twiſden, that he remembred it to have been adjudged.—but if a man covenants, that his Son, then infra annos nubiles, ſhall marry the Daughter of B. before ſuch a day, and he marries her accordingly; but at the age of conſent diſagrees to the marriage, yet is the covenant perform'd; for it was a marriage, though ſubject to be defeated by diſagreement; and no other could be had within the Time. Ow. 25. adjudged.

(S) What

(S) What ſhall be ſaid a (a) Performance, and what a Forfeiture.

(a) Lit. Rep. 95, 105, 128, &c. vide the ſeveral Arguments of that Caſe at large.

1. IF the Condition of a Feoffment be to enfeoff J. S. if he enfeoffs J. S. and two others, this is no good Performance, but the Condition is broke. (b) 21 Aſſ. 28.

(b) Br. Condition 107. S. C.

2. If the Condition be, That whereas B. hath bound himſelf Apprentice to the (bb) Obligor for Seven Years: If the Obligor retain, keep and employ, the ſaid Apprentice in his own Houſe and Service, in the Art of Surgery, during the Term, the Obligation ſhall be void; and after the Obligor ſends the Apprentice in a Voyage to the Eaſt Indies in the Company of other expert Surgeons, the better to learn the ſaid Art: This is a Breach of the Condition; though by the Condition he is not reſtrained from ſending his Apprentice into other Places about his Cures, yet he ought * always to be of his Houſhold, going and returning, and in his Service, and not put over to any other; for the Putting an Apprentice to another, is a great Truſt for his Diet, Health, and Safety: And generally a Man cannot compel his Apprentice to go out of the Realm, if it be not expreſly agreed, or the Nature of the Apprenticeſhip impoſes it, as if he be bound Apprentice to a Merchant Adventurer, or Sailor. Hobart's Reports 181. between (c) Covetre and Woodhall, adjudged.

(bb) In the Original, here, and in other Parts of this Caſe, 'tis Obligee, where it ought to be Obligor, and ſo appears to be miſprinted.

* Fol. 428.

(c) Hob. Fol. 134. S. C.

1 Rol. Abr. 445. Pl. 1, 2, 3. S. C.

3. If a Man ſeiſed in Fee of Lands, leaſes it for Years, and the Leſſee covenants to render the Poſſeſſion to the Leſſor, his Heirs, and Aſſigns, at the End of the Term, upon Requeſt; and after the Leſſor aſſigns over the Reverſion to Two, and One of them, at the End of the term, comes to the Leſſee, and demands the Deliverance of the Poſſeſſion: though the other never demanded the Poſſeſſion, yet by this Demand by one only, he is bound to render the Poſſeſſion, otherwiſe he hath forfeited his Covenant; for the Demand of one Joint-tenant is ſufficient for (d) both. Paſch. 16 Jac. B. R. between (e) Linghen and Payn, adjudged.

(d) So if two enter into a Statute, which is defeaſanced, that the Two ſhall make an Aſſurance, and One refuſes: This is a Breach as to both. Moor 555. Pl. 751. (e) Cro. Jac. 476. S. C. adjudged, the Iſſue being joined that both did not requeſt, it was found, that one of them did requeſt, &c. Bridg. 128, 129. S. C. adjudged. Godb. 272. S. C. adjudged.

4. If an Obligation be conditioned, That the Obligor ſhall repair, ſuſtain and amend, a Meſſuage during his Term, and leave it in ſufficient Repairs at the end thereof: If the Timber of a Bake-houſe, Part thereof, is ſo rotten that it cannot be repaired nor ſuſtained, if the Obligor pulls it down, and builds it again, yet he cannot plead this in Diſcharge of his Obligation; for though the Condition may be impoſſible, yet the Obligation is good. *Trin.* 31 *Eliz.* between (f) *Wood* and *Avery*. *Sav.* 96, 97. adjudged.

(f) 2 Leon. 189. S. C. adjudged; and a Diverſity taken where a Man is charged by his own Act, and where by Act in Law.

5. If a Man makes a Feoffment in Fee of Lands in Five Counties, upon Condition to reaſſure: If the Reaſſurance is made of the Lands in Four Counties, but not in the Fifth, the Condition is broke, for the Lands in that County only. *Trin.* 14. *Jac.* between the King and *Howard*. *Trin.* 14 *Jac. Moor.* 823. *Pl.* 1112. by *Coke* Chief Juſtice *de B. R. Hobert* Chief Juſtice *de B.* and *Egerton* Chancellor.

6. King *Henry* VIII. granted Lands to *A.* and his Heirs; provided that he and they, *perpetuis futuris temporibus invenirent & ſuſtinerent duos Capellanos in Eccleſia parochiali de W. ad orandum pro Anima H.* 8. his Heirs and Succeſſors, *& ad celebranda divina Servitia, & Curam Animarum Parochianorum*; and *A.* conveyed the Lands to *B.* and his Heirs, who appointed Two Chaplains, one of which was not reſident, but neglected his Duty: This is a Breach, for the Eſtate was tied with the Condition, into whoſe Hands ſoever it came, and *B.* ought not only to have found Chaplains, but alſo to have taken Care that they had been ſuch as would have done their Duty. *Trin.* 4 *Car.* between the King and *Brockham. Lit. Rep.* 94, 105, 128, *&c.* adjudged by all the Barons of the *Exchequer*, upon an Information of Intruſion, after the Matter was fully and at large debated.

7. If Two Men, upon Sale of their Wives Lands, covenant, That they and their Wives have good Right to convey Lands, and to make further Aſſurance: If one of the Women is under Age, this is a Breach; for ſhe hath not Power to convey the Eſtate according to the Covenant. *Paſch.* 34. *Car.* 2. between *Naſh* and *Aſton.* 2 *Jon.* 195. adjudged.

(T) What ſhall be ſaid a Performance.

(a) 2 Inſt. 145. S. P. Ow. 92, 93. S. P. adjudged.

1. IF (a) a Man leaſes for Life, upon Condition, That the Leſſee ſhall not do any Waſte; and after the Leſſee ſuffers the Houſe to fall for Want of Covering and Reparation, which is not any Act of Doing, but a Permiſſion; yet it ſeems that the Condition is broke; for the Words are any Waſte, and ſuch Waſte is within the Statute of Glouceſter, which ſpeaks of doing of Waſte: And it ſeems, that the Permiſſion of the Houſe to fall, may properly be ſaid a doing of Waſte, which is a collateral Thing; which is but as much as if he had ſaid, if he had diſinherited him. D. 11 Eliz. 281. 21. but quere.

(b) 1 Leon. 64. S. P. 4 Leon. 39. S. P. per curiam.

2. (b) If a Man leaſes Land, upon Condition, That the Leſſee ſhall not do Waſte; and after, a (c) Stranger does Waſte; yet this is not any Forfeiture, becauſe a Condition ſhall be taken ſtrictly. Paſch. 44 Eliz. B. R. between Baſpoole and Longe, by Three Juſtices.

(c) So if the Condition of an Obligation be, That I ſhall not continue ſuch an Action, and my Attorney without my Privity continues it: This is no Breach. Cro Jac. 525. per Dodderidge and Houghton. 2 Rol. Rep. 63. by Mountague and Houghton, con. Dod, who ſaid, the Act of my Attorney is my own Act.

3. If a Man makes a Feoffment in Fee, reſerving Rent, upon Condition, That if the Rent be behind, and no Diſtreſs to be found upon the Premiſſes, to re-enter: If the Rent be behind, and no Diſtreſs but a Cupboard in a Houſe lock'd, ſo that the Feoffor cannot come at it, this is a Forfeiture; for when the Place is not open to the Diſtreſs, it is all one as if there had been no Diſtreſs there. Mich. 31, 32. Eliz. B. R. per Wray, upon a Special Verdict.

(d) What ſhall be ſaid an Alienation. 2 Leon. 82. 3 Leon. 182.

4. *A.* made a Feoffment in Fee to the Uſe of himſelf and his Heirs, and 21 *H.* 8. deviſed the Uſe to *B.* his younger Son, and the Heirs Male of his Body, Remainder to *C.* his Eldeſt Son, in Fee; provided *B.* or any of his Iſſue, ſhould not diſcontinue or (d) alien, but only to make a Jointure for a Wife; and *B.* after the Statute of 27 *H.* 8. leaſed for Three Lives, purſuant to the Statute of 32 *H.* 8. and after levied a Fine *ſur conuſance de come ceo, &c.* with Proclamations to the Uſe of himſelf and his Wife, and the Heirs Males of their Two Bodies, the Remain-

Remainder to himſelf in Tail Male, the Remainder to the right Heir of *A.* This was a Breach of the Condition, for he might have made an indefeaſible Jointure by Fine *ſur Grant & Render:* But by this Fine, the Tail created by the Deviſe is dock'd; and if he had Iſſue by a former Wife, they ſhould not inherit. *Mich.* 28 *Eliz.* between (f) *Ruddiard* and *Miller.* 1 *Leon.* 298. adjudged, though it was averred this Fine was levied to make a Jointure to his Wife.

(f) Sav. 76, 77. S. C. adjudged becauſe other uſes are limited by the Fine than what were before, viz. the Fee is limited to the Heirs of A. whereas it was before limited to C. in Fee.

5. If a Man deviſes Lands in Tail, upon Condition the Deviſee ſhall not give or grant the Premiſes otherwiſe than by Leaſe, for any Number of Years, determinable upon the Death of any Three Perſons *to be named in the Leaſes*, and he leaſes for 1000 Years, *&c.* This is no Breach, (g) becauſe it determines by his Death. *Trin.* 2 *Jac.* between (h) *Loves* and *Goddard. Cro. Jac.* 61, 62. by *Daniel* and *Walmſly*; but *Warberton contra*, becauſe by the Words of the Condition, the Limitation ought to be by expreſs Words in the Deed.

(g) And vid. Cro. Jac. 689.
(h) Moor 771. Pl. 1067 S. C. & S. P. per totam Curiam, contra Warberton: and all the other Juſtices held, that inaſmuch as the deviſee is party to the Leaſe, the very words of the condition are ſatisfied.

(V) Condition broke.

(a) What Act ſhall be ſaid a Forfeiture.

(a) A Woman covenants not to do any Act to diſcontinue or countermand an Action, and after ſhe marries, per quod, &c. This is a Breach. Goulſ. 59.

1. IF there be Leſſee for Years, upon Condition not to deviſe it to any Body but only to his Sons or Daughters, and he deviſes it to a (b) Stranger, and dies, and his Executor never conſents to the Deviſe, yet this is a Forfeiture, becauſe he hath (c) done all (d) that was in his Power to paſs it by the Will; and this puts it in the Power of an Executor to execute it. Trin. 3 Jac. B. R. between (e) Burton and Horton, by Three againſt One.

(b) So if he deviſes to his Executors, and they accept the ſame only as Executors. 3 Leon. 67. 4 Leon. 5. (c) Q. if extended upon a Judgment or Recognizance againſt him. 1 And. 124. 3 Leon. 3. (d) Secus, if he deviſes it, if the Leſſor will aſſent; for there nothing paſſes till the Aſſent of the Leſſor obtained. Cro El. 60. (e) Cro. Jac. 74, 75. S. C. & S. P. by Three Judges againſt One.

2. So if ſuch Leſſee deviſes the Term to his Executor for Payment of his Debts, (as it ſeems it is to be intended to make the Deviſe void:) Though this Deviſe is void, becauſe the Law had veſted it in him for the * ſame Cauſe, yet inaſmuch as he hath done his Endeavour to paſs it by the Deviſe, this is a Forfeiture. Trin. 3 Jac. B. R. in Burton and Horton's Caſe held by Three.

* Fol. 429.

(f) 2. If Leſſee for Years, (g) upon Condition not to alien without the Aſſent of the Leſſor, makes his Executor, and (h) deviſes it to him, and the Executor enters (i) generally, the Teſtator not being indebted to any Body: This is a Forfeiture of

(f) In the Original this is printed as here, ſo that there are two Pl. 2.

(g) But per Stil. 483. a Deviſe is no Breach of ſuch Covenant. (h) Where a Deviſe ſhall be a Breach of a Condition not to alien. Dyer 45. b. Taunton's Caſe. Ow. 14. Cro. El. 330. Goulſ. 49. 184. Poph. 106. *et vid.* Cro. El. 60. — So where the Condition is, That the Leſſee ſhall not alien during his Life, and he deviſes it; for the Deviſee ſhall be ſaid by Aſſignment made by the Deviſor in his Life-time. Dyer 45. b. (i) 1 Rol. Abr. 619. Pl. 3.

the

the Condition. P. 43 El. B. R. between (k) Dumpere and Simms, agreed per Curiam.

(k) Cro. El. 815, 816. S. C. & S. P. by Gundy; but the other Justices spoke not to it. 4 Co. 119. b. S. P. appears.

3. If there be a Grantee of a Reversion, upon Condition not to grant it over to J. S. and he grants the Reversion to J. S. by his Deed: Though the Lessee never attorns, yet this is a Forfeiture, because he hath done his Endeavour to grant it, and put it in the Power of a Stranger to perfect it. Tr. 3 Jac. B. R. in Burton and Horton's Case, per Three.

4. If Lessee for Years covenants not to assign it, by which it may come to J. S. and obliges himself to perform Covenants; and after he assigns it to J. D. This breaks the Condition, inasmuch as by this Means it may come to J. S. Tr. 13 Ja. B. between Cumin and Richardson, per Curiam.

5. If the Condition of an obligation be, That he shall not be aiding and assisting to E. in any Action to be prosecuted against L. the (l) Obligee; and after the obligor joins in a Writ of Error with E. and another against L. upon a Judgment in Trespass against them Three, which is apparently erronious: This is not any Breach of the Condition, for this is not (m) properly an Action, but a Suit to discharge himself of a tortious Judgment, in which they ought all to join. H. 17 Ja. B. between (n) Lambe and Tomson, dubitatur.

(l) This is Obligor in the Original, and so appears to be misprinted.

(m) 1st Part 1. Pl. 1.

(n) Hob. 304. S. C. adjudged. Hut. 40. S. C. adjudged.

6. If a Man leases for Years, and covenants with the Lessee, That he shall enjoy it without any lawful Interruption by the Lessor, or any claiming under him; and also covenants, That the Land shall remain and continue to the Lessee and his Assigns, of the clear yearly Value of 20 l. over all Reprizes during the Term; and after the Lessor enters upon the Lessee and ousts him tortiously, and takes the Profits for several Years, so that it does not continue to the Lessee of any Value, for the Lessor took Profits; he hath broke his Covenant; for though the Lessee may have an Action for the Interruption upon another Covenant, yet by the Special Words he hath covenanted, That the Land shall continue to the Lessee of such a value; and so the Lessee may have his Action upon one Covenant or the other: And it shall not be intended, that the Covenant was made to the Intent to warrant the Land to be of this value generally, and not to the Lessee, when it is expressly covenanted, that it shall continue to the Lessee of this value. Trin. 11 Car. B. R. between (o) Cave and Brooksby, adjudged upon Demurrer per totam Curiam, preter Brampston, who doubted thereof; but there the first Covenant did not appear in the Pleading, for this was not pleaded; but the Court, ut supra, delivered their opinion as if it had been pleaded. Intratur. P. 11. Car. Rot. 265.

(o) 1 Jon. 360. S. C. adjudged.

7. If A. leases Lands to B. for Years by Indenture, and covenants, that B. shall enjoy the Land peaceably and quietly to his own use, according to the Intent of the Indenture, without any (p) lawful Impediment, Suit, Disturbance, Ejection, Contradiction, Molestation, Charge, Incumbrance, or Denial of the said A. and after A. enters upon B. and distrubs him in the taking of the Profits, without any lawful title but as a Trespasser: This is not any Breach of the Covenant, because it is expressly limited that he shall enjoy it without any lawful Disturbance,

(p) So if the Covenant be, That the Lessee shall lawfully enjoy the Land without Impediment, Disturbance, &c. Vaugh. 124.

bance,

bance and ſo a Diſturbance by Tort is out of the Covenant. Mich. 11 Car. B. R. between Davie and Sacheverel, per Curiam, adjudged upon a Demurrer, in an Action of Debt, upon an Obligation; * the Condition whereof was for the Performance of the Covenants of an Indenture. Intratur, Tr. 11 Car. B.R. Rot. 437.

* Fol. 430.

8. If the Condition of an Obligation be to ſave the Obligee harmleſs of and concerning the Will of J. S. and of all Legacies given by the ſame Will, and after he is ſued in Chancery as Adminiſtrator, and there conſtrained to pay a Legacy due by the ſame Will: this is a Breach of the Condition, though the Suit and Decree be in a Court of Equity. M. 10 Ja. B. R. between Dowtie and Fawne, per Curiam.

9. If the Parſon aſſumes to the Pariſhoner, in Conſideration, &c. that he ſhall be diſcharged of the Tithes of his Lands, and after ſues him in the Eccleſiaſtical Court for theſe Tithes: This Suit, though he does not there compel him to pay the Tithes, is a Breach of the Aſſumpſit. M. 10 Ja. B. R. between Brown and Kinman.

10. If Leſſee for Years aſſigns it to J. S. and after aſſigns it to J. D. and covenants with J. D. that he is poſſeſſed of the Term, and that J. D. ſhall enjoy it, and ſhall be ſaved harmleſs of all Incumbrances done by him; the firſt Aſſignment is not any Breach of the Covenant before Entry made by J. S. nor any Diſturbance of the Poſſeſſion of J. D. M. 8 Ja. B. between Lamme and Sir Lewis Treſham, per Curiam.

11. (q) If the Leſſor covenants with his Leſſee for Years, That it ſhall be lawful for the Leſſee peaceably, &c. to enjoy the Land, and after the Leſſor enters tortiouſly upon the Leſſee, and outs him: This is a Breach of the Covenant; for the Intent was, That he ſhould enjoy it without the Interruption of the Leſſor. H. 39 El. B. R. (r) Core's Caſe adjudged: So it would have been, though the Word peaceably had not been with n the Covenant. Hob. 49. 20 H. 7. 12. 6 E. 3. 4.

(q) Cro. Jac. 383. S. P. adjudged; & vid. Winch. 25.

(r) 1 Rol. Abr. 427. Pl. 4. S. C. Cro. El. 544. S. C. adjudged.

12. (s) If the Leſſor Covenants with his Leſſee, That he ſhall have and enjoy the Land quiete & pacifice, ſine Evictione & (t) Interruptione alicujus Perſonæ, and after a Stranger enters by Tort; yet this is a Breach of the Condition, becauſe the Covenant is, That he ſhall not be interrupted in his Poſſeſſion. (u) D 16 El. 328. 8.

(s) 3 Leon. 43. like Point. Godb. 48.

(t) 2 Vent. 62. S. C. cited; and ſaid, this Caſe ſeems to be determined upon theſe Words.
(u) Hob. 35. .C. cited and allowed. Vaugh. 120, 121. S. C. cited, and the Authority of it denied.

13. So if the Covenant be, that the Leſſor ſhall ſave harmleſs the Leſſee, concerning the Premiſſes, and Profits thereof to be received, againſt J. S. Parſon of D. If J. S. after ejects the Leſſee without Title, the Covenant is broke. Hobart's Reports 49. cited. H. 30 El. (w) Foſter's Caſe, adjudged.

(w) Cro. El. 213. S. C. adjudged, becauſe the Covenant is to ſave harmleſs againſt a certain Perſon; ſecus if to ſave harmleſs againſt all Perſons. Ow. 100. S. C. adjudged. 1 Leon. 324. S. C. adjudged. Hob. 35. S. C. cited to be adjudged, becauſe it was to ſave harmleſs againſt a Perſon certain. Vaugh. 127. S. C. cited; and the Diverſity queſtioned, and ſaid, that it appears at the End of the Caſe in Croke, that the Court was of Opinion that the Entry of J. S. was lawful, the Leaſe being of the Rectory of D. & vid. 2 Lev. 37.

14. If the Lessor covenants with his Lessee, quod ipse haberet, occuparet, & gauderet, the Land demised, and after a Stranger enters (x) by Tort, and ejects him: this is not any Breach of the Covenant, for the Law will not construe this Covenant to extend to tortious Acts without an express Covenant. Hobert's Reports, (y) Tisdel and Sir William Essex, 48. adjudged.

(x) Where it must be shewed what Title such Stranger had or otherways it will be intended by Tort. Cro. Eliz. 437, 916, 917. Cro. Car. 1. Stil. 67. All. 19. Vaugh. 118, 119. &c. Norman and Foster. 1 Mod. 101. 3 Keb. 246. Chantflower and Pinsely, Cro. El. 914. adjudged. Yelv. 30 adjudged. Noy. 50. adjudged. Vaugh. 121. cited. Dal. 110. Moor 185. Pl. 331.—Otherways if the Covenant be only to save harmless as to the Possession, Gregory and Major 2 Lev. 194. adjudged; but in 2 Mod. 213. in the Case of Greg. and Major, which seems to be the S.C. it was said, Judgment was given because after Verdict; and the Plaintiff had set forth, that the Disturber recovered per Judicium Curie; et vid. 2 Vent. 46.—The Want thereof not helped after Verdict upon the general, or upon a collateral Issue, Nokes and James, 4 Co. 80. adjudged. Cro. El. 675. adjudged. Vaugh. 122. cited. Bracking and cham. Cro. Jac. 435. Vaugh. 121. cited. So Cro. Jac. 315. 444. adjudged. 3 Mod. 135.—Quod J.S. habens legale Titulum, intravit &c. contra Norman conventionis, is not sufficient, for he may have Title under the Plaintiff himself. Wotton and Lee, 1 Mod. 66, 290. adjudged. 2 Saund. 177, 181. adjudged; and that if J.S. claimed under the Plaintiff himself, the Defendant might give it in Evidence upon non ejecit. &c. 1 Syd. 466. adjudged. 1 Lev. 301. adjudged. 2 Keb. 684. 703 &c. 2 Vent. 62. S.C. cited.—But habens Jus virtute Tituli et inde fuit. before the Conveyance to or Covenant with the Plaintiff, intravit, &c. is well enough, for the Plaintiff is a Stranger to his Title. Prior and Newton, 2 Lev. 37. adjudged. 1 Vent. 184 adjornatur. 2 Keb. 878. 3 Keb. 41. adjudged; and like Case cited. Buckly and Williams, 3 Lev. 325 adjudged. though not shewed from whom he derived his Title. 2 Vent. 61, 62. adjudged between Rashly and Williams. (y) Hob. Fol. 34, 35. S. C. adjudged. Moor 861. Pl. 1183. S. C. adjudged; and that there was a Diversity where the Breach is alledged in the Entry of the Lessor and where of a Stranger; and that in the last Case also there is a Diversity where the Action is brought upon the Covenant in Law, and where upon an express Covenant. 1 Brownl. 23. S.C. adjudged. 3 Bulst. 204. S.C. 1 Rol. Rep. 397. S. C. But as to this Point, the two last Books are not clear; and it is said therein, that Judgment was given for the Plaintiff, though he alledged only quod conatus fuit to enter, and was hinder'd by Strangers; & vid. Vaugh. 119. Vaugh. 120. S. C. cited.

15. (z) If the Lessor covenants with his Lessee for Years, That he quietly and peaceably shall enjoy the Land, without the Impediment and Disturbance of the Lessor, &c. and after the Lessor exhibits a Bill in Chancery against the Lessee, supposing this Lease was made in Trust for certain Purposes; but there it is decreed against the Lessor: this is not any Breach of the Covenant, because the Chancery hath nothing to do to meddle with the (a) Possession, but only with the Person, and this Suit stands with the Covenant, scilicet, the trust. Tr. 12 Jac. between (b) Selby and Shute, adjudged.

(z) 3 Leon. 71. like Point per Dier; but this Case of Leon. being cited in Raym. 371. it is said the Suit being by a Stranger, the Lessee could not be disturbed thereby. Raym. 370. like Point debated. (a) So if the Lessor exhibits a Bill in chancery against the Lessee, to restrain his committing Waste, and this is dismiss'd with Cost: This is no Breach, because this Suit does not relate to his Title or Possession. 2 Vent. 213, 214. adjudged. (b) Moor 859. Pl. 1179. S. C. adjudged. 1 Brownl. 23. S. C. adjudged. Raym. 371. S. C. cited; and said, that by the Record it self, Winch. Entr. 116. it appears, Judgment was given for the Plaintiff; and Winch. was one of the Judges that gave the Judgment, and so must know better than any Reporter of the Case.

16. If a Man devises Lands, upon Condition that if he does not (c) permit the Executors of F. to take the Goods that then were in the House, the Estate should be void, &c. a (d) Denial by Parol is not any Breach of the Proviso; but it ought to be an Act done, as the shutting the Door against the Executors, or laying his Hands upon them to resist them, or such like Acts; so that, by reason of any such Act, he did not * permit them to take or carry the said Goods according to the Proviso. Co. 8. (e) Francis 91. resolved.

(c) But the Condition of a Bond being to permit the Obligee quietly to take, reap, and carry away Corn: Coming upon the Land with Staves, and prohibiting the Obligee by Word, 1 And. 131. was adjudged a Breach. (d) 1 Jon. 169. et vid. 1 Rol. Abr. 434. Pl. 12. 1 Bulst. 139. (e) 2 Brownl. 277. S. C. adjudged.

* Fol. 431.

17. If A. and B. are Executors of C. who was a Freeman of London, and A. upon the Marriage of E. the Daughter of C. covenants

venants with F. who is to marry with E. quod licitum foret prefato F. de tempore in tempus post maritagium præd' videre & perscrutare omnes tales compotos qui tangerent the Estate of C. the testator, by which he may see what Money became due to be paid to E. In this Case, if B. the other Executor hath any Accounts which concern the said Estate of the testator, and F. requires A. and B. to see and search the said Accounts, and B. refuses to permit him to do it; but A. says he does not deny to do it, yet A. hath broke the Covenant; for by this Covenant he hath undertaken for B. and all other Strangers, who have any such Accounts, that they will permit F. to see and search for the Cause aforesaid, by force of the Words of the Covenant licitum foret prefato F. Hill. 8 Car. B. R. between Roberts and Willamot, adjudged, per Curiam, upon Demurrer. Intratur Mich. 8 Car. Rot. 492.

18. If a Parson leases his Rectory for Years, and covenants, That the Lessee shall have and enjoy it during the Term without Expulsion, or any thing to be done by the Lessor; and after, for not reading the Articles, he is, *ipso facto*, deprived, by the Statute 13 *Eliz.* and the Patron presents another, who ousts the Lessee: This is no Breach, for he was not ousted by reason of any Act done by the Lessor, but for a (a) Nonfeasance, and so it is out of the compass of the Covenant. *Pasch.* 19 *Eliz.* 4 *Leon.* 39. adjudged.

(a) But if Lessee for Years reserving rent, with a condition of re-entry for nonpayment, leases part for a less Term, and covenants, that his Lessee shall enjoy without impeachment of him, or of any other occasioned by his impediment, means, procurement, or consent, and after he neglects to pay his rent, upon which the first Lessor enters, &c. this is a breach. 1 Bulst. 182, 183. adjudged.

19. If *A.* grants the next Avoidance of a Church to *B.* and *C.* and *A.* becomes bound to *C.* in an Obligation, That he shall enjoy the said Presentment without the Claim of *A.* and after *B.* grants his Interest to *A.* and the Church becoming void, *A.* offers to join with *C.* in the presenting: This is a Breach, tho' *A.* had a Puisne Title to it after the Obligation entered into. *Mich.* 26 *Eliz. Bluet's* Case. 4 *Leon.* 18. *per Curiam.*

20. If *A.* leases Lands to *B.* for Years. and *B.* devises it to his Wife so long as she continues a Widow, and if she marries, that her Son shall have it; and *B.* dies, and *A.* by (b) Feoffment, conveys the Land to the Wife, and covenants, that from thence it shall be clearly exonerated *de omnibus prioribus barganis, &c. & aliis oneribus quibuscunque*, and after the Wife marries, and the Son enters: This is a Breach, for the Term not being Extinct by the Acceptance of the Feoffment, the Land continues charged with this (c) Possibility. *Mich.* 29 and 30 *Eliz.* between (d) *Hamington* and *Rider.* 1 *Leon*, 92. adjudged.

(b) By Fine according to the report of the case in Ow. and Goulst.

(c) tenant in tail of a rent, purchases the Land out of which it issues, and makes a feoffment thereof, and covenants, that it is free from all former incumbrances: This is a charge, tho' not in esse, but in suspense, for if Tenant in Tail dies, his issue may distrain, and then the covenant is broke. Ow. 7. per Curiam; but vide Co. Lit. 389. a. (d) 1 And. 162. S. C. and S. P. said. Ow. 6, 7. S. C. adjudged. Goulst. 59. 60. S. C. and S. P. by Two Judges against One, con.

21. If *A.* be Tenant in Tail, the Reversion in the King, and *A.* leases for Years, and covenants, That the Lessee shall enjoy it against all Persons, and without the Interruption of any except the King, his Heirs and Successors, *existentibus regibus vel reginis Angliæ*, and the King grants his Reversion to *B.* and *A.* dies without Issue, and *B.* enters, the Covenant is broke, for the Exception extends only to the King and his Successors, in which Words his Patentee is not included. *Hill.* 38 *Eliz.* between *Woodruff* and *Greenwood. Cro. Eliz.* 517. adjudged.

22. If

22. If *A.* by the Means and Procurement of *B.* by Fine, conveys Lands to *B.* and his Wife, and the Heirs of *B.* and after *B.* leaſes the ſame for Years, and covenants, That the Leſſee ſhall quietly enjoy, during the Term, without the Diſturbance of him, his Heirs or Aſſigns, or of any other Perſon by or through his Means, Title, or Procurement, and *B.* dies, and his Wife enters: This is a Breach, for ſhe Claims by the Means of the Baron, and therefore it is within the Covenant. *Hill.* 20 *Jac.* between (f) *Butler* and *Swinnerton. Cro. Jac.* 657. adjudged, *per totam Curiam.*

(f) Palm. 339, 340. S. C. adjudged, by Three Judges, abſent Chamberlain, tho' objected by his Means and Procurement muſt refer to ſubſequent Acts. 2 Rol. Rep. 286, 287. S. C. adjornatur.

(X) Condition (a) to perform Covenants.

(a) Where the Leaſe is void, the Bond for the Performance of Covenant is ſo alſo. 1 Syd. 309. 1 Lev. 45. Ray. 27. And vide Johnſon and Proctor's Caſe. Yelv. 175. 1 Bulſ. 2. &c. 2 Brownl. 212. &c.

1. If a Man leaſes a Manor by Indenture, except (b) certain Parcel of Land, and in the Indenture there are ſeveral Covenants to be performed of the Part of the Leſſee; and after the Leſſee for further Security binds himſelf in an Obligation to perform all the Covenants, Articles and Agreements, contained within a pair of Indentures, and names the ſaid Indentures, and after the Leſſee enters into the Land excepted: Yet this is not any Breach of the Condition, for this Land excepted is not leaſed, and ſo (c) as if it had not been named, and therefore it cannot be intended an Agreement to be performed on the Part of the Leſſee within the Intent of the Indenture. Paſch. 41 Eliz. B. R. between Lame (d) Ruſſel and Gulwell adjudged.

(b) Otherways if the Exception be of a Thing dehors, as a Way Common, or other Profit a prender. Cro. Eliz. 637. Moor 553. Pl. 747. (c) So if a Man leaſes a Manor, except all Woods, Trees, and Underwoods, and covenants, That the Leſſee ſhall have Hedgeboot and Fireboot ſuper dicta præmiſſa: The Leſſee ſhall not have it out of ſuch Woods, the Soil whereof by the Name of Woods is excepted; for præmiſſa extends only to the Thing demiſed. Cage and paklin. 1 Leon. 116. adjudged. Cro. Eliz. 125. adjudged. And vide 1 And. 236. 1 Rol. Abr. 422. Pl. 1. Cro. Car. 222. (d) Cro. Eliz. 657. S. C. adjudged by poph. and Fenner contra Gaudy: And poph. ſaid, he had conferred with the other Juſtices, and the greater Part of them agreed accordingly. Moor 553. Pl. 747. S. C. adjudged. 11 Rep. 50. S. C. cited.

2. If a Man leaſes for Years rendring Rent, payable at Michaelmas and at the Annunciation, upon Condition, That if he does not pay it upon the ſaid Feaſts, or within 14 Days after, that it ſhall be lawful for him to Re-enter; and the Leſſee binds himſelf upon Condition to perform the Covenants and Agreements of this Leaſe; and after the Leſſee does not pay the Rent at the Feaſts, but after, and within the 14 Days, yet the Condition is forfeited; for the Condition in the Leaſe is not part of the Reſervation. Mic. 13 Jac. B. between Middleton and Ratcliff, per Curiam.

3. If *A.* by Deed-Poll reciting, That he was poſſeſſed of certain Lands for Years by good and lawful Conveyance, aſſigns the ſame to *B.* and in the Deed there are ſeveral Articles and Agreements on the Part of *A.* and *A.* enters into Bond to *B.* conditioned for the Performance of the Articles and (e) Agreements in the Deed: If *A.* had not ſuch Intereſt by a good and lawful Conveyance, the Obligation is forfeited. *Trin.* 30 *Eliz.* between *Severn* and *Clerk.* 1 *Leon.* 122. adjudged.

(e) covenant, That the Leſſee may cut Fire-Wood, without making Waſte; and in Debt upon ſuch Bond by the Leſſor, it was aſſigned for Breach, That the Leſſee had committed Waſte in felling Wood: And tho' it was objected, That this was the covenant of the Leſſor; yet 1 Leon. 324. it was adjudged for the plaintiff, for it was an Agreement alſo on the part of the Leſſee not to commit Waſte.

4. If

4. If *A.* by Indenture leaſes Lands to *B.* for Years, and covenants, That *B.* ſhall enjoy without Interruption; but there is a Proviſo in the Indenture, That if *A.* pays 10 *l.* to *B.* the 31*ſt* of *March* next, the Indenture and all therein contained ſhall be void; and *A.* enters into an Obligation conditioned for the Performance of the Covenants in the Indenture; and the 20*th* of *March* next *A.* diſturbs *B.* and after upon the ſaid 31*ſt* of *March* pays the 10 *l.* yet an Action lies upon the Obligation, for by the Breach of the Covenants before the Condition was performed, the Obligation (f) was forfeited, and (g) it is not material that the Covenants became void before the Action brought. *Mich.* 33 and 34 *Eliz.* between *Hill* and *Pillington*. *Cro. Eliz.* 244. adjudged.

(f) 2 Brownl. 167.

(g) And tho' the Obligee releaſe the covenants after Breach, it is not material. 3 Leon. 69. Hob. 168.

5. But if the Proviſo had been, that upon Payment of the 10 *l.* as well the Obligation as Indenture ſhould be void; perhaps it had been otherways, for then the Bond would have been void before the Action brought. *Mich.* 33 and 34 *Eliz.* *Cr. Eliz.* 244. *per Wray.*

6. If a Man leaſes for Years, by the Words Demiſe, Grant, *&c.* and in the Deed there are ſeveral Covenants on the Part of the Leſſor, and he enters into a Bond conditioned for the Performance of all the Covenants, *&c.* in the ſaid Deed: This extends as well to the Covenants in Law, as expreſs Covenants. *Trin.* 41 *Eliz.* between *Nokes* and *James.* 4 *Co.* 80. b. adjudged.

7. If (h) *A.* by Deed enfeoffs *B.* provided, That if *A.* pays Money to *B.* by a Day, the Feoffment ſhall be void, and covenants to ſave harmleſs from Incumbrances and Arrears of Rent, and to make further Aſſurance, and after *A.* enters into an Obligation conditioned for the Performance of all (i) Covenants, Payments, Articles and Agreements, compriſed in the Deed: If *A.* pays not the Money, yet the Bond is not forfeited, for there being no Covenant to pay the Money, it is a Proviſo in advantage of the Feoffor, that if he paid the Money, that he ſhould have the Land again; ſo that it is in his Election to pay the Money or loſe the Land, which is a ſufficient Loſs to him; and the Word Payment in the Bond hath reference to the Covenant to ſave Harmleſs from Arrears of Rent. *Trin.* 9 *Jac.* between (k) *Briſcoe* and *King*. *Cro. Jac.* 281. adjudged.

(h) 2 Mod. 36, 37. S. P. and the Court inclined accordingly.

(i) Otherways if the Condition of the Bond had been for the performance of all covenants and conditions in the Deed, Tomleſs and Chandler. 2 Lev. 117. adjudged: But in 3 Keb. 454. 460. Judgment is given for the plaintiff unleſs the Defendant diſcontinue.

(k) Briſtoe and Knipe. Yelv. 206. S. C. adjudged: The Proviſo being, That if A. paid for B. 40 l. to C. &c. for the Word Payment in the Obligation ſhall have reference to ſuch payments only as by the Deed are compulſory, not ſuch as are voluntary, for otherways the Obligation and Condition would be repugnant and contrary to the deed. 1 Brownl. 113. S. C. adjudged. Briſcoe and Knight. 1 Bulſ. 156. S. C. adjudged, per totam Curiam.

(Y) The Condition is to ſave Harmleſs, &c.

1. IN an Action of Debt brought by A. againſt B. in which C. and D. are Bail for B. if the Plaintiff hath Judgment againſt B. and the Bail, and after C. one of the Bail gives Security to A. for all the Money due to him; and in Conſideration thereof, A. promiſes C. That he may take Execution againſt D. the other Bail, and that he will not Releaſe him without the Aſſent of C. upon which C. procures D. to be taken in Execution, and after A. releaſes him out of Execution, and thereupon D. is bound to A. in an Obligation, of which the Condition is to ſave A. harmleſs of all Actions and Damages which may ariſe upon the Releaſe of D. out of Execution, then being in Execution at the Suit of A. from all Perſons that may trouble him concerning the ſaid Releaſe, and after C. brings an Action againſt A. for the Breach of his Promiſe, * and recovers his Damages: This is a Breach of the Condition, for the Condition is not to be intended by the Words of the Damages only which directly ariſe upon the Releaſe, but to any collateral Act dehors, as to the ſaid Promiſe. Hobert's Reports, Caſe 353. between (a) Wilden and Wilkinſon.

*Fol. 432.

(a) Hob. fol. 269,270. S.C. adjudged, contra Hut. who thought the Condition was to be underſtood only of Damage directly growing by the Releaſe.

(Z) How the Condition ought to be performed when it is to keep him without Damage

(a) *Vide* for this, *Co.* 5. *Broughton* 24.

(a) Moor 185. Pl. 131.

1. IF it be to ſave him harmleſs from J. S. if J. S. after ſays to him, That if he goes to his Houſe he will beat him, by which Menace he dares not go to his Houſe about his Buſineſs, the Obligation is forfeited. (b) 18 E. 4. 28.

(b) Br. Condition 165. S. C. cited. 5 Co. 24. S. C. cited. 3 Bulſ. 234. S. C. cited.

2. If the Condition of an Obligation be to perform an Award which is, That the Obligee ſtaret acquietatus de qualibet materia, contained in a Bill in Chancery that the Obligor hath depending againſt him, and that the ſaid Suit ſhall ceaſe; and after the Obligor exhibits a new Bill in Chancery againſt the Obligee for the ſame Matter, and in the end of the Bill prays Proceſs, but never takes out Proceſs thereupon againſt him: This is not any ſuch Moleſtation that it ſhall be a Forfeiture of the Condition, for he is not at any Damage thereby. Paſch. 12 Ja. B. R. between (c) Freeman & Sheene, per Curiam.

(c) Cro. Jac. 340. S. C. and S. P. per curiam. 1 Bulſ. 93, 94. &c. S. C. and S. P. per curiam. 1 Rol. Rep. 7. S. C. and S. P. per curiam.

3. If the Condition be to diſcharge another againſt J. S. of an Obligation in which he is bound, he ought to diſcharge him of the Obligation by Releaſe or otherways, and it is not ſufficient to ſave him harmleſs. 22 E. 4. 40. b.

4. If the Condition be to diſcharge and ſave harmleſs the Sureties from the Penalty of an obligation, if the obligation be for-

feited

feited; yet this Condition as to the Sureties is not broke, for they may be discharged and saved harmless from the Penalty of the obligation notwithstanding. D. 4. 5. Ma. 161. 44. (but it seems the Resolution there is contra.)

5. If A. and B. are bound in an obligation to perform certain Covenants contained in an Indenture, of which one is to pay certain Money, and C. covenants with A. and B. to save them harmless from all Things contained in the said Indenture, and after the Monies is not paid according to the said Indenture, by which the obligation is forfeited; yet it seems that C. is not bound to save them harmless from the obligation, for this is a Thing collateral to the Indenture. Mich. 5 Jac. B. between Scot and Pope Plaintiffs, and Griffin Defendant.

6. If the Condition be to save Harmless from such a Thing; this does not extend to Actions, in which he might have a lawful Defence without the obligor. (d) 2 H. 4. 9.

(d) Br. Condition 34.

S. C. Br. Dette 51. S. C. Br. Obligation 20. S. C. Fitz Obligation 13. S. C.

7. (e) If A. and B. are bound in 60 l. to C. and A. binds himself in another obligation to B. upon Condition to acquit, discharge, and save harmless, the said B. from the said obligation, and after C. sues B. upon the obligation of 60 l. and hath Judgment against him upon nil dicit, and after, before Execution sued, A. delivers to B. the 60 l. for which, &c. yet his obligation is forfeited, for he hath not acquitted B. as he ought, for he is damnified by the Suit, and (f) Judgment, by which his Lands, Goods and Body, are subjected to an Execution. Hill. 37 Eliz. B. R. between (g) Bopwright and Harvey adjudged.

(e) Cro. Eliz. 264. like Point adjudged Cro. Car. 350. S. P. adjudged.

(f) So in case A. assumes to save B. harmless from a Recognizance entered into by B. for the Appearance of A. if A. doth not appear, this is a Breach, for the Recognizance being forfeited, tho' not sued, he is subjected to be sued thereupon. Yelv. 287. adjudged: And vide 1 Brownl. 24. (g) Cro. Eliz. 369. S. C. adjudged. Ow. 19. S. C. adjudged.

8. If a Man enters into an obligation with another for his Debt, of which the Condition is to pay the Money at a Day, and the Principal assumes to discharge and save him harmless from the said obligation, and after does not pay the Money at the Day, by which the obligation is forfeited, and the Surety to avoid the Suit pays the Money; he may have an Action upon the Case against the Principal, for the Assumpsit is broke. Hill 14 Jac. B. R. Cranmer and Gomersal adjudged; and the Court said it was a stronger Case, by reason of the Word Discharge, the Exception being in Arrest.

Fol. 433.

9. If A. Lessee of a Term Rendering Rent, assigns it to B. and B. covenants to save A. without Damage from all Rents payable to the Lessor, and after B. leases Parcel of the Land to A. and after the Hay of A. is there distraintd for Rent Arrear; yet the Covenant is not broke, because the Distress of the Hay was Unlawful and a Trespass, and the Sufferance of the Rent to be Arrear without actual Damage is no Breach of the Covenant. Mich. 4 Car. B. R. between (gg) Cooper and Pollard, adjudged upon Demurrer. Which intratur Trin. 4 Car. Rot. 457.

(gg) 1 Jon. 197. S. C. adjudged per totam curiam; and that the Covenant extended to lawful Incumbrances only, and to Things in esse at the time of the Covenant made, and not to Damage happening to the Plaintiff afterwards by an Act of his own.

10. (h) If the Condition of an Obligation be, That whereas the Obligee became bound for the Obligor in 200 *l.* for the Payment of 100 *l.* to *J. S.* If therefore the Obligor shall save and keep harmless the

(h) 1 Vent. 261. like Point adjudged.

2 Bulst. 115. like Point adjudged. 3 Bulst. 233, 234. S. P. adjudged.

Obligee

Obligee for all Suits, Grants, Demands, touching and concerning the ſaid Bond of 200 *l.* then this Obligation to be void; and at the Day of Payment of the 100 *l.* the Obligee comes to the Place where the 100 *l.* is to be paid, and perceiving no Body there preſent to pay the 100 *l.* for the Obligor, he to ſave the Penalty pays it, the Counter-bond is forfeited; for the Payment of the 100 *l.* is a Damage and Harm, and if he had not paid it, greater Harm would have enſued, and it is not neceſſary the Obligee ſhould be ſued, *&c. Mich.* 42 *Eliz.* between *Broughton* and *Pretty.* 5 *Co.* 24. adjudged.

(A) Conditions.

In reſpect of the (a) Words.

(a) Condition to ſave the Obligee harmleſs concerning his Buying of certain Goods at ſuch a Price, extends not to the Price, but Title. All. 95. ruled upon Evidence. —Proviſo, That Tenant in Tail ſhall not go about to avoid any Eſtate, or Demiſe by Copy made, or to be made, extends not to Eſtates limited by the ſame Deed, but only to Eſtates made before, or to be made afterwards. 1 Leon. 207. —The Father upon the Marriage of his Daughter, makes a Proviſo, That if his Daughter dies without Iſſue within Two Years, that her Husband ſhall repay 500 l. of the Portion: the Daughter hath Iſſue, and after ſhe and her Iſſue die, within the Two Years. 1 Syd. 102. cited by **Windham** to have been adjudged, That the Husband ſhould not repay the 500 *l.* for by the having of Iſſue, the Condition was performed. — Where a Biſhop leaſed for 21 Years, and covenanted for him and his Succeſſors to pay all Taxes to be aſſeſſed upon the Land during the Term, and it was held this ſhould not extend to new Taxes impoſed by Authority of Parliament. **Davenant** and the Biſhop of **Salisbury.** 1 Ven. 223, 224. 2 Lev. 68.

1. If the Condition be, That if he recovers 20 Acres of Land, the Obligee ſhall have a Moiety; if he recovers but 10 Acres, he is not bound to pay any Part. 21 Ed. 4. 52. b.

2. If the Condition be to make before Eaſter next a ſufficient Eſtate in Fee of the Manor of B. diſcharged of all former Bargains and Incumbrances, except a Leaſe for Years upon which the ancient Rent is reſerved; if a Leaſe for Years be made (b) Pein between the Date of the Covenant and the Delivery of the Deed, this is not any Breach, D. 3. 4. Ma. 139. 34. the ancient Rent being reſerved.

(b) For this, vide under Title Faits, &c.

3. If the Condition of a Feoffment be, That the Feoffee ſhall give other Lands in Recompence thereof, and the Feoffee infeoffs him of other Lands of a defeaſible Title, which is after evicted; yet the Condition is performed, for once a Recompence, and perpetually. D. 3. 4 Ma. 139.

4. If the Condition be, That if the Conuſee of a Statute holds ſuch Lands in Peace without Damage or Loſs for want of Warranty, then, &c. If the Conuſee be impleaded, and vouches the Conuſor, who renders it, by which the Land is loſt, and the Conuſor hath nothing to render in value, the Condition is broke; for to render in value is of common Right upon a Warranty, and the Judgment to recover in value is not ſufficient, for he is endamaged without the value. (c) 46 Ed. 3. 28. b. ſuch Caſe.

(c) Br. Condition 227. S. C.

5. If the Condition be to acquit another; tho' he acknowledges the Acquittance, yet if he do not acquit him in Deed, the Condition is broke. 46 Ed. 3. 28. b.

6. If the Condition be to ſtand to an Award, de partitione faciend', and they award a Partition, and that he ſhall levy a Fine to make it certain; he ought to levy a Fine, becauſe this depends upon the Partition, and enforces it. 11 H. 4. 25. b.

7. If

7. If the Condition be not to alien the Land, and he gives the Land to his Heir Apparent, without taking any Thing for it, the Condition is broke. 46 Ed. 3. 33.

8. If the Condition be not to do any Thing which shall turn him in Vileny; if he acknowledges a Statute, whether the Condition is broke. Dubitatur 46 Ed. 3. 32. b. (Quere, the intent of the Word Vileny.)

9. If the Condition be, not to make any Debate or Disturbance about the Administration of the Goods of B. against the Obligee; if he administers the Goods, and causes him to be summoned for them, the Condition is broke. 47 Ed. 3. 23. b. Fol. 434.

10. If the Condition be to suffer an Assize to pass, which the Obligee hath against another; tho' he gives 20s. to a Juror to pass against him, yet if the Assize pass for him, the Condition is not broke. 10 H. 6. 19.

11. But otherways it had been, if the Condition had been to suffer the Assize to pass without Impediment or bad (d) Attempt. 10 H. 6. 19. (d) In the Original 'tis Engine.

12. If the Condition be, That if the Lessor may come to the House leased at a certain Time, and that the Lessee do not Oust him during the Term: If the Lessor comes, and the Lessee (e) shuts and (f) locks the Gates, yet this is no Ouster, for he might have entered notwithstanding. (g) 3 H. 4. 8. b. adjudged. (e) 1 Rol. Abr. 430. Pl. 16. (f) In the Original 'tis enseales les heules. (g) Br. Dette 56. S. C. Fitz 105. S. C. Br. Condition 35. S. C.

13. If a man leases for Years, and covenants, That the Lessee shall enjoy the Land peaceably, without the Trouble or Molestation of any, and there was a Rent Seck at the same time issuing out of the Land which was due to the Queen, and after the Queen by her Prerogative distrained in the Land; yet this is not any Breach of the Covenant, for the Land is not charged or incumbered with the Rent Seck, Scilicet, as to the Possession; and then when the Queen distrains for it by her Prerogative, this is of Common Right, and none is bound to discharge Things of Common Right. Mich. 43, 44 Eliz. B. R. between Herle and Howe, per Curiam.

14. So a fortiori if the Rent had been issuing out of other Land. Ibidem per Popham.

1. If one by Indenture leases an House for 40 Years, and the Lessee covenants with the Lessor, That he will sufficiently repair it during the Term, and that the Lessor may enter every Year to see if the Repairs are done; and if it is Repaired, upon View of the Lessor, according to the Agreement, that then the Lessee shall hold for 40 Years, after the first Term ended, *&c.* If the Lessor does not View, *&c.* yet if it is kept in Repair, the Lessee shall hold the other 40 Years, because the View is voluntary in the Lessor, and for his Benefit, and the not doing thereof shall not prejudice the Lessee. *Trin.* 3 *Eliz. Skern's* Case. *Moor* 27. *Pl.* 88.

2. If a Man makes a Lease for Years of a Manor, in which are several Copyholders, provided the Lessee shall not molest, vex, or put out any Copyholder paying his Duties and Services; if the Lessee enters upon a Copyholder in a Cow-House (gg), Parcel of the Premisses, and beats him: This Tort done to his Person, or Distrubance in other Lands than his Copyhold, is no Breach. *Mich.* 37 and 38 *Eliz.* between (h) *Pen* and *Glover*. *Cro. Eliz.* 421. adjudged (gg) By the Report in Moor, the place into which he entred was in the possession of the Copyholder. (h) Moor 402. Pl. 533. S. C. adjudged, That it was no Breach without an Ouster or Disturbance in taking the profits.

3. If the Conuſee of a Statute extends and aſſigns it to one, and after grants the Lands to another, and covenants, That notwithſtanding any Act by him, or any other by his Conſent, the Statute, Extent and Execution ſhall be in force; the precedent Aſſignment is no Breach, for notwithſtanding that, the Statute is in force. *Hill.* 20 *Jac.* (k) between *Perſon* and *Palm.* 388. adjudged upon a Writ of Error, and the firſt Judgment reverſed accordingly; the precedent Aſſignment being laid as a Breach, tho' it was agreed, That if the Covenant had been that the ſecond Grantee ſhould have it without Diſturbance; or if he had declared upon the Covenant in Law *eo quod conceſſit*, the precedent Aſſignment would have been a Breach.

(k) 2 Rol. Rep. 399. S. C. adjudged upon a Writ of Error, and the firſt Judgment reverſed accordingly.

4. If Tenant in Tail, the Reverſion in the Crown, leaſes for Three Lives by Indenture, and covenants, That if the Leſſee or his Aſſigns are evicted before the Expiration of the Term to make Compenſation, *pro tali termino qualis tunc fuit futur'*, *&c.* and afterwards Tenant in Tail died without Iſſue, and the Lands by the King were granted to *J. S.* who entered, and whether the Leſſee ſhould have an Action of Covenant againſt the Executors of Tenant in Tail. *Trin. 6 Car.* between *Jennings*, and *Pollard* and his Wife. *Lit. Rep.* 335. *&c. dubitatur & adjornatur:* And it was ſaid, That by the Death of Tenant in Tail without Iſſue, the Leaſe was determined; and that the Covenant extended only to Evictions *ante expirationem termini*, and to make Compenſation *pro termino futur'*; but on the other Side it was ſaid, That the Leaſe was not determined till Entry, *&c.*

5. If a Man by Charter-Party covenants, That a certain Ship ſhall make ſuch a Voyage, and to bear all Loſſes and Damage which ſhall befal the Ship or Merchandizes in her, exceping only Perils of the Sea; if ſhe is taken by Pirates, whereby ſhe is hindred in making her Voyage, *&c.* this is no Breach, for the Pirates may well be ſaid Perils of the Sea. *Mich.* 24 *Car.* between *Pickering* and *Barkly*. *Stil.* 132. adjudged, after a Certificate of ſeveral Merchants was read in Court, that they were ſo eſteemed amongſt Merchants.

6. If *A.* covenants with *B.* That if *B.* marries his Daughter, he will pay (l) him 20 *l. per Annum*, without ſaying, *quamdiu*, *&c.* yet it ſhall be intended, That the Payment ſhall be for Life; for Annually imports more than for one Year. *Paſch.* 15 *Car.* 2. between (m) *Hookes* and *Swain.* 1 *Lev* 102. the Court inclined accordingly, *adjornatur*; and whether for the Life of the Baron or Feme, *dubitatur.*

(l) By the Report, 1 Syd. 151. the Covenant was to pay it to him and his Wife.

(m) 1 Syd. 151. S. C. and ſaid the Court inclined accordingly, and that it ſhould be paid during the Life of B. and his Wife, and that the Maintenance ſhould be as laſting as the Marriage. 1 Keb. 511, 517, 555. adjudged.

7. If an Obligation be conditioned to pay Money, when a Ship ſhall go from *A.* to *C.* and from thence to *Briſtol*, and ſhall arrive there, or at any other Port of Diſcharge in *England*; and the Ship going from *A.* to *C.* takes in Proviſions at *Briſtol*, but is not there diſcharged, but after proceeds in her Voyage to *C.* and is caſt away, the Money ſhall not be paid. *Mich.* 29 *Car.* 2. between *Dunning* and *Laſcomb.* 2 *Mod.* 267. adjudged.

(B) How to be performed when it is (a) *pro* (b) *Concilio* (c) *impendendo.*

1. IF an Annuity be granted to a Man of the Law, pro Consilio impendendo, the Grantee is not bound to travel, nor do any Thing, but council where he may be found. (d) 41 Ed. 3. 6. 8 H. 6. 24. 21 Ed. 3. 7. b. adjudged.

(a) Where an Office was granted percipiend' pro inde, an Annuity and Issue was joined upon the Exercise of the Office. Moor 88. Pl. 220. (b) Where granted for other Things: vide Hob. 41. Co. Lit. 204. a. (c) Where pro Servitio intended legal Service within the Realm. 2 Inst. 48. and vide 1 Rol. Abr. 445. Pl. 4. (d) Br. Annuity 7. S. C. Fitz Annuity 19. S. C.

2. Also the Grantor ought to disclose his Case to the Grantee, otherwise he is excused of his Council. (e) 41 Ed. 3. 6. b.

(e) Br. Annuity 7. S. C.

3. If the Grantee cannot council him, yet if he does as much as he can, he is excused. 41 Ed. 3. 6. b.

4. So if an Annuity be granted pro Consilio & Auxilio to a Physician, the Grantee is not bound to travel for him, but to give his Advice and Help where he may be found; also he ought to certifie him what Malady it is. (f) 41 Ed. 3. 6. b. 20. (R. Quere this, for a Malady is secret, which cannot be known but by the Physician; and a sick Man cannot travel to the Physician: but perhaps if he sends his Urine to him, he may know his Disease; but he may be helped much by Inspection, and feeling his Pulse; ideo Quere.)

(f) Br. Annuity 7. S. C. con; and a Diversity taken between a Physician and Counsellor. Fitz Annuity 19. S. C. seems con.

5. So if an Annuity be granted to a Man of the Law, pro Consilio & Servitio suo impendendo, (g) he is not bound to go with him, nor to Council him in other Place than where he is found. 8 H. 6 24.

(g) 1 Rol. Abr. 457. Pl. 20. Fitz Annuity 19. S. C.

6. So he is not bound to go with him, tho' the other will bear his Charges. 8 H. 6. 24.

7. If an Annuity be granted pro Consilio impenso & impendendo to a Counsellor, he is not bound by this to put his Hand to a Bill in Camera Stellata. Pasch. 16 Jac. B. R. between (h) Mingey & Hammond, adjudged per Curiam.

(h) Cro. Jac. 482, 483. S. C. adjudged. Poph. 135, 136. S. C. adjudg,d; for tho' he is bound to give his Advice, yet he is not bound to set his Name to every Bill, for that may be inconvenient to him.

8. But when an Annuity is granted pro Consilio impendendo, and the * Grantee in the same Deed binds himself by such Words, pro qua quidem concessione, That he will go with him to any Place within the County; there he ought to go with him, because he hath specially bound himself so to do. 8 H. 6. 24. 32 Ed. 3. Annuity 30. Curia.

* Fol. 435.

9. (i) If the Grantee of (k) such Annuity (l) refuse to give his Council upon Demand, the Annuity (m) is determined. Da. (n) 12. 1. b. 8 H. 6. 24. 16 Ed. 3. Annuity 22. 5 Ed. 2. Annuity 44.

(i) Br. Extinguishment 36. S. P. Co. Lit. 204. a. (k) So if the Grant be quod præstaret consilium, 204. a. (l) But if the Grantor dies, so that the Council is discharged by the Act of God, yet the Annuity continues. Plow. Com. 456. b. (m) Absolutely, not for one Payment only, but for ever. Hob. 41, 42. (n) This seems to be misprinted and should be Dav. Rep. 1. b.

10. If the Grantee of an Annuity, pro Consilio impenso & impendendo, refuses after to give Council: This does not determine the Annuity, because this was granted as well for the Services past, as those to come. Temp. Ed. 1. adjudged.

11. If a Dean and Chapter grants to another the Office of Chief Cook, with 5 l. for the Exercise thereof, provided, That he

he exerciſes the Office in the great Kitchen of the Church; and after, the Dean requires him to exerciſe it in his own Kitchen, and he refuſes, yet the Annuity is not determined. Hill. 37 Eliz. B. between Salisbury Dean of Norwich, and Chapman, adjudged.

12. If an Annuity be granted till the Grantee be promoted and preferred to a Benefice of 30 l. per Annum by the Grantor, and after the Grantor preſents him, but the Grantee is found inſufficient; the Annuity ſhall ceaſe. Paſch. 1 Jac. B. dubitatur.

13. If an Annuity be granted till the Grantee be promoted to a Benefice by the Grantor; if he proffers a Benefice to him which is Litigious, yet the Annuity is determined, for perhaps he hath a good Title thereto, tho' it be Litigious. 17 E. 3. 11. dubitatur.

14. But if the Church be full of another at the Time of the Preſentation; the Annuity is not determined, tho' he accepts the Preſentation, for the Preſentation and Acceptance is void. 26 Ed. 3. 69. b.

15. If an Annuity of 20 l. per Annum be granted till he be promoted to a Benefice, the Benefice ought to be of the value of 100 Marks per Annum. 16 Ed. 2. Annuity 47. Iſſue thereupon.

16. If an Annuity be granted to another till he be promoted to a competent Benefice; if the Grantor after tenders to him the Preſentation to a Vicaridge, which is worth 100 Marks per Annum, which he refuſes, the Annuity is determined. 3 Hen. 6. Annuity 2. adjudged. 31 Ed. 3. Annuity 28.

17. The Benefice ought to be of as much yearly value as the Annuity is, otherways it is not determined. 3 Ed. 3. Annuity 40. Temp. Ed. 1. Annuity 50.

18. The value of the Benefice ſhall be reckoned according to the Demerit of the Party to be promoted. 31 Ed. 3. Annuity 28.

19. If the Grantor preſents the Grantee to an Ewe Benet, (that is, the Cuſtody of the Holy Water:) This does not determine the Annuity, for he is removable at the Will of the Pariſhioners. 3 Ed. 3. Annuity 40. adjudged.

20. If an Annuity be granted till promoted, &c. by the Grantor or his Heirs, it is a good Performance of the Condition, that he was promoted by the Mother of the Grantor, at the Requeſt of the grantor, in Diſcharge of the Annuity. 33 Ed. 1. Annuity 51. adjudged.

21. If an Annuity be granted to an Infant, till he be promoted to a Benefice: If the Grantor tenders him a Benefice, tho' he cannot take it for the Non-ability of his Perſon, yet the Annuity is determined. 3 Ed. 3. Annuity 40.

22. If the Grantor reſigns a Prebend to the Grantee, and the Biſhop, at the Requeſt of the Grantor, tenders the Prebend to the Grantee: If he refuſes it, the Annuity is determined. 16 Ed. 2. Annuity 47.

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23. If the Annuity be granted, quouſque de Beneficio ſibi proviſerit quod duxerit acceptand', the Grantee is not bound to accept any Benefice of any Value, but at his Pleaſure, becauſe of the ſaid Words; and by his Refuſal, the Annuity ſhall not be determined. Temp. E. 1. Annuity 50. adjudged.

(n) In the Original it is 40 s. and ſo appears to be miſprinted.

24. If an Annuity of (n) 40 l. per Annum be granted till promoted to a (o) Benefice, a Vicaridge of the Value of 5 l. per Annum is not ſufficient within this Condition. 19 E. 2. Annuity 49.

(o) In Fitz 'tis to a Covenable Benefice, &c.

25. But it ought to be of the Value of 10 Marks per Annum at the leaſt, and this is ſufficient. 19 E. 2. Annuity 49. Iſſue thereupon.

(C) At

(C) At what Time it is to be performed where no Time is limited.

Presently within (a) convenient Time.

(a) For this vide the Divisions, Title, Temps or Time.

1. When the Act by the Condition of an Obligation to be done to the Obligee, is of its own Nature transitory, ((b) as Payment of Money, Delivery of Charters, and the like) and no Time limited, it ought to be performed in convenient Time. Co. 6. Bothie 31. Co. Lit. 208.

(b) Moor 472. 1 Leon. 125.

2. (c) If the Condition of an (d) Obligation be to pay a less Sum, and no Day of Payment limited, he ought to pay it presently; Scilicet, within a convenient Time. (e) 20 E. 4. 1. b. 18. 44 E. 3. 9. (f) 21 E. 4. 39. b. 14 H. 8. 23. Contra 10 H. 7. 15. Contra (g) 9 E. 4. 22. b.

(c) Cro. Eliz. 789. S. P. adjudged.

(d) But where the Condition of a Feoffment is for the Payment of Money by the Feoffor, without limiting any Time, he hath Time during his life. Co Lit. 208. a.—Secus, where the Condition is, that the Feoffee shall pay Money. 2 And. 73. (e) Br. Condition 166. S. C. Br. Obligation 55. S. C. (f) Br. Condition 173. S. C. (g) Br. Condition 34. S. C.

3. If the Condition be to make a Retraxit of a Suit, he ought to make it within convenient Time. 20 E. 4. 8. b.

4. If the Condition be to perform the Award of J. S. who awards the Obligor to pay 10 l. without limiting any Time, he ought to pay it in convenient Time. (h) 22 E. 4. 25.

(h) Br. Condition 182. S. C.

5. So if the Condition be to acknowledge Satisfaction in such Court, he ought to do it within a Convenient Time. Co. Lit. 208. b. Co. 6. Bothie 30. b. adjudged.

6. So if the Condition be to deliver to the Plaintiff an Obligation of 20 l. in which the Plaintiff and B. stood bound to the Defendant: Tho' no Time be limited for doing thereof, yet he ought to do it in convenient Time. Co. 6. Bothie 30. b. adjudged.

7. If A. demises to B. and C. certain Tythes for Ninety nine Years, if A. so long lives; and after B. assigns over by Indenture his Moiety to D. and B. also delivers to D. an Obligation, in which D. then stood bound to B. in 400 l. for the Payment of 200 l. to B. at a time then past: and thereupon, in Consideration that B. at the Instance and Request of D. would deliver to D. the Counterpart of the said Indenture of Assignment, sealed with the Seal of D. D. assumed, That if he should sell to any Person his Interest in the said Moiety so to him assigned by B. then D. would pay to B. 200 l. in Satisfaction of the said Obligation; and that if he sold the said Interest in the said Moiety to him assigned for more than 200 l. then he would pay to B. one Moiety of such Money, as he should sell it for more than 200 l. and that if he did not sell the said Interest in the said Moiety so Assigned, then he would re-deliver to B. the said Counterpart of the Indenture of Assignment and the said Obligation safe and not cancelled; and thereupon B. delivers to D. the said Counterpart and Obligation: This Promise being made, 20 July, 18 Car. and B. brought an Action thereupon Hill. 20 Car. and averred in his Declaration, That D. had not sold his said Interest in the said Moiety, and yet had not re-delivered the said Counterpart and Obligation according

to his Promise, licet ad hoc faciend' postea, 20 Sept. 20 Car. at such Place, &c. he was requested: * The Action lies upon this Declaration; for D. shall not have all his Life to sell it, but he ought to do it in a convenient Time; for otherways he may stay till the old Age of A. upon whose Life the Estate is to determine, and then it will be but of small Value, which was not the Intent of the Parties; but the Intent was to sell it for the best Value, or to re-deliver the Counterpart and Obligation. P. 23 Car. B. R. between (i) Williamson and Henly, adjudged upon a Demurrer. Intratur Tr. 21 Car. Rot. 362. for tho' he does not take upon him to sell it, but only to pay so much if he sells it, and if he does not sell, to re-deliver, &c. yet upon the whole Contract it appears, that this amounted to a taking upon him to sell or re-deliver &c. which ought to be within a convenient Time, or otherways it will be of no Effect to B.

*Fol. 437.

(i) Stil. 11. S. C. adjudged.

8. If the Condition of an Obligation be to pay a certain Sum to a Stranger, without limiting any Time: This ought to be done (k) in convenient Time. Mich. 14 Ja. B. R. the Bishop of Rochester, adjudged in Arrest of Judgment.

(k) So where the Condition was in convenient Time, to assure the Land for the Maintainance of a School, and the Devisee did not do it in eight Years, 1 Co. 25. b. it was adjudged a Breach.

9. If a Devise be made to another, upon Condition to pay his Debts; if he does not pay them within a convenient Time, the Condition is broke. Contra 38 E. 3. 11. b.

10. If a Man devises Lands devisable to his Executor to sell, and to distribute the Money for the Payment of his Debts; he ought to sell it as soon after the Death of the Devisor as he can, otherways the Condition is broke. (l) 38 Ass. 3.

(l) Br. Condion 215. S. C. Br. Entry Congeable 124. S. C. Fitz. 46. S. C.

11. For if after the Death of the Testator, a Man tenders to him a certain Sum for the Lands, and he refuses it, because it is not to the Value of the Lands, and after retains the Lands in his Hands, to the Intent to sell it dearer to another, and in the mean time takes the Profits to his own Use, and not for the Soul of the Testator, the Condition is broke. (m) 38 Ass. 3. adjudged.

(m) Br. Condition 215. S. C. Br. Entry Congeable 124. S. C. Fitz. 46. S. C.

12. If a Feoffment be made, upon Condition, that he shall sell it as soon as he can, and as profitably as he can, and the Money taken for the same Lands shall be distributed for his Soul: If the Feoffee continues the Possession an Year and half, because he finds not a Chapman to buy it, and takes the Profits of the Land, but never claims any Estate but under the Condition aforesaid, and is always of good Will to sell the Lands if he could find a Chapman, the Condition is not broke; for there is no Default in him. 26 Ass. 39. dubitatur.

13. If A. in Consideration of 50l. given to him by B. assumes to procure the Wardship of the Body and Lands of C. to be granted by the King (to whom it belongs) to B. during the Minority of C. who was then of the Age of 13 Years: He ought to procure it within a convenient time, without any Request; because otherways the Benefit of the Profits of the Land will be lost in the mean time. P. 8 Car. B. R. between Vine and Hethrington, adjudged upon Demurrer, per Curiam. Intratur Tr. 7 Car. Rot. 27.

(D) At what Time it ſhall be performed where no Time is limited.

Not before Requeſt.

1. IF Land be granted to the King, upon Condition to grant to any * Stranger, it ſeems he is not bound to do it before Requeſt. D. 3, 4. Ma. 139. 32. * Fol. 438.

2. If the Condition of an Obligation be to pay a certain Sum to a Stranger, without limiting any Time, it ought to be paid within a convenient Time, without any Requeſt. Mich. 14 Ja. B. R. the Biſhop of Rocheſter, adjudged, this Exception being moved in Arreſt of Judgment.

3. If the Condition of an Obligation be to pay a certain Sum to the Obligee, without limiting any Time, he is not bound to pay it before Requeſt.

4. If the Condition of a Feoffment be to enfeoff a Stranger upon Requeſt, he is not bound to enfeoff him before Requeſt. (a) 19 H. 6. 34. b. (a) Fitz. Entry Congeable 2. S. C.

5. So it is if it be to enfeoff the Feoffor upon Requeſt. 19 H. 6. 34. b.

6. So if the Condition of a Feoffment be, that he ſhall re-enfeoff the Feoffor, he is not bound to do it before Requeſt. 38 Aſſ. 7. (b) 44 Aſſ. 26. (c) 43 E. 3. 9. (b) Br. Condition 217.

S. C. Br. Tender 33. S. C. (c) This is miſprinted in the Original, and ſhould be 44 Ed. 3. which vide. Br. Condition 26. Fitz. Entry Congeable 33.

7. So where the Condition extends to the Feoffee, or his Heirs, to re-enfeoff the Feoffor, the Heir after the Death of the Feoffee is not bound to do it before Requeſt. 38 Aſſ. 7.

8. If a Feoffment be upon Condition to give it to a Stranger in Tail, the Remainder to the right Heirs of the Feoffor, the Feoffee is not bound to do it before Requeſt, becauſe the Feoffor is to have an Eſtate by the Condition. 44 Aſſ. 26. (d) 44 E. 3. 9. b. Curia. (d) Br. Condition 26. S.C. Fitz. Entry Congeable 33. S. C.

9. If W. in Conſideration that T. will marry M. his Couſin, before the Return of W. from London to Norwich, aſſumes and promiſes after his Return from London to Norwich aforeſaid, to pay to T. 10 l. and to find ſufficient Security for the Payment of 40 l. more at the Death of W. and after T. marries with M. and W. returns from London to Norwich, he ought to pay the 10 l. and find the Security for the 40 l. within a convenient Time after his Return, at his Peril; and there needs no Requeſt to be made by T. for he hath taken upon him to do it at his Peril. Mich. 31, 32 El. B. between Peeter and Carter, adjudged; put M. 31, 32 El. B. R.

If (e) *A.* in Conſideration of 12 Pieces of Stuff, of the Value of 40 *l.* by *B.* delivered to *A.* aſſumes to *B.* to deliver to *B.* ſo many Pipes of Sack, which *A.* then had lying in a certain Cellar in *London*, as ſhould be of the Value of the ſaid Stuff, *per præfat. B. Eligend. B.* muſt requeſt *A.* to let him make his Election; for before ſuch Election, *A.* cannot deliver the Wine; and there is no Reaſon that *A.* ſhould requeſt *B.* to make his Election, as he ought to have done, if the Promiſe had been to deliver them to a Stranger. *Trin.* 23 *Car.* 2. between (f) *Parmenter* and *Creſſy*. *All* 25. adjudged; and that a Requeſt at *Norwich* to deliver the Wines was good, both in Reſpect of the Place and Manner; for *B.* muſt requeſt *A.* where he could meet with him, and thereupon *A.* ought (e) 1 Rol. Abr. 466. Pl. 33. like Point. (f) Stil. 49. 74. S. C. darkly reported.

to

to have appointed a reaſonable Time when he would be ready to go with *B.* to the Cellar, that he might make his Election: And as to the Manner, it was as much as if he had requeſted *A.* to perform his Promiſe, which muſt be by ſhewing the Wine; to the Intent that *B.* might taſt it, and make his Election, *&c.*

(E) At what Time it ought to be performed where no Time is limited.

During the Lives of the Parties.

1. (a) IF a Man makes a Feoffment, upon Condition to re-enfeoff him: If he does not re-enfeoff him during the Life of the (b) Feoffor, the Condition is broke, if he had convenient Time to re-infeoff him before his Death. (c) 18 Aſſ. 18. adjudged, Lord Clifford's Caſe. (d) Regularly if the Feoffee or Grantee be upon (e) Condition to re-enfeoff or regrant any Eſtate to the Feoffor or Grantor, without limiting any time, the Feoffee or Grantee hath Time to do it during his Life, if he be not haſten'd by Requeſt. Co. 2. Lord Cromwell 78. b. 79.

(a) Co Lit. 219. a. S. P. 2 Co. 79. b. S. P.

(b) But tho' the Feoffor dies before any Re-feoffment, yet is not the Condition broke. Co. Lit. 219. a. Kelw. 137. 2 Co. 79. b.

(c) Br. Condition 105. S. C. (d) Co. Lit. 208. b. S. P. 6 Co. 31. a. S. P. 2 Co. 79. b. (e) But if a Man covenants to grant an Eſtate to another, it muſt be done in convenient Time. 2 And 73, 74.

2. But in the ſaid Rule, if the Caſe be, that it appears by the Thing to be performed, or by any Accident, that the Feoffor cannot have all the Benefit intended him by the Condition, the Condition is broke without any Requeſt, and during the Life of the Feoffee or Grantee. Co. 2. Lord Cromwell 79.

(f) Andrews and Blunt S. P. upon the ſame Grant. 1 And 17. adjudged. Moor 105. Pl. 249. adjudged. Dy. 311. b. adjudged.

3. (f) As if A. conveys a Manor to which an Advowſon is appendant to J. S. in Fee, upon Condition that J. S. ſhall grant the Advowſon to * A. for his Life, and if it happens not to be void in his Life, then one Turn to his Executors: Though in this Caſe, J. S. hath all his Life to regrant it, if he be not haſtened by Requeſt, and the Church becomes not void in the mean time (g); yet if the Church becomes void during his Life, before any Requeſt, the Condition is broke, becauſe the Feoffor cannot have all the Effect which was intended him by the Regrant, which was to have all the Preſentations during his Life. Co. 2. (h) Lord Cromwell 78. b. 79. reſolved.

* Fol. 439.

(g) Co. Lit. 222. b. S. P. (h) 2 And. 69. S. C. adjudged. Moor 472. Pl. 679.

(i) Co. Lit. 208. b. Moor 472. S. P. Gould. 117. S. P.

4. (i) If A. enfeoffs B. the 1ſt. of May, upon Condition that he ſhall grant to A. an Annuity or Rent during his Life, payable yearly at Michaelmas and the Annunciation: In this Caſe the Feoffee hath not Time to do it during his Life, but he ought to do it (k) before the firſt of the ſaid Feaſts, or otherways A. ſhall not have all the Advantage of the Rent intended him by the Condition. Co. 2. Lord Cromwell 79. Vide 8 H. 4. Vide 14 E. 3. Det. 138.

(k) Where one is to grant a Reverſion, he may do it any Time during his Life, if it ſo long continues a Reverſion, if he be not haſten'd by Requeſt. 1 Lev. 44. per Windham.

5. If

5. If a Man makes a Feoffment in Fee, upon Condition to be void upon Payment of Money (l) by the Feoffor: The Feoffor may pay it at any Time during his Life. *Lit. Sect.* 337. *Co. Lit.* 208. a.

(l) Seems, if upon condition that Feoffee ſhall pay money; for it is not reaſonable the Feoffee ſhould have the benefit of the Land, without payment of the money. 2 And. 73.

6. If the Condition of an Obligation be to do a local Act to the Obligee, to which the Concurrence of the Obligor and Obligee is neceſſary, as to make a Feoffment, *&c.* (no Time being limited) the Obligor hath Time during his Life to perform it, if not haſtened by Requeſt. *Co. Lit.* 208. b. 6 *Co.* 30. b.

7. But though the Condition is local, yet if it may be performed for the Benefit of the Obligee in his Abſence, as the Acknowledgment of Satisfaction upon Record, *&c.* it ought to be done in convenient Time. *Co. Lit.* 208. a. (m) 6 *Co.* 30. b.

(m) Hadr. 10. S. C. & S. P. cited.

8. When by the Condition, the Obligor, Feoffor, Feoffee, or Stranger, are to do a ſole (n) Act or Labour, as to go to *Rome*, *&c.* they ſhall have Time during Life, and cannot be haſtened by Requeſt. *Co. Lit.* 208. b. 209. a.

(n) Which in no manner concerns the Obligee, Feoffee, &c. nor their benefit. 6 Co. 31. a. b. 1 Leon. 125.

9. The Lord *Clifford* held, *&c. in Capite*, and the King licenſed him to alien to *B.* and *C.* ſo that they ſhould give the ſame to my Lord *Clifford*, and the Heirs of his Body, the Remainder over, *&c*, and the Lord *Clifford*, according to the Licence, enfeoffed *B.* and *C.* and before any Reconveyance the Lord *Clifford* died, and it was adjudged his Heir might enter; for if they ſhould make the Eſtate to the Iſſue of the Lord *Clifford*, the King might ſeize for Want of a Licence, and that in Default of the Feoffees, (o) *Co. Lit.* 222. b.

(o) 2 Co. 80. a. S. C. cited.

10. If *A.* pawns a Jewel to *B.* for 25 *l.* but no certain Time is appointed for the Redemption thereof, and *B.* dies, it may be redeemed afterwards. *Trin.* 8. *Jac.* between (p) Sir *John Ratcliff* and *Davis*. *Cro. Jac.* 224. adjudged; but *Yelv.* and *Croke* doubted.

(p) Yelv. 178. S. C. adjudged. 1 Bulſ. 29, 30. S. C. adjudged. Noy. 137. S. C. adjudged.

11. (q) Otherwiſe if *A.* dies before Redemption. *Trin.* 8 *Jac.* between Sir *John Ratcliff* and *Davis*. *Cro. Jac.* 244. reſolved.

(q) Yelv. 178. S. C. & S. P. per Curiam; for the condition is perſonal; and being generally pawned, it extends but to the perſon of him that pawned it. 1 Bulſt. 29, 30. S. C. adjudged. Noy. 137. S. C. adjudged.

(F) At what Time the Condition ſhall be performed when no Time is limited.

To the Obligor, Feoffor.

1. If the Condition be to be performed to the Party himſelf only, who is to take Advantage of the Breach of the Condition, (a) the Feoffee is not bound to do it before Requeſt. D. 3, 4, Ma. 139, 32.

(a) Moor 472.

2. (b) If *A.* enfeoffs *B.* of Black-Acre, upon Condition to be void if *C.* enfeoffs *B.* of White-Acre: *C.* hath Time during his Life to do it, if not haſtened by Requeſt. *Co. Lit.* 208. b.

(b) 6 Co. 31. a. S. P.

3. So in Caſe of the Condition of an Obligation. *Co. Lit.* 208. b.

(G) To a Stranger.

(a) Co. Lit. 208. b. S. P. 6 Co. 31. a. S. P. Co. Lit. 219. b. S. P. (b) Secus, where the Condition is, that a Stranger ſhall enfeoff the Feoffee. Co. Lit. 208 b. (c) Secus, where to enfeoff the Feoffor and a Stranger jointly. Co. Lit. 219. b. (d) Fitz Entry Congeable 33. S. C. Br. Condition 26. S. C. (e) Br. Condition 217. S. C.

1. (a) FEoffee, upon Condition to enfeoff a (b) Stranger (c) ought to do it preſently. (d) 44 E. 3. 9. D. 3, 4, Ma. 139. (e) 44 Aſſ. 26.

(H) Stranger and Obligor.

(a) Co. Lit. 219. a. S. P. con. becauſe the Stranger, who is not privy to the Condition, ought to have the Profits preſently. (b) Fitz Entry Congeable 33. S. C.

1. (a). IF the Condition be to enfeoff a Stranger in Tail, Remainder to the right Heirs of the Feoffor; he is not bound to do it before Requeſt. (b) 44. E. 3. 9. b.

2. If Land be granted to the King, upon Condition that he, his Heirs and Succeſſors, ſhall give other Lands in Conſideration thereof: The King is not bound to do it in his Life, but any of his Succeſſors may; for the Word his extends to every of them. D. 3, 4, Ma. 139. 32.

3. If the Condition be to make a Gift in Tail to the Feoffor, the Remainder to a Stranger in Fee: The Feoffee has Time during his Life to do it, becauſe the Feoffor, who is Party, and privy to the Condition, is to take the firſt Eſtate. *Co. Lit.* 219. b.

(I) At what Time it ought to be performed where no Time is limited.

Upon Requeſt.

(a) But if not haſtened by Requeſt, he hath Time during his Life, becauſe the Feoffor, who is privy to the Condition, is to take jointly with her. Co. Lit. 219. a. Hetl. 56.—But if the Baron dies, the Feoffment muſt be made to the Wife without Requeſt. Hetl. 56. (b) Made to the Obligor, and a certain Time limited for the doing thereof. 6 Co. 31. S. C. (c) Br. Condition 26. S. C. Fitz Entry Congeable 33. S. C.

1. IF a Feoffment be upon Condition to re-enfeoff the Feoffor and his Wife, he (a) ought to do it upon (b) Requeſt. 21. E. 3. 11. b. 44 Aſſ. 26. (c) 44 E. 9. admit.

2. If the Condition of an Obligation be to pay a certain Sum, without limiting any time, it ought to be paid upon Requeſt. 38 E. 3. 12.

3. If a Man deviſes Lands, upon Condition to pay his Debts; he ought to pay them upon Requeſt, otherways the Condition is broke. 38 E. 3. 11. b.

Fol. 440.

4. If the Condition of an Obligation be, that whereas A. the Obligor hath conveyed Lands to B. the Obligee: If A. (d) the

(d) Theſe Words, the Obligor, and C. his ſon, are left out in the Original.

Obligor

Obligor, and C. his Son, shall do all Acts and Devises for the better Assurance of these Lands to B. which shall be devised by B. or his Council, then the Obligation shall be void: And after B. devises and tenders a Release, to be sealed by A. and C. his Son, and A. presently seals it; but (e) C. because he was not lettered, nor could read it, prays B. to deliver it to him, to shew to some Man learned in the Law, who might inform him whether it was according to the Condition, and if it was according to the Condition, he would seal it, which B. refuses, upon which C. refuses to seal it: This was a Breach of the Condition, because he did not require the Writing to be read to him; and he was bound to take Conusance of the Law, whether it was according to the Condition, and shall not have reasonable time to shew the Writing to his Council learned in the Law, to be instructed by them. Co. 2. (f) Manser. 3. per Curiam resolved.

(e) The C. is wanting in the Original.

(f) 1 Rol. Abr. 424.

Pl. 11. S. C. with Notes and References.

5. If A. covenants with B. to make such Conveyance of certain Lands to B. as by him shall be devised at the Costs and Charges of B. and after B. devises, and tenders a Writing, containing a Bargain and Sale to (g) B. and A. requires time to shew it to his Council, to be advised thereupon, and B. refuses it, upon which A. does not seal: he hath broke his Covenant, for the Covenant was peremptory, scilicet, to be performed presently, at his Peril. D. 16 El. 338. 39. between (h) Wotton and Coke.

(g) This is A. in the Original, and so misprinted there.

(h) 1 Rol. Abr. 424.

Pl. 11. S. C. with Notes and References.

(K) At what Time it may be performed where a Day is limited.

Before the Day

1. If the Condition be to stand to the Award of J. S and he awards him to pay 10 l. such a Day: It is a good Performance, if he pays it to the Obligee before the Day, and the other accepts it: for Payment before contains Payment at the Day. Hill. 14 Jac. at Sergeant's Inn, between (a) Berrey and Perrin, in a Writ of Error, where the Award was to pay at or before such Day, and the (aa) Breach assigned for Non-payment at the Day, without mentioning the Non-payment before, and yet the Judgment affirmed per Curiam, because Payment before is Payment at the Day. Mich. 21 Car. B. R. between Ireland and Sutton, adjudged accordingly upon Demurrer. Intratur Tr. 21 Car.

(a) 3 Bulf. 62, 67. S. C. adjudged. Bridg. 91. S. C. adjudged. This Case is also reported in 1 Rol. Rep. 223, 375. Cro. Jac. 299. Moor 849. but no Notice taken of this Point. (aa) where the Breach being so assigned, was adjudged naught, vide Mattnough and Holgate. 3 Levin. 293. 2 Vent. 221.

2. If the Condition of an obligation be to pay so much to a Stranger such a Day: If he pays it before the Day, (b) this is a good Performance, (c) because Payment before contains Payment at the Day. 9 H. 7. 20. (d) 10 H. 7. 10. b.

(b) Co. Lit. 212. a. b. Cro. Car. 284. Cro. Jac. 435. Moor 367. Pl. 502. Et vid. 2 Syd. 78. (c) And upon tolvit ad diem, such Payment may be given in Evidence. Bond and Richardson. Moor 267. Pl. 417. adjudged. Cro Eliz. 142. adjudged. 1 And. 198, 199. adjudged. Sav. 96. adjudged. Ow. 45. adjudged against the Opinion. Dyer 222. b. Moor 47. Pl. 141. Godb. 20. (d) This is misprinted in the Original as here, and should be 14. which vide Br. Condition 242.

3. So

3. So if the Condition of an Obligation be, That a Stranger ſhall enfeoff a Stranger ſuch a Day: If he enfeoffs him before the Day, this is a good Performance, becauſe it contains a Feoffment at the Day. (e) 9 H. 7. 18, 20. (f) 10 H. 7. 14. b.

(e) Br. Condition 136. S. C. (f) Br. Condition 242. S. C.

4. So if the Condition be, That a Stranger ſhall enfeoff a Stranger (g) after the Death of J. S. If he enfeoffs him during the Life of J. S. this is a good Performance, becauſe it continues a Feoffment after his Death. (h) 9 H. 7. 17, 20.

(g) But where the Condition was to pay 10 l. after the Obligee had enfeoffed him, and he pays 5 l. before, and 5 l. after, it was no Performance. N. Dyer 222. b. Margine. (h) Br. Condition 136. S. C.

5. If the Defeaſance of an obligation be to pay a leſs Sum than is contained in the obligation, at a Day certain: If he pays it before the Day, and the Obligee accepts it: this is a good Diſcharge of the obligation. 30 E. 3. 22. b. 23. admitted by the Iſſue.

6. If a Condition be to make an Aſſurance within a Month after the Date of the obligation: He is not bound by any Requeſt to make it at any certain Time; but he may perform it at any Time * within the Month. Hill. 37. El. B. between Pexpoint and Thimblebye, per Curiam.

* Fol. 441.

7. If a Condition be to make further Aſſurance within a Month, upon Requeſt to the Obligee: If the Obligee requeſts him within the Month, and he refuſes, tho' he be ready after within the Month, yet the obligation is forfeited, inaſmuch as the Time of the Month is limited to the Requeſt. Hill. 37. El. B. in Pexpoint and Thimblebye's Caſe, per Curiam.

8. If the Condition of an obligation be, If the Obligor do at all Times hereafter, within the Space of one Month, when he ſhall be required, make ſuch further Act and Acts, Aſſurance and Aſſurances, as the Obligee ſhall by his Council demand, for the Recovery of one Annuity of 30 l. due from J. S. then the Obligation to be void: In this Caſe, if the (i) Obligee does not demand any further Aſſurance within the Month after the making the obligation, yet the Obligor is bound to make further Aſſurance within a Month after Requeſt, made after the Month paſt, after making the obligation, becauſe the firſt Words (ſcilicet, all Times hereafter) are without Limitation, and the other Words (within one Month, when he ſhall be required) refer to the Requeſt; ſcilicet, he ſhall have a Month for the making thereof after Requeſt; for the moſt benign Conſtruction ſhall be made to make this Agreement effectual; for this is not like a common Aſſurance, by which it is covenanted to make further Aſſurance within ſeven Years, becauſe the Uſe in ſuch Caſe hath interpreted it, that he ſhall not be troubled beyond 7 Years. Hill. 1650. between (k) Wentworth and Wentworth, adjudged upon Demurrer. Intratur Trin. 1650.

(i) If the Condition of an Obligation is to pay 50 l. upon the 10th of January next on 3 Months Warning, the Obligor muſt pay the Money upon the 10th of January next giving the Obligee 3 Months Warning; for the Words ſhall be taken moſt ſtrongly againſt the Obligor. Lawſon and Widdrington, 1 Lev. 85, 86. adjudged niſi. Raym. 61. adjourned: But ſaid by Windham, admitting the Obligee is to give Warning, and omits it, yet the Money is not loſt, but ſhall be paid upon any 3 Months Warning. 1 Keb. 381, 415. (k) Still. 241. S. C. adjudged per totam Curiam niſi.

(L) At what Time it ſhall be made where Time is limited.

Upon Requeſt.

1. IF A. covenants with B. to make a Surrender of Land, or to convey Land to B. (a) upon Requeſt: If a Writing purporting a Surrender or Conveyance, be tendered to him, with Requeſt to ſeal it, A. ought to ſeal it preſently, and ſhall not have any time to be adviſed by his Council, whether it be according to the Covenant. Paſch. 9 Car. B. R. between (b) Somes and Smith, per Curiam reſolved.

(a) So if upon reaſonable Requeſt. Cro. Jac. 299, 300. 1 Jon. 314.

(b) Sims and Smith, Cro. Jac. 299, 300. S. C. adjudged. 1 Jon. 314. S. C. adjudged. Godb. 445. S. C. adjornatur.

2. If a Man covenants to make further Aſſurance at all time and times, at the Charges of the Covenantee, and the Council adviſes, that he ſhall levy a Fine; yet he is not bound to do it preſently, but he ſhall have convenient time to do it, though the Words be, that he ſhall do it at all times; for the Words ought to have a reaſonable Conſtruction. Hill 37 El. B. between Pexpoint and Thimbelby, per Curiam.

3. If A. being a Copyholder for Life, covenants with B. to ſurrender to B. in Reverſion the ſaid Copyhold Tenement, ſuper rationabilem Requiſitionem ei fiendam by B. and after B. tenders to A. a Writing, purporting a Letter of Attorney of Surrender of the ſaid Tenement to B. and A. requeſts, that before ſhe ſeals it, ſhe by her Council, circa Scriptum illud infra rationabile Tempus tunc proximo ſequens adviſaretur, the which B. refuſes, and thereupon A. refuſes to ſeal it. Admitting that A. was bound to ſeal the Letter of Attorney, and to ſurrender by ſuch Letter of Attorney, then ſhe hath broke her Covenant: for ſhe ought to take Conuſance of the Law at her Peril, whether the Letter of Attorney was according to the Covenant; and ſhe ſhall have no time to be adviſed thereupon: but the reaſonable time mentioned in the Covenant is intended * reaſonable Time in the making thereof, ſcilicet, ſhe ſhall have time to read it before ſhe ſeals it, and therefore it ought to be ſealed preſently, without Time to adviſe upon Requeſt, according to the Words of the Covenant. Paſch. 9 Car. B. R. between (c) Sims and Dame Smith, per Curiam reſolved upon Demurrer. Intratur Hill. 6 Car. Rot. But Judgment was given againſt the Plaintiff for another Matter. Co. 2. Manſer 3. D. 16. El. 338. 39.

* Fol. 442.

(c) Cro. Jac. 299, 300. S. C. adjudged. 1 Jon. 314. S. C. adjudged. Godb. 445. S. C. adjornatur.

(M) At what Time it ſhall be performed.

Where Time is limited.

1. IF the Condition be to do a thing within a certain time, he may perform it the (a) laſt Day of the time appointed. 8 H. 4. 14.

(a) For this, vid. Cro. Eliz. 14. Moor 122. Pl. 266.

2. So if the Parliament make a Conſtitution, That if J. S. comes not in B. R. within a quarter of a Year after Proclamation made, he ſhall be convicted of a Treſpaſs, &c. he need not come before the laſt Day of the Quarter. 8 H. 4. 13.

3. If an obligation be made the 17th Day of November, Anno 12 Jac. and the Condition is to pay 5 l. the 21ſt of November following, and 5 l. the 20th of December next after: The firſt 5 l. ought to be paid the 21ſt Day of November, 12 Jac. for it refers to the Day and not the Month. It was adjudged in B. Mich. 13 Jac. B. between (b) Price and Coa.

(b) 2 Rol. Abr. 251. Pl. 3. S. C.

4. If the Condition be to pay 10 s. when A. comes to his Houſe, and 10 s. at the Feaſt of St. Michael, and then at the Feaſt of St. Andrew then next enſuing, 10 s. Theſe laſt Sums ought to be paid at ſuch next Feaſts or Times, and not at the next Feaſts after A. comes to his Houſe.

5. If the Condition be to pay ſo much on this Side ſuch a Feaſt; it ought to be paid in the (bb) Wake of the Feaſt at the leaſt, and not the Feaſt-Day. (c) 21 E. 4. 52.

(bb) In the Original it is in vigell del Feaſt.

6. The ſame Law where it is to be paid infra Feſtum. (d) 21 E. 4. 52.

7. The ſame Law where it is to be paid ante Feſtum. (e) 21 E. 4. 52.

8. But where the Condition is to be performed in Feſto, it ought to be done the Feaſt-Day, and not before nor after. (f) 21 E. 4. 52.

(c) Br. Condition 174. S. C.

(d) Br. Condition 174. S. C.

(e) Br. Condition 174. S. C.

(f) Br. Condition 174. S. C.

9. If the Condition of an obligation upon an Adventure to Newfoundland be, to pay ſo much within 40 Days next after the Ship ſhall make her firſt Return and Arrival in this Voyage from Newfoundland into the Port of Dartmouth, or into any Harbour, Creek, or Port of England, where ſhe ſhall firſt unlade her Goods, &c. and after the Ship, does not return to Dartmouth, but to Plimouth in Devon, where ſhe unlades her Goods: In this Caſe the Obligor is bound to pay the Money within 40 Days after the Arrival of the Ship, and ſhall not have 40 Days after the unlading the Goods; for this is not for Freight, but for an Adventure; and the Unlading of the Goods is mentioned only to deſcribe the Haven where the Arrival ſhall be, ſcilicet the Port of Diſcharge, and not put to make a Limitation of the Payment of the Money, to have 40 Days for the Payment thereof after the Diſcharge; but perhaps there will be ſome Doubt if the Diſcharge be not within the 40 Days. Trin. 23 Car. B. R. between (g) Leere and Cholwicke, adjudged for the Plaintiff, this being moved in Arreſt of Judgment, where it was aſſigned for Breach, that he did not pay the Money within 40 Days after the Arrival of the Ship; and avers, that the Ship was unladed of the Goods, but no Time alledged of the Unlading; * and per Curiam, if it was not unladed within 40 Days, it ought to come of the other Part to ſhew it. Intratur, Hill. 22. Car. Rot. 912.

(g) Stil. 30. S. C. but S. P. does not fully appear.

* Fol. 443.

10. If a Man makes a Feoffment in Fee, upon Condition to be void upon Payment of Money at a Day; the Feoffor muſt tender it upon the Day, a convenient Time before Sun-Set. *Co. Lit.* 206. b.

11. But if he tenders it to the Perſon of the Mortgagee at any Time of the Day of Payment, and he refuſes, the Condition is ſaved. *Co. Lit.* 206. b.

12. If the Condition of an Obligation be, to deliver to the Obligee 20 Quarters of Corn the 29th of *February* next following the Date hereof, and the next *February* hath but 28 Days; he is not bound to deliver it till a Leap-Year. *Paſch.* 30 *Eliz.* 1 *Leon.* 101. adjudged.

(N) How

(N) How.

1. If the Condition be to be performed at a Day certain, it is not necessary for the Obligor to be there all the Day. Contra (a) 21 E. 4. 52.

(a) Br. Condition 174. S. C.

2. If the Condition be to ſtand to the Award of B. to be made ſuch a Day: If he does not make the Award at the Day, but at a Day after, he is not bound to perform it. 49 E. 3. 9.

3. If the Condition be to make an obligation to the Obligee, by the Advice of J. S. of 40 l. immediately, yet he ſhall have reaſonable time to do it by the Advice of J. S. 18 E. 4. 21.

4. Where by a Condition a thing is to be performed upon Demand, yet he ſhall have reaſonable time to perform it after Demand. (b) 15 E. 4. 30.

(b) Br. Condition 65. S. C. 1 Rol. Abr. 449. F. 2. S. C.

5. If A. recites by his Deed, that whereas he is indebted to B. in 100 l. he covenants with B. that the ſaid 100 l. ſhall be paid and delivered to B. or his Aſſigns, at Rotterdam in Holland, per C. abſque aliqua Secta Legis ſuper primam Requiſitionem quæ de eodem faceretur. In this Caſe the Demand may be made in any other Place preter Rotterdam; for though the Payment is to be made at Rotterdam, yet the Demand may be made in any Place, as if the Demand be made in England, or at Dort, which is 10 Miles from Rotterdam, (c) or in England; for he ought to have reaſonable time to pay it after the Demand, having Reſpect to the Diſtance of the Place: But if the Demand ſhould be limited to Rotterdam, perhaps he would never come there, and ſo the Covenant would be of no Effect. Mich. 1650. between Halſted and Vauleyden, adjudged upon a Special Verdict.

(c) So is the Original; but it ſeems Surpluſage.

6. If an Obligation is conditioned for the Payment of Money to the Obligee at or before the 29th of *September* at ſuch a Place; it cannot be tender'd at the Place before the laſt Day, unleſs the Obligee is there ready to receive it. *Mich.* 25. *Eliz.* between (d) *Hawly* and *Simpſon*. *Cro. Eliz.* 14. adjudged.

(d) Moor 122. Pl. 266. S. C. & S. P. dubitatur.

7. (e) But if the Obligor meets the Obligee at the Place before the Day, he may then tender it, and the Obligee ought to receive it. *Mich.* 25 *Eliz.* in the Caſe of (f) *Hawly* and *Simpſon*. *Cro. Eliz.* 14. *per Curiam*.

(e) Co. Lit. 211. like Point.

(f) Moor 122. Pl. 266. S. C. & S. P. dubitatur.

8. If an Obligation be conditioned to be at *A.* at a certain Day, and there to chuſe Two Arbitrators to be joyned with Two others, to be choſe by the Obligee, to arbitrate all Matters between them; he ought to be there in ſuch Time, that Arbitrators may be choſe, and all ended that Day. *Mich.* 39 & 40 *Eliz.* between (g) *Marſh* and *Edmunds*. *Moor* 545. *Pl.* 725. And the Pleading that he was there the laſt Inſtant, to make his Choice, is not ſufficient.

(g) Cro. Eliz. 549. S. C. adjudged, That the plea was naught, becauſe he ſhewed not what hour of the day he came, nor how long he continued there, nor that his Arbitrators were preſent alſo.

(O) At

(O) At what (a) Place where none is limited.

(a) Vide Poph. 11.

1. IF the Condition be, that a Stranger ſhall ſhew certain Evidences of ſuch an Annuity to the Council of the Obligee upon Requeſt: When the Requeſt is made, the Stranger ought to ſeek the Council where they are. 19. E. 4. 1. b

(P) To the Perſon.

(a) Lit. Sect. 340. Co. Lit. 210. S. P.

1. (a) IF the Condition be to pay a ſmall Sum, and no Place is limited, he ought to ſeek the Obligee. 21 E. 4. 6. b.

2. If the Condition be to do a thing upon Requeſt, and the Plaintiff aſſigns for Breach, that the Defendant could not be found to make a Requeſt to him, and therefore he made a Proclamation at the Church where he was born, and another Proclamation in ſeveral Markets in the ſame County, by them giving Notice of his Requeſt; yet this was not any Requeſt, inaſmuch as it ought to be made to his Perſon. Mich. 8 Car. B. R. between Gruit and Pinnel, adjudged upon Demurrer.

3. A Man leaſes, rendering Rent, and the Leſſee binds himſelf in 20 l. to perform the Covenants: this does not alter the Place of Payment of the Rent, for it may be tender'd (b) upon the Land, without ſeeking the Obligee. (c) 21 E. 4. 6. 20 E. 4. 18. b.

(b) But where the Condition is for the Performance of Homage, or other ſpecial corporal Service, to the Perſon of the Lord, the Tenant, by the Law of Convenience, ought to ſeek him in any Place in England. Co. Lit. 211. a. (c) Fitz Dette 97. S. C.

Fol. 444.

4. If the Leſſee binds himſelf to pay a greater Sum if he does not pay the Sum reſerved at the Day, yet he is not bound to make tender in another Place than upon the Land. (d) 21 E. 4. 6. b.

(d) Fitz. Dette 97. S. C.

(e) 3 Leon. 260. S. P. per Manwood and Clark.

5. (e) If the Condition of an Obligation or Feoffment be to deliver 20 Quarters of Wheat, or 20 Load of Timber, &c. to the Obligee or Feoffee, the Obligor or Feoffor is not bound to carry the ſame about, and ſeek the Feoffee; but the Obligor or Feoffor before the Day muſt go to the Obligee or Feoffee, and know where he will appoint to receive it, and there it muſt be delivered. *Co. Lit.* 210. b.

(Q) Where a Place is limited.

(a) 1 Rol. Abr. 445. Pl. 2. S. P.

1. (a) IF the Condition of an Obligation be to pay 10 l. at a Day at S. he is not bound to pay it in any other Place. (b) 41 E. 3. 25.

(b) Br. Condition 21. S. C. 1 Rol. Abr. 456. Pl. 11. S. C.

2. (c) So in such Case, the Obligee is not bound to receive it in any other Place upon a Tender. (d) 41 E. 3. 25. (e) 46 E. 3. 4. b. 11 H. 4. 62.

(c) 1 Rol. Abr. 445. Pl. 2. S. C.

(d) Br. Condition 21. S. C. Fitz Dette 121. S. C. (e) Br. Defeasance 14. S. C. Fitz Audita querela 1. S. C. 1 Rol. Abr. 456. Pl. 12. S. C.

(R) How.

1. IF the Condition be to pay 10 l. at D. such a Day, or 10 l. at S. such a Day; if he tenders it at D. the first Day, the Condition is saved. (a) 21 E. 4. 52.

(a) Br. Condition 174. S. C.

(S) What shall be said a Condition in the Disjunctive.

1. (a) IF the Condition be in the Copulative, and it is not possible to be so performed, it shall be taken in the Disjunctive. Vid. 21 E. 4. 44.

(a) Ow. 52. S. P. cited arguendo. 1 Leon. 74. same Rule arguendo. Goulf. 71. et vid. Poph. 204, 205.

2. As if the Condition be, That he and his Executors shall do such a Thing: This is in the Disjunctive, because he cannot have an Executor in his Life-time. 21 E. 4. 44. b.

3. So if the Condition be, That he and his Assigns shall sell certain Goods: This is in the Disjunctive, because both cannot do it. 21 E. 4. 44.

4. (b) If a Lease be made to Husband and Wife for 21 Years, if the Husband and Wife, or any Child between them, so long lives, and the Wife dies without Issue, yet the Lease shall continue during the Life of the Husband; for the Disjunctive referreth to the Whole, and disjoineth not only the latter Part, as to the Child, but also to the Baron and Feme; so that the Sense is, if the Baron, Feme, or any Child shall so long live. *Co. Lit.* 225. a.

(b) Baldwin and Cook, S. P. Moor 239. Pl. 375. adjudged; and said by Anderson, that so was the Opinion of all the Judges of England. Ow. 52, 53. adjudged. 1 Leon. 74. adjudged. Goulf. 71. adjudged. 1 And. 161, 162. adjudged. 1 Leon. 244. S. C. cited. Cro. El. 269, 270. S. C. cited. Et vid. 2 Syd. 107.

(c) So if an Use (d) be limited till *A.* shall come from beyond Sea, and attain unto his full Age, or die. If he comes from beyond Sea, or attains his full Age, the Use ceases. *Co. Lit.* 225. a.

(c) Lord Mortdant and Vaux, S. P. 1 Leon. 243, 244. adjornatur. Cro. El. 270. adjudged; but after a Writ of error being brought, it was ended by composition. (d) But for this, vid. under Title Estates, what shall be a Determination of an estate, &c.

(T) At what Time it ſhall be performed where a Day is limited.

1. IF a Latitat to arreſt J. S. be returnable Die Lunæ prox' poſt Craſtinum Sanctæ Trinitatis, which this Year was the 10th of July, and the Sheriff arreſts him the 10th of July, and takes an Obligation from him the ſame Day, with a Condition to appear coram Domino Rege, Die Lunæ prox' poſt Craſtinum Sanctæ Trinitatis, ad reſpondend', &c. (a) it ſeems he ought to appear the ſame Day, and not this Day Twelve-month. Trin. 3 Jac. B. R. between May and Hooper, dubitatur.

(a) If a Man in Lent enters into a Bond conditioned to pay a leſſer Sum in quarta ſeptimana Quadrageſime pror': This is not payable till Lent come Twelve-month. Goulſ. 137. per Coke. —So if a Bond is enter'd into upon Michaelmas Day, conditioned to pay a leſſer Sum upon the Feaſt of St. Michael pror' futur': It is not payable the ſame Day, but that Day Twelve-month. Goulſ. 137. per Coke.

2. If the Condition of an Obligation be to pay 81. Anno Domini 1599. in and upon the 13th Day of October next after the Date hereof at D. &c. where the 13th of October next after the Date is a long Time before 1599. yet it ſhall be paid in 1599. and not before; for it appears the Intention was, that it ſhould be paid in 1599. and this is firſt expreſſed; and therefore if the ſubſequent Words, upon the 13th of October, next after the Date hereof, are contrary, they ſhall be void: But it ſeems they may be interpreted, that it ſhall be paid the 13th of October, which ſhall be Anno Domini 1599. next after the Date thereof, and ſo all may ſtand together, otherways not. Mich. 37, 38 Eliz. B. R. between Hankinſon and Rile, per Curiam.

3. If A. be obliged to B. the 1ſt of May, upon Condition to pay to him 10 l. at the Feaſt of St. Michael, without ſaying more; it ſhall be intended the Feaſt of St. Michael next enſuing. Mich. 12 Jac. B. between Lewkner and Smallwood, adjudged.

Fol. 445.

(V) At what Place it ought to be performed where none is limited.

1. IF the Condition of an Obligation be to perform Covenants, of which one is, That whereas he is a common Surgeon, and hath taken J. S. to be his Apprentice; he covenants to inſtruct him in his Trade, and to keep him in Domo ſua propria & Servitio: If he after ſends the Apprentice to the Eaſt-Indies in a Voyage to exerciſe his Trade, this is a Forfeiture of the Obligation, becauſe he cannot ſend him out of the Realm for the Danger thereof; for this is not any keeping in Domo ſua propria & Servitio. Hill 14 Jac. B. (a) Coventree againſt Boſwell, adjudged.

(a) 1 Rol. Abr. 427. Pl. 2. S. C. Hob. 134. S. C. adjudged.

(b) Hob. 134. S. C. & S. P. 2. (b) But in this Caſe it was agreed per Curiam, That he may, without Forfeiture of the Condition, ſend him to any Place in England to cure a Patient.

3. If

3. (c) If an Apprentice be bound to a Merchant, and the Master binds him with such Words as supra, he may send him over the Sea; for this is his Trade, and incident to it. This was so agreed in the said Case.

(c) Hob. 134. S. C. & S. P.

4. If an Annuity be granted, upon Condition to do Service to the Grantor, and to counsel him in Time of War and Peace; and after the King warns the People to go with him into Britany, upon which the Grantor goes there with the King, and warns the Grantee to go with him, &c. If he refuses, the Condition is broke, though it be out of the Realm, because the Word (d) War, which cannot be properly within the Realm, implies as much. Dubitatur, 17 E. 3. 26.

(d) For otherways it should be intended legal Service within the Realm. 2 Inst. 48.

5. But if the Condition had been to serve him, and counsel him generally, he had not been bound to go with him out of the Realm, because of common Right, a Man is not to travel out of the Realm. 17 E. 3. 26. admit.

6. If a Man mortgages Land, upon Condition to enter upon Payment of 10 l. he may tender it upon the Land, without seeking the Person of the Mortgagee, because this is to be paid in Recompence, in lieu of the Land. 11 H. 4. 62. b. per Skreene. 19 H. 6. 50. b. per Fortescue. Lit. 78. (e) Quere.

(e) This Doubt is now settled, having been oftentimes resolved, That the Money being a Sum in Gross, and collateral to the Title of the Land, the Feoffor must tender the Money to the Person of the Feoffee, if in England. Co. Lit. 210. b.

7. If a Man releases all his Right in the Land, upon Condition if he pays the other 10 l. such a Day, the Release shall be void; it shall be paid upon the Land, or to his Person. (f) 317 E. 3. 17 Ass. 2.

(f) I suppose this is misprinted in the Original as here, and should be 17 Ed. 3. 16.

8. (g) In this Case the Payment should be made in what Place his Person could be found. 17. E. 3. 16.

(g) In the Original this and the following Placitum is misprinted, for there they are 6, 7.

9. If a Man makes a Feoffment, reserving a Rent, to a Stranger; and for Default of Payment, that it shall be lawful for the Feoffor to reenter: This is not any Rent, because it cannot be reserved to a Stranger; and therefore the Feoffee ought to tender the Sum to the Person of the Stranger where he may be found, otherwise the Condition is broke. Lit. 80.

10. If the Condition of a Bond or Feoffment is to make a (h) Feoffment, it is sufficient to tender it upon the Land, because the Estate must pass by Livery. *Co. Lit.* 210. b.

(h) Otherways if to make an absolute estate of Inheritance, unless he first gives notice that he will do it such a time by Feoffment. Brooke & Brooke, All. 24, 25. adjudged. Stil. 61. adjudged; but not so clearly reported as in Allen.

11. If the Condition of a Bond or Feoffment be to deliver 20 Quarters of Wheat, or 20 Load of Timber, *&c.* the Obligor or Feoffor is not bound to carry the same about, and (i) seek the Feoffee, *&c.* but before the Day he must go to the Feoffee, *&c.* and know where he will appoint to receive it, and there it must be delivered. *Co. Lit.* 210. b.

(i) 3 Leon. 260. S. P. per Manwood & Clerk.

(X) At what Place it ought to be performed where a Place is limited.

1. IF the Condition of an Obligation be to appear coram Juſticiariis apud Weſtmonaſterium, he ought to appear in B. and not in B. R. for this is not the Stile of the King's Bench. Hill. 14 Jac. B. R. between Muſgrave and Robinſon, per Curiam.

(a) 1 Rol. Abr. 444. Pl. 1. S. P.

2. (a) If a Place of Payment be limited by a Condition, he is not bound to pay it in any other Place. 17 E. 3. 16, 42. b. (b) 17 Aſſ. 2.

(b) Br. Condition 103. S. C.

* Fol. 446.

3. (c) If a Place be limited by the Condition where it ſhall be perfor-med, the * other is (d) not bound to receive it in another Place. 17 E. 3. 2. b. 3. 16. 17 Aſſ. 2.

(c) 1 Rol. Abr. 444. Pl. 2. S. P.

(d) But he may accept it at another Place, and 'tis good. Moor 367. Pl. 502.

4. As if a Releaſe be upon Condition of Payment of 20 l. to another at D. he is not bound to receive it out of D. upon a Tender to his Perſon. (e) 17 E. 3. 2. b. 15. b.

(c) Br. Condition 103. S. C.

5. So if the Condition be to come to the Releaſee at D. to help him with his Council: It is not perform'd if he tenders his Council at the Day at another Place. 17 E. 3. 2. b.

6. If the Condition be to pay a ſmall Sum of Money at ſuch a Place, the Obligee is not bound to receive it in another Place. (f) 21 E. 3. 45.

(f) 1 Rol. Abr. 456. Pl. 11. S. C.

(Y) How a Condition is to be performed, where divers Things are to be performed in the (a) Disjunctive.

(a) Where in the Conjunctive, both Parts muſt be performed; otherwiſe where in the Disjunctive. Co. Lit. 225. a.

1. (b) DY. 18 Eliz. 347. the Condition of an Obligation was, If the Obligor before Michaelmas made a Leaſe to the Obligee for 31 Years if A. would aſſent, and if he would not aſſent for 21 Years, then the Obligation ſhall be void; and A. would not aſſent a Leaſe for 21 Years, it ought to be made before Michaelmas.

(b) 1 And. 49, 50. S. C. adjudged. 2 Sand. 131. S. C. cited.

2. If the Condition be to enfeoff the Obligee of D. or S. the (c) Obligor hath Election. (d) 18 E. 4. 17. b.

(c) 5 Co. 22. a. ſame Rule. — So if a Deviſe be made upon a Disjunctive Condition, to be performed by the Deviſee, he hath his Election. Palm. 76. (d) Br. Condition 161. S. C.

3. So if the Condition be to enfeoff him of D. or S. upon Requeſt, the Obligor hath Election. 18 E. 4. 17. b.

4. The ſame Law if it be to pay 20 l. or a Pint of Wine, upon Requeſt. 18 E. 4. 17. b.

5. The

5. The ſame Law if it be to ſhew Evidences to the Obligee, or his Council, upon requeſt made by the Obligæ, (e) 18 E. 4. 17, 20. b. Et 19 E. 4. 1. it was repleaded.

(e) Br. Condition 161. S. C.

6. The ſame Law if it be to cut 20 Acres of Meadow or Corn upon Requeſt. Dubitatur, 18 E. 4. 20. b.

7. The ſame Law if it be to go with me or my Wife to Church upon Requeſt. 18 E. 4. 21.

8. The ſame Law if it be to go to York, or marry my Daughter, upon Requeſt; for in all theſe Caſes, the Requeſt is of no other Effect but to appoint a time when the Obligee ſhall do the one or the other. 18 E. 4. 21.

9. A. Covenants with B. to diſcharge him from the Wardſhip of his Body at his Age of 21 Years, or before, upon the Requeſt of B. Quære which of them have the Election, if B. requeſts before 21. D. 1, 2 Ma. 108. 32.

10. If I am obliged in 10 l. to pay 5 l. at the feaſt of P. next, &c. or before, at the Requeſt of the Obligee; the Obligor hath given his Conſent, that the Obligæ, ſhall have the Election in this Caſe. D. 1, 2 Ma. 108. 32.

11. But otherways it is if the Words are retrorſum; as if the Condition be to pay 5 l. before the feaſt of P. at the Requeſt of the Obligæ or at the feaſt of P. there the Obligor hath the Election. D. 1, 2 Ma. 108. 32.

12. D. 20 Eliz. 361. 9. Windſor Bargainee of Land for 60 l. by another Indenture, covenants to make back to the Bargainor, and his Heirs, ſuch Aſſurance as the Council of the Bargainor ſhall deviſe, within one Year after; provided that if the Vendee makes Default in the Aſſurance, then if he does not pay 500 l. to the Vendor, that he ſhall ſtand ſeiſed to the Uſe of the Vendor, the Vendor does not (f) tender an Aſſurance, and the 500 l. is not paid, per Curiam the Vindee hath a Right to the Land, becauſe it was the folly of the Vendor, that no Aſſurance was deviſed and notified to the Vendee, and therefore there was no Default in the Vendee.

(f) For this vid. 1 Rol. Abr. 423, 424, &c. with the Additions and Annotations under that Title.

13. If an Obligation be conditioned to pay *B.* or his Heirs Annually 12 *l.* at *Midſummer* and *Chriſtmas*, or to pay him or his Heirs, at any of the ſaid Feaſts, 150 *l.* the Obligor hath Election to pay the 12 *l.* or the 150 *l.* but he ought to continue the Payment of the 12 *l.* Annually, until he pays the 150 *l.* though he may at any time determine the Payment of the 12 *l.* by Payment of the 150 *l.* *Mich.* 18 *Jac.* between *Abbot* and *Rookwood*. *Cro. Jac.* 594. adjudged.

14. If *A.* covenants with *B.* That *A.* or his Son, *C.* or either of them, ſhall work with *B.* at the Grinding and Poliſhing of Glaſs, *B.* paying to each of them ſo much, *&c.* and *B.* requeſts *C.* to work with him, *&c.* If he doth not, the Covenant is broke, for *B.* had the Election to require both, or any one of them, to work with him. *Mich.* 1658. between Sir *Paul Neele* and *Reeve*. 2 *Syd.* 107. adjudged.

15. If an Obligation be conditioned to pay Mony if a Ship puts to Sea, or the Goods of the Obligor return ſafe, and the Obligor dies before his Return, yet the Money is payable; for all theſe Things being contingent, and uncertain which of them will happen, the Law ſupplies the Words, *which ſhall firſt happen*, and prejudices the Electi on of the Obligor. *Hill.* 13 & 14 *Car. Sayer & Glean.* 1 *Lev.* 54, 55. adjudged; And it was ſaid by *Bridgman*, not to be like the Caſe (g) where a Man is bound to pay Money at *Lady-day* or *Michaelmus*, and he dies after *Lady-day*, and before *Michaelmas*.

(g) Vid. Cro El. 308.

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(Z) How a Condition is to be performed where ſeveral Things are to be performed in the Disjunctive.

In what Caſes he ought to make a Tender.

1. (a) IF the Condition of an obligation be, That if the obligor delivers certain obligations to the obligee before ſuch a Day to be cancelled, or elſe if he ſeal a Deed of Releaſe of all Actions which the Obligee ſhall cauſe to be made by the Advice of his Council, and ſhall deliver it to the Obligor to be ſealed before the Day aforeſaid, &c. In this Caſe both are in the Election of the obligor (b) for if the Obligee does not deliver to him any Releaſe to be ſealed by him, he is not bound to deliver the obligations, for both are only in his Power. H. 38 El. B. R. between (c) Greningham and Ewer; & H. 39 El. adjudged per Curiam, contra Popham.

(a) 3 Lev. 137, 138. like Point adjudged.

(b) But if the Condition be to make ſuch good Aſſurance of an Houſe to the Obligee, with ſuch Covenants as he ſhall accept, and ſignify under his Hand to be reaſonable, the Obligor muſt tender an Aſſurance; for there cannot be an Acceptance but where there is a Tender of the other Part. Mills and Wood, Cro. El. 718. Moor 645. Pl. 892. cited; but ſeems to be miſtaken.

(c) Poph. 98. S. C. & S. P. dubitatur. Moor 395. Pl. 515. S. C. adjudged con. and that the Obligor had an Election upon Contingency only; and that if no Releaſe was adviſed, yet the Obligor ought to have performed the firſt Part. Cro. Eliz. 396, 539. S. C. adjudged by Three Judges againſt the Opinion of Popham. Goulſ. 142. S. C. & S. P. by two Judges againſt one, con. 2 Mod. 201. S. C. cited.

2. In this Caſe, if the obligee had delivered to him a Releaſe to be ſealed by him, then he ought to have had his Election, either to deliver the obligations to be cancelled, or to ſeal the Releaſe. H. (d) 38 El. B. R. per Popham.

(d) Cro. El. 396, 539. S. C. & S. P. admitted per totam curiam. Moor 395. Pl. 515. S. C. & S. P. admitted per curiam.

3. (e) So if the Condition of an obligation be to deliver to the Obligee ſuch obligations before ſuch a Day, or to pay to him 10 l. if he requeſts it. If he does not requeſt the 10 l. the Obligor ought to deliver the obligations, for he hath no Election till Requeſt made; but after Requeſt made, he hath Election which of them he will do. (f) H. 38. El. B. R. per Popham.

(e) Moor 591. Pl. 797. like Point adjudged. Et vid. Kelw. 53. a.

(f) Cro. El. 539. S. C. & S. P. per Popham: And Gaudy ſaid, this differed much from the Caſe ante, Pl. 1.

4. If the Condition of an Obligation be to pay 30 *l.* or 20 Kine, within a Month after the Death of *K.* at (g) the Election of the Obligee: He muſt at his Peril, make his Election within the Time limited, for the Obligor is not bound to tender both. *Mich.* 26 *&* 27 *Eliz.* between (h) *Baſſet* and *Baſſet*, 1 *Leon.* 69. adjudged. But it was ſaid by *Windham*, and admitted *per Curiam*, That where the Condition is to pay ſuch a Day 10 *l.* in Gold or Silver, at the Election of the Obligee, if he does not make his Election before the Day, yet the Duty remains payable, being Parcel of the Penalty.

(g) Secus, if at the then choice of the Obligee, &c. for in ſuch caſe the Obligor muſt tender both. 1 Leon. 68.

(h) Moor 241. Pl. 377. S. C. adjudged; yet per Peryam & Anderſon, the 30 l. being parcel of the condition, ought to be paid.

5. If the Condition of an Obligation be, That if the Obligor, within Six Months after the Death of *B.* ſhall aſſure a Rent of 20 l. Yearly, to *C.* as the Council of *C.* ſhall adviſe, at the Coſts and Charges of *C.*

if

if *C.* require the ſame; or if the Obligor ſhall not grant the Rent, if then he ſhall pay to *C.* 300*l.* the Obligation ſhall be void; and *B.* dies and *C.* tenders no Grant of the Rent within the Time, the Obligor is not bound to pay the 300*l.* *Trin.* 29 *Car.* 2. between (i) *Baſſet* and *Baſſet.* 1 *Mod.* 265. adjudged, *niſi*, by *North*, *Adkins* and *Scroggs*, *contra Windham*, who ſaid, The Condition is not Disjunctive till requeſt to ſeal a Deed of Annuity, and that therefore the Obligor ought to pay the 300*l.*

(i) 2 Mod. 200, 201, &c. S. C. adjudged per totam Curiam.

6. If the Condition of an Obligation be, That the Obligor ſhall work out 40*l.* at the uſual Prices in Packing, when the Obligee ſhall have Occaſion for himſelf or Friends to employ him therein, or otherways ſhall pay 40*l.* If the Obligee hath no Occaſion to make uſe of him in Packing, he muſt pay the 40*l.* *Paſch.* 30 *Car.* 2. between *Wright* and *Bull.* 2 *Mod.* 304. adjudged, the Defendant having pleaded, That he was always ready to have wrought out the 40*l.* but the Plaintiff did not employ him: and held an ill Plea, becauſe he had not averred that the Plaintiff had any Occaſion to make uſe of him.

(A) Diſability.

1. If a Man (a) promiſes to perform an Award, which is, That he ſhall deliver up a certain obligation to the other, in which the other is bound to him, without limiting any time when it ſhall be performed: If he brings an Action of Debt upon the obligation, and recovers, and after delivers up the obligation; yet it is not any Performance of the Condition, but it is broke, becauſe he ought to deliver it up as it was at the time of the Award made, for the Recovery in the mean time is a Deceit, and a Diſability of it ſelf by his own Act to perform it. Trin. 15 Jac. B. R. Nicklas and Thomas, adjudged.

(a) Robinſon and Ants, like Point, in caſe of a Covenant. 1 Syd. 48. adjudged. Raym. 25. appears to be admitted. 1 Keb. 103, 118. adjudged: And vide Moor 709. Pl. 989. Cro. Eliz. 7. Goulſ. 177.

2. If the Feoffee, upon Condition to reinfeoff the Feoffor, infeoff a Stranger, upon Condition to perform the Condition; yet the Condition is broke, becauſe the feoffee hath diſabled himſelf to do it. 38 Aſſ. 7. per Mowbray.

3. (b) If there be Feoffee upon Condition to reinfeoff, or to infeoff a Stranger, and after another recovers the Land againſt him (c) by Default, yet till Execution ſued the Condition is not broke, for before Execution he is not diſabled; for perhaps he will never ſue Execution, and if he ſues Execution after he has made the Feoffment according to the Condition, the Feoffor may re-enter for the Condition broke. 44 Aſſ. 26. Curia. (d) 44 Ed. 3. 9. b.

(b) 1 Rol. Abr. 848. Pl. 1, 2. like Point.

(c) Secus if upon a feigned Title. Co. Lit. 222. b.

(d) Br. Condition 26. S. C. Fitz Entry Congeable 33. S. C.

4 (e) If the Feoffee, upon Condition to reinfeoff, &c. grants a Rent-Charge out of the Land: This is a Forfeiture of the Condition, becauſe he is diſabled to make a Feoffment of the Land (f) as it was at the firſt Feoffment. (g) 44 Aſſ. 26. (h) 44 E. 3. 9. b. per Perſey; and if the Feoffor ſhould accept the Refeoffment, he ſhould be ſubject to the Charge.

(e) Co. Lit. 222. a. S. P. though the Grantee brings a Writ of Annuity, by which the Land is diſcharged ab initio.

(f) The Feoffee is diſabled when he cannot convey over, according to the Condition in the ſame Plight, Quality, and Freedom, as conveyed to him. Co. Lit. 221. a. Poph. 110. 1 Rep. 25. b. (g) Br. Condition 217. S. C. (h) Br. Condition 26. S. C. Fitz Entry Congeable 33. S. C.

5. If

5. If the Feoffee, upon Condition to reinfeoff, &c. takes a Wife; by this he hath diſabled himſelf to perform the Condition, becauſe the Land is (i) ſubject to the Dower of his Wife, and remains not in the ſame Plight. *Lit. Sect.* 357. *Co. Lit.* 221.

(i) So if he had made a Leaſe for Years, to commence in futuro. Co. Lit. 221. b.

6. (k) But if Feoffee, upon Condition to reinfeoff, is diſſeiſed, and after takes Wife, binds himſelf in a Statute, &c. This is no Diſability, for that during the Diſſeiſin the Land is not charged with it; ſo that if the Wife die, or the Conuſee releaſe, &c. and after the Diſſeiſee enters, he may perform the Condition. *Co. Lit.* 222. *a.*

(k) 2 Co. 59. b. S. P. adjudged.

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(B) How to be performed.

(a) Obligor diſabled.

1. If a Day be limited to perform a Condition, if the Obligor once diſables himſelf to perform it, (b) tho' he be enabled again before the Day, yet the Condition is broke. 21 Ed. 4. 55.

(a) A Feme Sole enters into a Bond conditioned, That ſhe would from time to time, and at all times, upon Requeſt, do all ſuch Acts for the aſſuring of Lands, &c. at the Charge of the Obligee, and after marries; and whether this was a Breach, Hard. 463. dubitatur. It was ſaid, That by the Marriage her Husband had a Poſſibility of being Tenant by the Curteſy; and that now an Aſſurance could not be made without Fine, and ſo the Obligee muſt be at greater Charge than intended. (b) Co. Lit. 221. ſame Rule, and ſeveral Caſes put thereupon; and vide 5 Co. 21. a.

2. As if the Condition be to enfeoff before Michaelmas; if before the Feaſt he enfeoffs another, tho' he after repurchaſes, yet he cannot perform the Condition. 21 E. 4. 55.

3. So where no Time is limited, if the Obligor once diſables himſelf, he is perpetually diſabled. 21 E. 4. 54. b.

4. As if the Condition be, that A. ſhall ſuffer B. to recover in a Formedon attained by B. againſt A. and that then B. ſhall enfeoff A. If B. be nonſuit in this Formedon, he hath diſabled himſelf to recover and make the Feoffment. 21 E. 4. 55.

(c) Lit Sect. 355. Co Lit. 220. b. S. P. (d) Or makes to him a Leaſe for Life or Years. Lit. Sect. 355. Co. Lit. 220. b. 221. a.

5. (c) If Feoffee, upon Condition to enfeoff another, (d) enfeoffs a Stranger: This is a Forfeiture, becauſe he hath diſabled himſelf. 19 H. 6. 34 b.

6 If Feoffee, upon Condition to reinfeoff, takes a Wife, or enters into Religion, and is Profeſſed, by which he hath diſabled himſelf to perform the Condition; yet if his Wife dies, or he is deraigned before the Day, he cannot perform the Condition, becauſe by his Diſability the Condition is broke, and the Feoffor may enter. *Co. Lit.* 221. b.

7. But if a Man makes a Feoffment, upon Condition if the Feoffor or his Heir pay Money before a certain Day, &c. and the Feoffor is attainted of Treaſon, and executed before the Day; yet if his Heir is reſtored before the Day, he may perform the Condition, for that the Condition may be performed at any Time before the Day. *Co. Lit.* 221. b.

8. So if the Feoffor enters into Religion, and before the Day is deraigned. *Co. Lit.* 221. b. 222. a.

9. If *A.* leaſes to *B.* for Twenty one Years, and covenants at any Time during the Life of *B.* (e) upon Surrender of the old Leaſe to make a new Leaſe; and after *A.* leaſes to a Stranger, he hath diſabled himſelf, and broke his Covenant. *Paſch.* 38 *Eliz.* between (f) Sir *Anthony Scot* and *Main.* 5. *Co.* 20, 21. adjudged.

(e) So if the Leſſee aſſign his old Leaſe, he diſables himſelf of taking Benefit of the Covenant. 1 Bulſ. 22. (f) 2 And. 18. S. C. adjudged. Moor 452. Pl. 619. S. C. adjudged. Cro. Eliz. 450, 479. S. C. adjudged; and after affirmed upon a Writ of Error. Poph. 109, 110. S. C. adjudged, and ſaid, That admit the Leaſe to the Stranger was to begin at a Day to come, yet the Obligation is preſently forfeited, &c.

(C) What

(C) What ſhall be a Diſability.

1. If a Stranger (a) recovers by Real Action againſt Feoffee, upon Condition to reinfeoff: This is no Diſability of the Feoffee before Execution ſued, for perhaps he will not ſue Execution. (b) 44 E. 3. 9. b.

(a) Secus, where by Default upon a feigned Title. Co Lit. 222. b. and vide 1 Rol. Abr. 447. Pl. 3. (b) Fitz. Entry Congeable 33. S. C. Br. Condition 26 S. C.

2. But if he that recovers ſues Execution, or enters upon the Feoffee, the Condition is broke, for he is diſabled. (c) 44 Ed. 3. 9. b.

(c) Fitz. Entry Congeable 33. S. C. Br. Condition 26 S. C.

3. So if after ſuch Recovery the Feoffee makes a Releaſſment, and after he that recovers enters upon him, or ſues Execution; now the Condition is broke, and the Feoffor may re-enter. (d) 44 Ed. 3. 9. b.

(d) Fitz Entry Congeable 33. S. C. Br. Condition 26 S. C.

4. If an Annuity be granted till he is promoted to a Benefice, if the Grantee takes a Wife, the Annuity is determined, becauſe by the Marriage he is diſabled, and Lex non cogit inutile, Scilicet, to proffer it to him. (e) 7 H. 4. 16.

(e) Br. Annuity 16. S. C. Godb. 76. S. C. cited.

(a) (D) What Thing will excuſe the Penalty of the Obligation.

Acts of the Obligee.

1. If the Condition be to pay a ſmall Sum, and the Obligee refuſes it at the Day; this ſaves the Penalty, (c) but he ought to pay the ſmall Sum notwithſtanding. (d) 20 E. 4. 1. b. dubitatur. 22 E. 4. 26.

(b) Co. Lit. 207. S. P. becauſe the Sum mentioned in the Condition is Parcel of the Obligation, and the Obligee hath Remedy for it by Law. Cro. Eliz. 757. S. P. per Curiam. (c) And if an Action is brought againſt him upon the Obligation, and he pleads the Tender and Refuſal; he muſt alſo plead, That he is yet ready to pay the Money, and tender it in Court, Co. Lit. 207. a.—But if the Plaintiff will not then receive it, but takes Iſſue upon the Tender, and it is found againſt him, he hath loſt the Money for ever. Co. Lit. 207. a. Hob. 198, 199. Noy 110. (d) Br. Touts temps prift. 31. S. C.

2. So it is, tho' there be a Place limited for Payment, and the Obligee refuſes it. D. 3. 4. Mar. 150. 84. contra 22 E. 4. 26. contra (e) 7 H. 4. 18.

(e) Br. Touts temps prift. 35. S. C. Br. Condition 38. S. C. Br. Tender and Refuſal 6. S. C.

3. But if the Condition of an Obligation of 100 *l.* be for the Delivery of Corn, Timber, *&c.* Performance of an Arbitrament, or other Act, *&c.* This is Collateral to the Obligation, and no Parcel of it, and therefore a Tender and Refuſal is a perpetual Bar. *Co. Lit.* 207. a.

(E) At what Time it ſhall be performed if no Time be limited, and at what not.

1. If the Condition be to pay when he comes to his Houſe, it ſhall be paid when he comes there, not before. (a) 20 E. 4. 18.

(a) Br. Obligation 56. S. C.

(F) How.

1. (a) D. 19 Eliz. 354. 32. A Fine levied by Edward Barrowes to Anthony Barrowes, to the Uſes in an Indenture, where was a Proviſo, If Edward Barrowes pays or tenders 20 l. during his Life, at the Font-Stone in the Church of S. to Anthony, That it ſhould be to the Uſe of Edward in Fee; by Three Juſtices a Tender of the ſaid Sum at the ſaid Place is void, if he (b) gives not Notice to Anthony, that he or his Deputy may be there to receive it, (c) becauſe no Day certain was appointed.

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(a) Moor 602. Pl. 833. like Point certified by the Judges to the Chancellor for Law. 8 Co. 92. S. C. cited 2 Bulſ. 144. S. C. cited. Co. Lit. 211. a. Cro. Eliz 14.

(b) But if at any Time he meets him at the Place, he may tender the Money.

(c) Yelv. 37. like Point, per Poph. Cro. Jac. 9, 10. like Point, per Poph. Co. Lit. 211. two like Points. Cro. Eliz. 298, 299. 13 Co. 2. and vide 1 Rol. Rep. 373.

2. Where a Condition by the Expoſition of the Law is to be performed upon Demand, yet he ſhall have a reaſonable Time to perform it after Demand. (d) 15 Ed. 4. 30.

(d) 1 Rol. Abr. 443 Pl. 4. S. C. Br. Condition 65. S. C.

3. Where it is to be performed in a reaſonable Time after Demand by the Expoſition of Law; if upon Demand he refuſes, the Condition is broke, altho' he performs it after within ſuch reaſonable Time, as would have been a good Performance if there had been no Refuſal. 15 Ed. 4. 30.

4. So if the Condition be to do a Thing at a Day which ſhall be aſſigned; if he does not perform it at the Day aſſigned, he cannot perform it after. 18 E. 4. 15.

5. If the Condition be, That there ſhall be a Contract upon the liking or diſliking upon the View once like or diſlike, he cannot alter it, for otherways there would be no End; but otherways it is where a Day is limited, there if he likes or diſlikes before the Day, yet he may alter it at the Day. (e) 46 E. 3. 5. b. 14 H. 8. 23. b.

(e) Br. Condition 30. S. C. Fitz. Dette 133. S. C.

6. If *A.* is bound to *B.* upon Condition that *C.* ſhall enfeoff *D.* on ſuch a Day; *C.* muſt ſeek *D.* and give him Notice thereof, and (f) requeſt him to be upon the Land at the Day to receive the Feoffment. *Co. Lit.* 211. a.

(f) Co. Lit. 220. S. P.

(G) What will excuſe the Performance of a Condition.

(a) Acts of God.

1. (b) REgularly, if a Condition, which was poſſible at the making thereof, becomes impoſſible by the Act of God, the Obligation is diſcharged.

(a) Where the Sickneſs of the Wife will excuſe the Husband and Wife from levying a Fine, the Condition being to levy it upon the reaſonable Requeſt of the Obligee. Moor 124. Pl. 270. Et vid. 2 Leon 304. (b) Co. Lit. 206. a. ſame Rule.

2. If a Man be let to Mainprize, it is a good Plea at the Day when the Manucaptors ought to have the Body, &c. for the Manucaptors to ſay, That he who was let to Mainprize was dead before the Day, ſo that they could not have his Body at the Day. (c) 21 E. 4. 70. b. Curia, contra (d) 21 E. 3. 51. b. ſcilicet, that this cannot be averred by the Manucaptors; but it ought to come in by Return of the Sheriff, upon a Capias againſt him and the Manucaptors.

(c) 1 Rol. Abr. 451. P. 3. S. C. (d) Fitz. Mainprize 24. S. C.

3. But it is clear by thoſe Books, that his Death excuſes the Manucaptors. Mich. 32, 33 El. B. R. between (e) Warter Plaintiff, and Perry and Spring Defendants, per Curiam.

(e) Cro. El. 199. S. C. & S. P. per Curiam. 2 Leon. 101. S. C. & S. P. per Curiam.

4. If A. agrees with B. to give him eight Marks to ſerve him three Years, and becauſe he hath not the Money ready, in Surety of Payment he enfeoffs him of Lands in Fee, upon Condition to continue till the eight Marks are paid, &c. and after A. dies within three Weeks after this Agreement, yet his Death ſhall not excuſe the Payment of the eight Marks; for the Heir cannot enter before Payment thereof, or raiſing thereof out of the Land. (f) 21 E. 3. 11. b. (g) 21 Aſſ. Pl. 18.

(f) Fitz Aſſiſe 202. (g) Br. Condition 106. S. C. & S. P. per Curiam.

5. If A. recovers a Debt againſt B. in Banco, and B. brings a Writ of Error, and finds Manucaptors to proſecute with Effect, and after dies before the * Return of the Writ: This Act of God will excuſe the Manucaptors. Hill. 13 Jac. B. R. between (h) Sir Tho. Middleton and Twinie, per Curiam.

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(h) 1ſt Part 675. S. C. 1 Rol. Rep. 329. S. C. & S. P. per Curiam.

6. If a Man becomes Bail for another in an Action, and after the Plaintiff recovers againſt the Principal, and the Capias againſt him is returned non eſt inventus, and this is filed, and after the Principal dies before any Scire Facias ſued againſt the Bail; yet this ſhall not excuſe the Bail, inaſmuch as he died after the Capias returned and filed; (yet it ſeems, that after this, and before the Return of the Scire Facias, the Bail is excuſed de Gratia, by bringing him in.) Trin. 5 Jac. B. R. between (i) Timberly and Boothe, adjudged upon Demurrer.

(i) 1ſt Part 674. Pl. 1. Cro. Jac. 165. S. C. where the Defendant pleaded, That the Principal died before the Scire Facias brought, and without more it was adjudged no good Plea. Hut. 47. S. C. cited.

7. But

7. But otherways it had been, if he had died before a Capias returned or filed. Trin. 5 Jac. B R. agreed per Curiam, Mich. 2 Car. between Calf and others Plaintiffs, and Davies Defendant, adjudged upon Demurrer, inasmuch as it was not averted by the Plaintiff in the Scire Facias against the Bail, that there was a Capias returned against the Principal before his Death, which ought to come in of his Part, and then cited by Justice Jones, 43 Eliz. B. R. between (k) Hobbes and Doncaster, adjudged, That the Death of the Principal before the Return of the Capias discharges the Bail.

(k) 1st Part 674. Pl. 2. S. C.

8. If a Man covenants to do a certain Thing before a certain Time: Though it becomes impossible by the Act of God, this shall not excuse him, inasmuch as he hath bound himself precisely to do it.

9. If a Man, for a certain Consideration given by A. assumes to deliver to A. certain Goods in London: Though he after puts the Goods in a Boat to carry to London accordingly, and in going, the Boat is overturned by the Violence of the Tempest and Water; (l) yet this shall not excuse him in an Action upon the Case upon this Promise. Tr. 32. El. B. R. between Tomson and Miles, per Curiam.

(l) Diversity where a Man is bound by his own Act, and where by Act in Law. Lit. Rep. 89. All 27. Styl. 47, 48, 162. 1 Lev. 3. 1st Part 507. Pl. 2.

10. If a Man covenants to build an House before such a Day, and after the Plague is there before the Day, and continues there till after the Day: This shall excuse him from the Breach of the Covenant for the not doing thereof before the Day, for the Law will not compel a Man to venture his Life for it, but he may do it after. H. 8 Jac. B. R. between Lawrence and Twentiman, per Curiam.

(m) Trop and Bedingfield like Point, Cro. Eliz. 277. per Curiam, upon the first Motion; sed adjornatur.

11. (m) If the Condition consists of two Parts in the Disjunctive, in which the Party hath an Election which of them to perform, and both possible at the Time of the making the Condition, and one becomes impossible afterwards by the Act of God: (n) This shall excuse the Performance of that and the other also, for otherways his Election should be taken away by the Act of God. Co. 5. (o) Loughton 22.

Trop and Bedingfield, Moor 357. Pl 485. cited con. Warren and White like Point, 2 Jon. 95. adjudged. 3 Keb 738, 761, 770. adjudged nisi. (n) For this, vid. Moor 432. Pl. 607. Roe and Mozecomb, Cro. El. 864. Moor 645. Pl. 892 (o) Eaton and Laughter S. C. the Condition being, That if B. aliened his Wife's Lands, if then he purchased other Lands of as good Value to his Wife and her Heirs, or should leave her the Value by his Will, then the Bond should be void; and he aliened his Wife's Lands, and before any Purchase made, the Wife died, living B. Cro. El. 398. adjudged per totam Curiam, preter Gaudy, who held, That he ought to purchase Lands to the Heir of the Wife. Poph. 98. appears, but no Judgment. Moor 357. Pl. 485. adjudged. Et vid. 1 Mod. 265. 3 Mod. 234.

(p) Cro. El. 780. S. P. per Poph. & Clinch.

12. (p) If a Condition consists of two Parts, of which one was not possible at the making of the Condition (q) to be performed, he ought to perform the other. 21 E. 3. 30. Co. 5. Laughton 22.

(q) In the Original, 'tis nec instead of destre, and so plainly misprinted.

13. As if the Condition be to enfeoff J. S. or his Heirs, when he comes to such Place; he is bound to enfeoff J. S. when he comes, because the other is not possible, for he cannot have an Heir during his Life, and so he had not any Election. 21. E. 3. 30. Co. 5. Laughton 22.

14. (r) If a Condition of an Obligation be to make an Aſſurance of certain Land to the Obligee and his Heirs, and after the Obligee dies, yet he ought to make the Aſſurance to his Heir, for this Copulative, and his Heirs, ſhall have the Signification of a Disjunctive. Trin. 40 El. B. between Horne and May, adjudged.

(r) Eaton and Buller like Point, Palm. 552, 553. 1 Jon. 180. the Cout divided. Et vid. Cro. El. 399, 400. 3 Mod. 233, 235.

15. (s) If the Condition of an Obligation be to enfeoff Two before ſuch a Day, and one dies before the Day, yet he ought to enfeoff the other. Trin. 40 El. B. in the ſaid Caſe of Horne and May, adjudged.

Fol. 451.

(s) N. Bend 35. S. P. per Montague con.

16. If the Condition of an Obligation be, That whereas a Marriage is intended between A. and B. if the ſaid Marriage takes Effect, and if B. the Wife ſurvives A. and does not receive 300 l. of A. by his Will, or, by the Cuſtom of London, within Three Months after the Death of A. that then if the Obligor pays to B. or her Executors 500 l. within Six Months after, the Obligation ſhall be void: And after the Marriage takes Effect, and B. ſurvives A. and dies within Three Months, without receiving any Thing of the ſaid 300 l. by the Will of A. or by the Cuſtom of London; it ſeems the Death of B. within the Three Months ſhall not excuſe the Obligor to pay the 500 l. to the Executors of B. becauſe it is not any disjunctive Condition, of which the Obligor hath any Election to do the one or the other. But the Condition is, That if a Stranger does not pay ſo much within a Time, that he himſelf will pay another Sum; ſo that the Death of the Party who is to receive from the Stranger, ſhall not excuſe the Obligor. Trin. 3 Car. between (t) Wood.

(t) Wood and Bates S. C. 1 Jon. 171. adjudged con. per totam Curiam. Palm. 513, 516. adjudged con. per totam Curiam; And it was ſaid, That there was no Difference when the Election is in a Staanger, or in the Obligor.

17. If *A.* enters into a Bond to *B.* conditioned, That *C.* ſhall perform an Award to be made between *B.* and *C.* and it is awarded, That *C.* ſhall pay to *B.* 10 *l.* at *Michaelmas*, and 10 *l.* at *Lady-Day*, and *C.* pays the 10 *l.* at *Michaelmas*, and dies before *Lady-Day*; yet becauſe the Sum awarded is a Duty, 'tis as if the Condition of a Bond had been for the Payment of the Money, and if not paid, the Bond is forfeited. 19 *Eliz.* between (u) *Kingwell* and *Chapman*. 2 *Leon.* 155. adjudged.

(u) Cro. Eliz. 10. S. C. adjudged.

18. But if the Condition of an Obligation be, That the Obligor ſhall enfeoff the Obligee at ſuch a Day, and before the Day the Obligor dies, and the Land deſcends to his Heir, the Condition is become impoſſible by the Act of God, and the Performance thereof excuſed. 19 *Eliz.* between *Kingwell* and *Chapman*. 2 *Leon.* 155. adjudged.

(H) Acts of the Law.

1. If an Annuity be granted upon Condition, That the Grantee ſhall be Attorney of the Grantor in all Pleas; if he be after made Sheriff, yet this ſhall not excuſe him from the Performance of the Condition, but he ought to be his Attorney, otherways the Condition ſhall be broke. 5 Ed. 2. Annuity 44.

2. (a) If A. deviſes Land to B. and his Heirs, upon Condition, That he, his Heirs and Aſſigns, with the Iſſues and Profits of the Land, ſhall pay Yearly ſo much for certain charitable Uſes, and dies, and after the Deviſee dies, his Heir within Age, and in Ward to the King, the Paymnt ſhall be excuſed during the Time the King hath him in Ward; for by the Intent of the Condition, the Payment ought to be made with the Iſſues and Profits, which are transferred by Act in Law to the King. Tr. 12 Jac. B. R. between (b) Slade and Tomſon, adjudged.

(a) Hard. 10. 11. &c. S. P. appears, and a long Argument, whether the King ſhould be bound by the Condition.

(b) Cro. Jac. 374. S. C. adjudged; 1 Rol. Rep. 198, 199. S C. adjudged; but per Croke, it had baen otherways, if the Money had not been limited to be paid out of the Profits of the Land. 3 Bulſ. 58, 59. S. C. adjudged, per totam Curiam. Hard. 16. S. C. cited.

3. If a Recognizance be conditioned for the Appearance of *B.* at the next Aſſizes held for the County of *S.* and before the next Aſſizes *B.* ſues a *Certiorari* out of the *King's-Bench*, to remove the Recognizance, and at the next Aſſizes delivers the *Certiorari* to the Judge; yet this does not excuſe his Appearance, for tho' the *Certiorari* was the Command of the King, yet the Purchaſe thereof was the Act of *B.* and he could by no ſuch Slight ſave his Recognizance. *Trin.* 9 *Jac.* between (c) *Roſſe* and *Pie. Yelv.* 207. adjudged.

(c) 1 Bulſ. 155, 156. S.C. and S. P. per Curiam; and ſaid, That tho' the Hands of the Judges were ſhut and foreclosed by the Certiorari, yet they might have entered his Appearance. Cro. Jac. 281, 282. S. C. adjudged; and that he ought to have procured his Appearance to be recorded.

4. If a Man hath a good Title to Lands by Virtue of a Fine, and ſells the ſame, and covenants with the Vendee his Heirs and Aſſigns, That he ſhall enjoy againſt him and *B.* and all claiming under them; and after by an Act of Parliament reciting, That *B.* had ſettled this Eſtate upon *C.* and that certain Perſons had unduly procured the ſaid Fine from her; it is Enacted, The Fine ſhall be void, and that every Perſon may enter as if no ſuch Fine had been; and after one enters, claiming Title under *C.* This is a Breach of the Covenant, for the Act makes no new Title, but removes the Obſtruction of the old; and it was ſaid, That doubtleſs *B.* was named in the Covenant for this Purpoſe in caſe this Fine unduly obtained ſhould be avoided. *Mich.* 23 *Car.* 2. between (d) *Lucy* and *Levingſton.* 2 *Lev.* 26. adjudged, againſt the Opinion of *Twiſden*; and a Writ of Error was immediately brought, but *quid inde venit* the Reporter *neſcit.*

(d) 1 Vent. 175, 176. S.C. adjudged and ſaid by Hale, That this Act was in nature of a Judgment, tho' it was by the Legiſlative Power; and it may be that the Proſpect of this Act was the Reaſon of the Covenant. 2 Keb. 831.

(I) Acts of God.

1. (a) REgularly, if a Condition which was poſſible becomes impoſſible by the Act of God, the Obligation is diſcharged. (a) Co. Lit. 206. a. Same Rule.

2. As if a Man hath Liberty to perform a Condition till a certain Day, if it after becomes impoſſible by the Death of any Perſon before the Day, the Obligation is ſaved. Dubitatur. (b) 14 E. 4. 3. (b) Br. Condition 155. S. C.

3. If a Man be let to Mainprize, it is a good Plea at the Day when the Manucaptors ought to have the Body, &c. That he was dead before the Day, (for this excuſes the Performance.) (c) 21 E. 4. 70. b. Curia. (c) 1 Rol. Abr. 449. Pl. 2. S. C.

4. If the Condition be to enfeoff J. S. within a certain Time, if J. S. dies before the Time be paſſed, the Obligation is diſcharged. 8 H. 4. 14.

5. If Two be infeoffed to reinfeoff, and one dies, the Survivor ought to perform it, and may. (d) 41 E. 3. 17. b. Co. 2 Cromwell 79. (d) Br. Condition 20. S. C.

6. But if Feoffee to reinfeoff dies before the Feoffment, the Condition is broke, for he is to perform it, and ought to do it during his Life. Co. 2. Cromwell 79.

7. But if the Condition had been, That the Feoffee, or his Heirs ſhould reinfeoff, and he dies, his Heir may perform it. Co. 2. 79.

8. If *A.* binds himſelf Apprentice to *B.* for Seven Years, and *B.* enters into a Bond to *A.* conditioned to pay *A.* his Executors or Aſſigns 10 *l.* at the Time of the End or Determinarion of his Apprenticeſhip; and *A.* ſerves Six Years, and then dies, the Money ſhall not be paid to his Executor. *Mich.* 5. *Jac.* between (e) *Cheyny* and *Sell.* 1 *Brownl.* 97. adjudged; tho' it was objected, That his Apprenticeſhip ended at his Death. (e) Godb. 153. S. C. adjudged.

(K) Acts of the Law.

Fol. 452.

1. IF the Condition of the Obligation be, to deliver a certain Thing to the Obligee bought by him from the * Obligor, it is not any Diſcharge that a Stranger recovered it from him after. Contra (a) 21 E. 3. 12. adjudged, as is ſaid. * In the Original, it is Obligee, and ſo ſeems miſprinted.

2. If a Man be bound in a Recognizance in Court for the Appearance of another, in a Scire facias he ſhall not avoid this Recognizance, by ſaying, That he that ought to appear was impriſoned at the Day. (b) 22 E. 4. 27. (a) Vide the Year Book, where the Condition was to pay the Tithes Money for Tithes bought; and the Defendant pleaded, That a Stranger had recovered by an elder Title. (b) Br. Condition 182. S. C.

3. But in ſuch Caſe, at the Day of Appearance, if the Manucaptors come and ſhew it to the Court, and the Court of Curteſie do not record the Default, but ſend to the Gaoler to certify whether he be impriſoned, and for what; by this Way he ſhall have

Advantage of the Imprisonment to avoid the Recognizance. (d) 22 E. 4. 27.

(d) Br. Condition 182. S. C.

4. If there be a Constitution upon a Penalty in Parliament, that J. S. shall render himself in B. R. within a certain Time: If he renders himself to the King within the Time, where he is imprisoned until the Time is passed, he hath forfeited the Penalty, because it was his Folly to render himself where he ought not. (e) 8 H. 4. 14. 20.

(e) Br. Parliament 11. S. C.

5. If there be a Constitution made in Parliament, upon a Penalty that J. S. render himself before the Justices in B. R. within a Quarter of a Year after Proclamation made: If Proclamation be made Termino Paschæ, so that the Quarter of a Year is passed before Michaelmas Term, yet if he does not render himself within a Quarter, he shall forfeit the Penalty. (f) 8 H. 4. 13, 20. adjudged: Yet he could not appear in the Vacation; but some said, that he might before the Chief Justice: (But in this Case he ought in the Term before the Quarter, because he knows in Principio, that in the Vacation he cannot appear.)

(f) Br. Parliament 11. S. C.

6. Regularly, if a Condition be to be performed to a Stranger, and he refuses to accept thereof, yet the Obligation is forfeited, because the Obligor takes upon him, that a Stranger shall accept it.

(L) Acts of a Stranger.

1. A. and B. submit themselves to the Award of C. and A. enters into an Obligation to C. to stand to the Award, and so B. also, and C. awards A. to pay 10s. to B. who tenders it, and B. refuses; the Obligor is excused, (a) because B. is not a meer Stranger, but privy, and so is the Obligee. (b) 22 E. 4. 25. b. Curia.

(a) So if a Recognizance, Bond &c. is made to A. to the Use of B. conditioned to pay Money, &c. to B. and B. refuses, &c. Cro. El. 755. Cro. Jac. 14. (b) Br. Condition 182. S. C. Br. Abitrament. 41. S. C.

2. (c) But if the Condition be, That the Son of the Obligor shall marry the Daughter of the Obligee; if the Daughter of the Obligee refuses the Son, yet the Condition is forfeited, for the Daughter is a (d) meer Stranger, and the Obligor hath taken upon him, that his Son shall marry her. (e) 22 E. 4. 26. b. Perkins 756.

(c) Hut. 48. S. P. arguendo. Winch. 30. S. P. arguendo.

(d) Diversity where a meer Stranger, and where privy. 3 Bulst. 30. (e) Condition 182. S. C.

3. (f) So if the Condition (g) be to enfeoff a Stranger, who refuses, yet the Obligation is forfeited. (h) 2 E. 4. 2. 39 H. 6. 10. b. (i) 22 E. 4. 26. b.

(f) Co. Lit. 209. a. S. P. where a meer Stranger.

Hut. 48. arguendo. Winch. 30. arguendo.—But otherways if to be made to the Obligee, or to any other for his Benefit. Co. Lit. 209. a. (g) Secus, where the Condition is, That a Stranger shall enfeoff a Stranger. Co. Lit. 209. a. (h) Br. Condition 140. S. C. Fitz. Barre 82. S. C. (i) Br. Condition 182. S. C.

4. (k) If there be a Feoffment upon Condition to enfeoff a Stranger; If the Stranger refuses, yet the Condition is broke, because the Intent was not that the Feoffee should retain it. (l) 19 H. 6. 34. b.

(k) Co. Lit. 209. a. S. P. 1 Leon. 226. S. P. per Curiam. 2 Leon. 222. S. P. per Curiam. (l) Fitz. Entry Congeable 2. S. C.

5. (m) But otherways it had been if the Condition was to make (n) a Gift in Tail to a Stranger, and he refuſes; for there the Intent was, that he ſhould have the Reverſion. 2 E. 4. (o)

(m) Co. Lit. 209. a. S. P. 1 Leon. 266. S. P. per Curiam. 2 Leon. 222. S. P. per Curiam. (n) So if the Condition be, that he ſhall grant a Rent-Charge to a Stranger, and he refuſes, becauſe intended the Feoffee ſhould retain the Land. Co. Lit. 206. a. (o) This ſhould be Fol. 2. which vid. Br. Condition 140. Fitz. Barre 82.

6. Regularly, if the Condition be to be perform'd by a Stranger, and he refuſes, the Obligation is forfeited, for the Obligor has taken upon him that the Stranger ſhall do it.

7. As if the Condition be, That my Son ſhall ſerve J. If he will not, my Obligation is forfeited. (p) 22 E. 4. 26. b.

Fol. 453.

(p) Br. Condition 182. S. C.

8. If the Condition of an Obligation be, That whereas the Obligor and Obligee are jointly ſeiſed of the Office of the Court of Admiralty: If the Obligor ſhall permit the Obligee to uſe the ſaid Office, and to take the Profits thereof only to his own Uſe during his Life, without Interruption made by the Obligor, then, &c. Although after the Admiral dies, and the new Admiral grants the ſaid Office to a Stranger, (as he may by Law) and he interrupts and ouſts the Obligee, yet if the Obligor after this interrupts the Obligee alſo, the Condition is broke. M. 32, 33 El. B. R. between (q) Parker and Harward, adjudged.

(q) 2 Leon. 124, 15. 3 Leon. 142. 143. S. C. and the Court clear, that Judgment ſhould be given accordingly; but after it ended by Compoſition. Godb. 47, 48. S. C. and S. P. per Curiam; and ſaid, Whether the Obligee occupy by Right or Wrong, the Obligor is not to interrupt him againſt his own Bond.

9. If *A.* is bound to (r) *B.* to pay 10 *l.* to *C.* if *A.* tenders it to *C.* and he refuſes, the Bond is forfeited. *Co. Lit.* 208. b.

(r) Otherways if bound to pay it to the Obligee, or his Aſſigns, and the Obligee appoints C. to receive it as his Aſſignee, and it is tendered to C. and refuſed by him. Dal. 38.

11. If *A.* diſſeiſes *B.* and after leaſes to *C.* for Years, and *C.* covenants, at the End of the Term, to leave and yield up the Tenements well repaired to *A.* and after *B.* enters, *&c. C.* is excuſed. *Hill.* 40 & 41 *Eliz.* between *Andrews* and *Necdham*. *Cro. Eliz.* 656. adjudged.

11. (s) If the Condition of an Obligation be, That the Obligee ſhall, in *Michaelmas* Term next, give unto the Obligor, *&c.* ſuch Releaſe as by the Judge of the *Prerogative* Court ſhall be thought meet: The Obligor ought to procure the Judge to deviſe and direct ſuch Releaſe; for the Judge is a Stranger to the Condition, and the Condition is for the Benefit of the Obligor, and he hath (t) taken upon him to perform it at his Peril. *Trin.* 41 *Eliz.* (u) *Lamb*'s Caſe, 5 *Co.* 23. b. adjudged.

(s) Moor and Morecomb like Point, Moor 645. Pl. 892. adjudged. Cro. Eliz. 864. adjudged. Lit. Rep. 13, 14. like Point, per Hutton & Yelverton. Butcher and Vale like Point. 1 Lev. 191. adjudged. 1 Sid. 313. ſaid, Judgment was given upon another Reaſon. (t) So if the Condition of an Obligation be, That a Stranger ſhall releaſe all the Right which he hath, or pretends to have, in a certain Manor, the Obligor muſt procure him to make a Releaſe de Facto, though he hath no Right. 1 Saund. 215, 216. (u) Cro. Eliz. 716 S. C. adjudged; and that the Obligor ought to draw ſuch Releaſe, and procure the Judge to allow it. Moor 645. S. C. cited. Cro. El. 864. S. C. cited.

12. If *A.* leaſes his Land for 40 Years, rendring Rent, and deviſes the Reverſion to *J. S.* in Tail, *&c.* provided that *B.* and his Wife ſhall have the Rent to their own Uſe till *J. S.* comes of Age; upon Condition that *B.* and his Wife, within three Months after his Death, enter into a Bond to his Overſeers for the Payment of 34 *l. per Annum*, in ſuch Penalty, and as his Overſeers ſhall adviſe; and *A.* dies: *B.* and his Wife muſt give Notice of this to the Overſeers, and at their Peril procure them to adviſe, *&c. Trin.* 18 *Jac.* between *Trehern* and *Claybrook*. *Winch.* 26, 69. *per Curiam.*

(M) What Things will diſpenſe with a Condition.

Acts of him that will have the Advantage.

1. If a Condition be to recover certain Land againſt J. S. and thereof to enfeoff another, who is Party to the Obligation: If he to whom the Feoffment is to be made accepts a Feoffment of the Land before any Recovery had by the other, the Condition is performed, (it ſeems) becauſe he hath diſpenſed with the Condition. 39 E. 3. 3, 5, 6. b. But Quære; for perhaps he hath diſſeiſed J. S. But it is there ſaid, that it ſhall be intended that he himſelf was ſeized thereof.

2. If a Leaſe for Years be made, upon Condition not to alien without Licence, and after the Leſſor licences the Leſſee to alien, and dies before any Alienation; yet the Leſſee may alien; for the Death of the Leſſor is not any Countermand; for this was executed on the Part of the (a) Leſſor as much as it could be. Co. Lit. 52. b. cited. (b) M. 3. Jac. b. to be reſolved.

(a) This is miſprinted in the Original, for there it is Leſſee. (b) 1ſt Part 670. Pl. 5. S. C.

(N) What Act or Thing will excuſe the Performance of the Condition.

Acts of him who is to have the Advantage.

1. If a Condition be to enfeoff the Obligee; though the Obligee diſſeiſſes him of the Land, yet this does not excuſe the Performance of the Condition; for he may re-enter, and perform it (a) notwithſtanding. Co. 8. Francis (b) 32. Co. 2. Julius Win. 59. b. admit.

(a) The Original is, Intent Obſtant, for Nient Obſtant. (b) This is miſprinted in the Original as here, and ſhould be 92.

2. If Leſſee for Years covenants (c) to drain the Water which is upon the Land before ſuch a Day, and after the Leſſor enters before the Day, and there continues till the Day is paſt; yet this ſhall not excuſe the Performance of the Covenant, (d) becauſe this is collateral to the Land. H. (e) 37 El. B. R. per Curiam adjudged.

(c) In the Original it is d'Avoider le Ewe. (d) But if it had been a Covenant adhering to the Land, and in Reſpect to the Enjoyment thereof, it would have been otherways; but then it muſt have been ſhew'd, that he held him out of Poſſeſſion. Moor 402. Pl. 534. Ow. 65, 66. (e) Carrel and Bead, S. C. Cro. El. 374. adjudged, it not being alledged, that the Leſſor held him out, and diſturbed him in doing it. Moor 402. Pl. 534. adjudged. Ow. 65, adjudged. Et vid. Godb. 69, 70, 75.

3. If a Man be bound to build an Houſe, &c. he is excuſed if the Obligee will not ſuffer him to build it; for he cannot come upon the Land without his Will. (f) 19 E. 4. 2. b. per Curiam.

(f) Br. Covenant 31. S. C.

4. If a Condition be to repair an House; he is excused thereof, if a Stranger, by the Command of the Obligee himself disturbs him, and will not suffer him to do it. (g) 9 H. 6. 44. b.

(g) Fitz. Double Plea 39. S. C.

5. If a Condition be to erect a Mill, and after he comes to the Obligee, and says all is ready for the erecting thereof, and demands of him when * he shall come with the Mill to erect it: If the Obligee says he will not have the Mill, and entirely discharges him of the Mill, this shall excuse him of the Performance. 3 H. 6. 37. admit by the Issue.

* Fol. 454.

6. If Lessee for Years covenants to drain the Water that stands upon the Land before such a Day; and after the Lessor enters upon the Land, and disturbs the Lessee: This is a good Excuse of the Performance of the Condition. (h) Hill. 37 Eliz. B. R. per Curiam.

(h) Carrel and Read S. C. & S. P. Cro. Eliz. 374. per Curiam. Ow. 66. per Curiam. Et vid. Godb. 66, 70, 75.

7. If a Man covenants with me to collect my Rents in such a Town: If I interrupt him in the collecting thereof, this excuses the Covenant. 13 H. 7. Keble. 34. b.

8. If Lessee for Years of an House covenants to repair it, and to leave it in as good Plight as he found it; and after, certain Sparks of Fire come out of the Chimney of the Lessor into an House not much remote, by which the House of the Lessee is burnt: This will excuse the Performance of the Covenant to the Lessee; so that he is not bound to rebuild, because this comes by the Act of the Lessor himself. Trin. 12. Jac. b.

9. (i) If the Condition of an Obligation be, That the Obligor shall enfeoff the Obligee of the Land before such a Day, and after, before the Day, the Obligee disseises the Obligor, and keeps it with Force till after the Day, so that the Obligor cannot enter: This will excuse the Performance of the Condition. Co. 8. Frances 92.

(i) Co. Lit. 206. S. P. upon the Condition of a Feoffment.

10. If a Lease be made, upon Condition that the Lessee shall not permit or harbour any (k) Whore within the House to him let; and that if he suffers such Woman to stay there for six Weeks after Warning, &c. it shall be lawful for the Lessor to enter; and after the Lessee suffers such Woman to be there, and Warning is given him by the Lessor: Although after the Lessor commands the Woman to stay there for six Weeks, yet this shall not excuse the Performance of the Condition, because the Lessor did not do any Act; and notwithstanding the Command, the Lessee (l) might have removed her. (m) 35 H. 6. Barr. 162. per Curiam. Co. 8. Frances 91. b.

(k) In the Original it is Femme Puteyn.

(l) If a Bond be conditioned to procure a Marriage between the Obligee and B. before a certain Day, and before the Day calls B. a Whore, and tells her, If he marries her, he will tie her to a Post; by Reason the Obligor could not procure B. to marry him. This will excuse the Non-performance. admit per Curiam: But then it must be shewed in Pleading, That the Obligor did what he could to procure her to marry, &c. (m) Godb. 70. S. C. cited; 75. S. C. cited. the Obligee whereof, the Cro. El. 694.

11. But in the said Case, if the Lessor ousts the Lessee, and with Force, and against the Will of the Lessee, puts in the Woman, and violently makes her stay there with Force, against the Will of the Lessee, for six Weeks: This shall excuse the Performance of the Condition. 35 H. 6. Barr. 162. Co. 8. 92.

12. If a Lessee for Years covenants to leave part of the Land at the End of the Term fallowed and fit for Wheat; Provided, That the Lessee, upon such Warning, may surrender and depart at any Feast of Michaelmas, at any Time within the Term, performing the Covenants: If after Warning he surrenders, and does not leave the Land fallowed, he hath forfeited his Covenant; for the Acceptance of this Surrender does not dispense with the Covenant;

nant, inaſmuch as by the Covenant he is to accept thereof. Hill. 4. Jac. Br. between Moyle and Auſten adjudged.

13. If Two are bound in a Statute, with a Defeaſance, That they two ſhall make ſuch Aſſurance as ſhall be deviſed, &c. If an Aſſurance be deviſed and tendred to one, and he refuſes to ſeal it, the Condition is broke for both; for he need not requeſt both at one Time. H. 41 Eliz. B. R. (n) Lowe and Terry's Caſe.

(n) Cro. El. 655. S. C. adjudged.

14. Upon a Marriage between A. a Woman and B. by Indenture between A. and B. and C. a Friend of A. it is agreed, That C. ſhall have all the Stock, Portion, and Eſtate, of A. prout tunc fuit, vel potuiſſet eſſe appreciat', vel extunc poſtea foret invent', reſtaret & remaneret in Manibus & Uſu, Anglice, Employment, of C. vel ubi ipſe diſponeret, till B. ſhall provide a certain Jointure, &c. ipſo C. * annuatim ſolvendo Querenti Intereſſe proinde, ſecundum Ratam 8 l. pro quolibet 100 l. pro quolibet Anno, durante Tempore quo Status ipſius A. in Manibus vel Diſpoſitione C. remaneret; and after the Marriage is had; and after 400 l. of the Subſtance of A. comes to the Hands of C. and for one Year continues in his Hands: But B. takes and detains in his Hands, of the Subſtance of A. Goods to the Value of 100 l. over and above the ſaid 400 l. and this alſo againſt the Will of C. ſo that C. hath not all the Subſtance of A. in his Hands; yet he ſhall pay according to the Rate of 8 l. for every 100 l. of the ſaid 400 l. which he had in his Hands, inaſmuch as the Words are, That he ſhall pay 8 l. pro quolibet 100 l. Mich. 1 Car. B. R. between Croſſe and Northey, adjudged upon demurrer, I being de Conſilio Querentis.

* Fol. 455.

15. If *A* is bound to *B.* that *J. S.* ſhall marry *Jane G.* before ſuch a Day, and before the Day *B.* marries her: He ſhall take no Advantage of the Condition, becauſe by his Means it could not be performed. *Co. Lit.* 206. b.

16. If a Man makes a Feoffment in Mortgage, upon Condition to be void upon Payment of Money by the Feoffor, *&c.* to the Feoffee at a Day: If at the Day the Feoffee is out of the Realm, the Feoffor is not bound to ſeek him, or to go out of the Realm to him; and therefore, becauſe the Feoffee is the Cauſe that the Feoffor cannot tender the Money, the Feoffor may enter into the Land, as if duly tender'd. *Co. Lit.* 210. b.

17. If *A.* leaſes to *B.* for Years, upon Condition that if *B.* pays Money to *A.* or his Heirs at a Day, that *B.* ſhall have the Fee; and before the Day *A.* is attainted of Treaſon, and executed. Now though the Condition became impoſſible by the Act and offence of *A.* yet *B.* ſhall not have a Fee, becauſe a precedent Condition to increaſe an Eſtate muſt be performed, and if it becomes impoſſible, no Eſtate ſhall riſe. *Co. Lit.* 218. a.

18. If *A.* leaſes to B. certain Lands for Years, rendring 40 *l. per Annum*, and a Stranger covenants with *A.* that *B.* ſhall pay unto him the 40 *l.* for the Farm and Occupation of the Lands, and before any Day of Payment, *A.* puſts *B.* of his Farm; *B.* is excuſed of the Payment of the Rent; for the Covenant was, That *B.* ſhould pay 40 *l.* for the Farm and Occupation; ſo that it is as a conditional Covenant, and there ought to be *quid pro quo*; and here the Conſideration upon which the Covenant is conceived, *viz.* the Farm, and the Occupation of it, is taken away by the Act of *A.* himſelf. *Trin.* 32 *Eliz. Bedel's* Caſe. 2 *Leon.* 115. adjudged. 3 *Leon.* 159. adjudged.

19. *A.* entered into a Bond to *B.* conditioned to ſave *B.* harmleſs from a Bond made to *C.* for Payment of 100 *l.* at a Day and Place, and at the Day of Payment, *A* was going to the Place to pay it, and *B.* by Covin cauſed *A.* to be impriſoned till after Sun-ſet, to the Intent the 100 *l.* ſhould not be paid. *Paſch.* 40. *El.* between *Morris* and *Lutterel. Cro. El.* 672. This being pleaded to an Action of Debt upon the Bond, it was adjudged upon Demurrer, That ſuch a bare Surmiſe was no Bar.

20. If the King grants a Reverſion in Tail, upon Condition that if the Grantee pays 20 *s.* at the Receipt of the *Exchequer*, *&c.* the Grantee ſhall have a Fee: If afterwards the King, under his Great Seal, refuſes to receive the Money, yet if the Grantee tenders it at the Receipt of the *Exchequer*, he ſhall gain a Fee; for the King by no Means can countermand or hinder the Encreaſe of the Eſtate in ſuch Caſe. *Trin.* 7 *Jac.* (o) Lord *Strafford*'s Caſe, 8 *Co.* 76. b. adjudged.

(o) 2 Brownl. 252. S. C. adjudged.

21. If the Condition of an Obligation be, That the Obligor ſhall pay 10 *l.* to the Obligee, which is for the Rent of certain Land, and the Obligee enters upon the Land, and ſo ſuſpends the Rent, yet this ſhall not excuſe the Payment; for it is but a Recital that it was for Rent, and not material. *Trin.* 11 *Jac.* between *Saint-John* and *Diggs*, *Hob.* 130. adjudged. So if by Pleading it had been applied to the Leaſe, *&c.*

22. If a Parſon by Indenture leaſes his Parſonage for Years, rendring Rent, and the Leſſee covenants to pay his Rent, and before any Day of Payment the Parſonage (p) is ſequeſtred for Non-payment of the First-Fruits, yet the Leſſee ſhall not be excuſed of the Payment of his Rent. *Mich.* 3 *Car.* between *Jeakill* and *Linne*, *Hetl.* 54. adjudged. So in Caſe of an Obligation for Payment of the Rent.

(p) Otherways if Leſſee for Years is evicted by a Prior Title. Hetl. 54. Cro. Car. 415.

1 Rol. Rep. 198, 199. Yelv. 23.

(O) What Things excuſe the Performance of Conditions, and what not.

Acts of him who ſhall have the Advantage,

1. (a) IF the Condition be to do a Collateral Act, and not to pay Money, which is of the Nature of the principal Sum; it ſeems if the Obligee refuſes it at the Day, this diſcharges the whole Obligation. D. 3, 4. Ma. 150. 84. 12 H. 4. 23.

(a) Co. Lit. 207. a. S. P.

(P) Acts of the Obligee.

1. IF the Condition be, That the Son of the Obligor ſhall ſerve the Obligee for Seven Years: If he tenders his Son, and the Obligee (a) refuſes, it is no Forfeiture. 22 Ed. 4. 26. 2 Ed. 4. 2.

(a) Where the Condition is to deliver a Releaſe to the Obligee, it is not enough to ſay, That it was writ, and Wax affixed to it, and that he was ready to ſeal and deliver it; but that the Obligee refuſed to accept of it; for he ought to have done all he could, and he might have ſealed it notwithſtanding. Per 2 Rol. Rep. 238. per Mountague.

(Q) Acts of the Obligee.

1. IF A. is obliged to B. and the Condition is, That the Son of A. ſhall ſerve B. for Seven Years: If B. takes him, and after within the Term commands him to be gone from him, the Obligation is not forfeited. 22 E. 4. 26.

2. If the Condition of a Bond be, That the Obligee ſhall peaceably enjoy certain Copyhold Land without the Interruption

tion of any; and after the Lord enters for a Forfeiture by Non-payment of the Rent according to the Cuſtom, yet the Obligation is not forfeited, for this was the Neglect of the Obligee himſelf.

(a) N. Benl. 18. Pl. 26. (a) Hill. 28. H. 8. Dyer 30. Pl. 205.

(R) Acts of both.

1. If the Obligor pays Part of a ſmall Sum contained in the Condition at the Day, without any Mention of the reſt, yet the whole Obligation is forfeited. 21 Ed. 4. 25. b.

2. If the Condition be, That he ſhall not diſturb the Obligee in certain Land leaſed to him; yet if he ſurrenders to the Obligor, this is a good Diſcharge of the Obligation. 22 Ed. 4. 27. admit.

3. Condition broke, Performance with the Acceptance of the Obligee after will not excuſe. 20 Ed. 4. 8. b.

4. If *A.* leaſes Lands to *B.* for 17 Years, and after *B.* enters into an Obligation to *A.* conditioned to pay an Annual Rent to *C.* for the Term of 17 Years, if *C.* lives ſo long, and the ſaid *B.* or his Aſſigns, or any claiming under him, ſhall or may ſo long enjoy the ſaid Land, and *B.* after ſurrenders to *A.* yet he muſt continue the Payment of the Rent, becauſe meerly collateral, and to be made to a Stranger, *Hill. 36 El.* between (a) *Forth* and *Holborough. Poph.* 39, 40. adjudged *per totam Curiam.*

(a) Cro. El. 313. S. C. adjudged per totam Curiam. Ow. 104. S. C. adjudged per totam Curiam. Moor 597. Pl. 815. S. C. adjudged per totam Curiam.

5. But if the Condition had been, That *C.* during the Term ſhould hold Part without the Interruption of *B.* or his Aſſigns; if after the Surrender, *A.* had interrupted him, *B.* ſhould not have forfeited his Bond.

(b) Ow. 104. S. C. & S. P. Cro. El. 313. (b) *Poph.* 40. *per Curiam.* like Point per Poph. for that the Obligee ſhould not take Advantage of his own Act.

(S) In what Caſes a Collateral Thing may be given in Satisfaction of a Condition.

(a) Co. Lit. 212. b. S. P. Cro. El. 458. S. P. adjudged. (b) 2 Brownl. * Fol. 456. 131. S. C. & S. P. per Warburton. 1. (a) If a Man be bound in 20 l. to do a Collateral Act, as a Feoffment, or to be bound in a Statute, or to render a true Account: There Money, or other Thing given in Satisfaction, is no Performance of the Condition. (b) Co. 9. Peytoe 79 b. D. 4 H. 8. 1. Perkins S. 173. contra, 9 H. 7. 18. per Vaviſor. H. 13 Jac. B. R. between (c) Forwood and Dicton, adjudged, * That Money cannot be given in Satisfaction. (d) 12 H. 4. 23. adjudged contra. 4 H. 6. 23. admit.

(c) 1 Rol. Rep. 296, 297. S. C. adjudged; but vid. Libzum. 3 Bulſ. 148. S. C. adjudged. (d) Br. Condition 41. S. C. Fitz. Barre 189. S. C.

(e) Co. Lit. 212. b. S. P. 3 Bulſ. 149. S. P. 2. (e) But when the Condition is to pay Money, there any other Collateral Thing will be a Satisfaction. Co. 9. Peytoe 79. (f) 19 Ed. 4. 1. b. (g) 12 H. 4. 23 b.

(f) Br. Condition 161. S. C. (g) Br. Condition 41. S. C. Fitz. Barre 189. S. C.

3. A Man bound in 200 Quarters of Malt, upon Condition to pay 20 l. a Ring, or Horſe, or other Collateral Thing, is a Satisfaction. Co. 9. 79.

4. (h) So a Feoffment upon Condition to pay 20 l. a Collateral Thing is a Satisfaction. Co. 9. Peytoe 97. (h) Co. Lit. 212. b. S. P.

5. A Man bound in 20 Quarters of Grain, conditioned to pay 5 Quarters; Money, or other Collateral Thing, is not a Satisfaction, becauſe of the original Contract.

6. (i) But otherways it is in a Contract without Deed. Co. 9. 79. b. (i) 3 Bulſ. 149. S. P. per Haughton Juſtice.

7. If the Condition be to pay a leſs Sum at a Day; if the Obligee agrees that he ſhall pay an Horſe or other Thing in Satisfaction, yet if he refuſes it, the Obligor ought to pay the ſmall Sum at the Day, otherwiſe he hath forfeited the Obligation; for the Agreement by Parol without Acceptance, cannot alter the Agreement by Deed before. (k) 19 E. 4. 1. b. 2. (k) Br. Condition 161. S. C.

8. (l) So if the Condition be to erect an Houſe of ſuch a Length, &c. he cannot plead another Agreement in another Manner in Satisfaction thereof, unleſs it be by Deed. 19 E. 4. 2. b. per Curiam. (l) Cro. El. 193. like Point; 304. like Point. Et vid. Hob. 178, 179.

9 So if the Condition be to pay a ſmall Sum at D. at ſuch a Day; an Agreement to pay at another (m) Place without Acceptance is not a Diſcharge. 19 E. 4. 1. b. (m) So at another Day. Cro El. 697. adjudged.

10. So if a Thing be to be done by Implication of Law to the Perſon of any Perſon, and the Obligee appoints him to do it at a Place in certain; yet if the Perſon be not there to accept it, it is not diſcharged, but the other ought to ſeek him. (n) 19 E. 4. 1. b. (n) Br. Condition 161. S. C.

11. If a Condition of an Obligation be to pay 10 l. at a Day to D. If the Obligee accepts it at another Place, it is a good Performance without Deed. (o) 41 E. 3. 25. (p) 46 E. 3. 29. b. (q) 3 H. 4. 9. (r) 11 H. 4. 50, 62. (s) 21 E. 3. 45. 49 E. 3. 6. (o) Br. Condition 21. S. C. 1 Rol. Abr. Pl. 1. (p) Br. Condition 31. S. C. Br. Debt 43. S. C. (q) Br. Eſtoppel 53. S. C. Fitz. Eſtoppel 95. S. C. (r) Br. Charters, & detinue de eux 20. S. C. (s) 1 Rol. Abr. 446. Pl. 6. S. C.

12. So if the Defeaſance of a Statute be to pay to D. ſo much Rent. (t) 46 E. 3. 4. (t) Br. Defeaſance 14. S. C. Fitz. Audita Querela 1. S. C. 1 Rol. Abr. 444. Pl. 2. S. C.

13. If a Condition be to pay a Rent to the Obligee; an Agreement to pay to his Bailiff, who refuſes, is no Plea without Deed. Dubitatur, 9 H. 6. 29. b.

14. If a Condition be, That a Stranger ſhall enfeoff the Obligee of Land, which the Stranger tenders, and he refuſes to accept; but by his Command he enfeoffs another: This is a good Performance without Deed. (u) 42 E. 3. (w) 22. b. It ſeems the Refuſal is the great Cauſe thereof; yet there the Iſſue is taken upon the Command. (u) Br. Condition 24. S. C. Fitz. Barre 190. S. C.

(w) This is miſprinted in the Original as here, and ſhould be 23; which vide Barre 190. S. C. Br. Condition 24.

15. If the Defeaſance of a Statute be to pay 10 l. Rent at a Day: It is a good Performance without Deed, that he paid part for the Expences of one of the Conuſees, and the Reſidue for the Reparations of the Houſes, (which he himſelf was not bound to repair) by the Command of the Conuſee. (x) 46 E. 3. 33. b. adjudged. (x) Br. Condition 32. S. C. Br. Audita Querela 6. S. C.

16. If

16. If a Lease be made by Deed, rendering Rent upon Condition: It is a good Performance, that by Accord the Rent should be recouped for the Table of the Lessor. (y) 27 E. 3. 24. b.

(y) Br. Condition 228. S. C. Br. Covenant 12. S. C.

17. If I deliver Money to another without Deed to my Use, and make a Defeasance by Deed to pay a less Sum: If (z) I accept Corn in Satisfaction without Deed, this is not any Discharge. Contra 18 E. 3. 39. b.

(z) In the Original it is if accept, in which there seems to be a Mistake.

18 (a) If the Obligee accepts the (b) Thing to be done after the Condition is broke; * yet this is not a Discharge of the Obligation without Deed. (c) 46 E. 3. 29. b. (d) 47 E. 3. 14. Contra, 18 Ed. 3. 58. b.

*Fol. 457.

(a) 1 Bulst. 39. S. P. agreed per Curiam; but adjudged, That it was otherways in Case of an Assumpsit: But when an Assumpsit after it is broke may be discharged by a Parol Agreement, vide 2 Rol. Abr. 408. Pl. 1.
(b) Or other Thing before the Day, agreed to be delivered after the Day in lieu thereof. Cro. El. 46.
(c) Br. Condition 31. S. C. Br. Dette 43. S. C. (d) Fitz. Barre 218. S. C.

19. If the Condition be to stand to an Award to be made such a Day: If at the Day no Award is made, but the Arbitrators, by Assent of Parties, appoint another Day to do it, and do make it at the Day, yet he is not bound to perform it. (e) 29 E. 3. 9. demurrer.

(e) Fitz. Barre 224. S. C.

20. If a Grantee of an Annuity, pro Consilio impendendo, promises the Grantor to come to a certain Place at a certain Day, to give him Counsel: If he does not come at the Day there, yet the Condition is not broke, (f) for he is not bound by the Condition to go there, and this cannot alter it. 21 E. 3. 7. b.

(f) 1 Rol. Abr. 434. Pl. 5, 6. S. P.

20. If a Bond or Feoffment is conditioned for the Payment of Money to a Stranger, he cannot accept an Horse, or other Thing, in Satisfaction, (g) because in this Case the Condition is to be strictly performed. *Co. Lit.* 212. b.

(g) A Stranger by his Agreement cannot dispense with a Condition, nor alter the Thing to be done. 1 Rol. Abr. 457. Pl. 1.

21. But if the Condition be, That a Stranger shall pay Money to the Feoffee or Obligee, the Feoffee or Obligee may receive an Horse, *&c.* in Satisfaction. *Co. Lit.* 212. b.

22. An Obligation was conditioned for the Payment of 7 *l.* at the Birth of the first Child of the Obligee; and whether a Load of Lime might be accepted in Satisfaction before the Birth of the first Child, *Mich.* 8. *Jac.* between (h) *Neal* and *Sheffield*, *Cro. Jac.* 254. *dubitatur*: But because it was pleaded to have been accepted in Satisfaction of the Bond, whereas it (i) ought to have been pleaded in Satisfaction of the Sum mentioned in the Condition of the Bond, it was adjudged the Plea was naught.

(h) Yelv. 192. S. C. adjudged upon both Points; and that it was altogether contingent whether it would be a Debt or not; so that being but a Possibility, it could not be discharged, and therefore not like the Case where the Condition is to pay Money at a Day to come. 1 Bulst. 66, 67. S. C. adjudged. 1 Brownl. 109, 110. S. C. adjudged. (i) Palm. 111. 2 Rol. Rep. 118.

(T) Who may diſpenſe with a Condition.

A Stranger.

1. IF the Condition of an Obligation be to aſſure a Copyhold to A. and B. his Wife, (who are Strangers to the Obligation) for the Life of C. and the Obligor at the Requeſt of A. ſurrenders it to the Uſe of A. &c. to the Uſe of ſuch Perſon as he ſhall nominate: This is not any Performance of the Condition; (a) for A. who is a Stranger, cannot diſpenſe with the Condition, nor by his Agreement alter the Thing to be done; but he ought to take it as the Condition limited it. Mich. 15 Jac. B. R. between Stile and Smith, adjudged upon a Demurrer.

(a) Yet where by the Intent of the Condition, an Eſtate is to be made to a Stranger for Life, without Impeachment of Waſte, and ſhe accepts it without this Clauſe, and held a good Performance, becauſe the Eſtate for Life was the Subſtance. Mid. Co. Lit. 219. b.

(V) What Things will excuſe the Performance of a Condition.

Acts of him that ſhall have the Advantage. (a) Abſence.

(a) Poph. 104.

1. IF a Thing be to be performed by a Condition, which cannot be performed without the Preſence of the Obligee: There his Abſence ſhall excuſe the Performance. 12 H. 4. 23. b.

2. If a Condition be to make a Feoffment to the Obligee: If the Obligee be not preſent at the Time, the Performance is excuſed. 12 H. 4. 23. implied.

3. If a Rent be reſerved to be paid at a certain Day, upon Condition: If the Leſſee be ready at the Day, and none comes for the Leſſor, this will excuſe the Performance of the Condition: (And here the Leſſor ought to demand.) Contra, (b) 4 H. 6. 9.

(b) Br. Entry Congeable 39. S. C.

4. As if the Condition be to enter into a Statute to the Obligee: If the Obligee be abſent at the Day, yet becauſe it may be performed in his Abſence, he ought to do it. 12 H. 4. 23 b. Otherways econtra, 12 H. 4. 24. b.

5. If an Abbot covenants with B. to ſing Maſs ſuch a certain Day in his Manor of D. for him and his Servants: Though B. nor his Servants do not ſtay there, yet he ought to ſing. 42 E. 3. 3. b

6. If a Condition be to take an Eſtate to himſelf for Life, Remainder to another, who is privy to the Condition, and is to have Benefit by the Obligation at a certain Day: Though he in Remainder be not there at the Day, yet it is forfeited if it is not taken accordingly; for this may be performed notwithſtanding his Abſence. (c) 40 E. 3. 12.

(c) Br. Condition 216. S. C. Br. Garniſhment 12. S. C.

7. But in this Caſe if the Condition had been alſo, That he in the Remainder ſhould be preſent at the Day; his Abſence would excuſe the Performance of the Condition, ſcilicet, of the taking

of the Remainder, and of the Leaſe to himſelf alſo. Contra, (d) 40 E. 3. 12.

(d) Br. Garniſhment 12. S. C.

Fol. 458.

(X) What Thing will excuſe the Performance of the Condition.

In what Caſes he that ſhall have Advantage ought to do the firſt Act.

Acts of him that ſhall have the Advantage.

1. IF the Condition of an Obligation be, That the Obligor, being a Parſon, ſhould reſign to the Obligee within a certain Time, for a certain Penſion as they ſhould agree: The Obligee ought to agree for the Penſion, and tender a Deed thereof to the Obligor before he is bound to reſign. (a) 14 H. 4. 18. b.

(a) Br. Condition 42. S. C. Fitz. Barre 190. S. C.

2. If an Annuity is granted till he is promoted to a Benefice by the Grantor: If the Grantee after accepts a Benefice from another, and after the Grantor proffers him a Preſentation to his Benefice, and he refuſes, the Annuity is determined. 11 Ed. 3. 11. dubitatur.

3. (b) Where a Rent is to be paid upon Condition at a certain Day, he cannot enter for the Condition broke before a Demand of the Rent. (c) 20 H. 6. 30, 31. (d) 40 Aſſ. 11. adjudged.

(b) Co. Lit. 201. b. S. P. (c) Br. Entry Congeable 2. S. C. Fitz. Entry Congeable 6. S. C. (d) Condition 216. S. C. Br. Entry Congeable 81. S. C.

4. And the Demand ought to be at the Day, and it is not ſufficient after. Contra, 20 H. 6. 30, 31.

5. Where a Rent is reſerved to be paid upon Condition at a certain Day, the Leſſor ought to demand it at the Day, otherways the Performance of the Condition is ſaved, although the Leſſee was not there ready. Contra (e) 4 H. 6. 9.

(e) Br. Entry Congeable 39. S. C.

6. If the Condition of an Obligation be to pay a Sum at a certain Day: The Obligor ought to tender it without any Demand. (f) 20 H. 6. 30. 2 Ed. 4. 3. b. 8 Ed. 4. 1.

(f) Br. Entry Congeable 2. S. C.

7. If I am bound to be Attendant upon you at all Times when you come to your Manor of D. I ſhall be bound to take Notice when you come to your Manor of D. at my Peril, without any Notice given by you. (g) 8 Ed. 4. 1. b. per Bingham.

(g) Fitz. Arbitrament 15.

8. If the Condition of an Obligation be to ſtand to the Award of J. S. &c. who awards a certain Thing to be done to another at a Day: He ought to perform it at his Peril, without any Notice given by any other. (h) 8 Ed. 4. 1.

(h) Fitz. Arbitrament 15. S. C. Br. Arbitrament 37. S. C. Br. Notice 18. S. C.

9. *A.* made a Deed of Feoffment of Lands in ſeveral Counties, dated the 15th of *October*, 4 *Mar'*, upon Condition the Feoffee ſhould reenfeoff him of all the Lands within 20 Days after the Date of that Deed; and yet becauſe *A.* made his Feoffment but of Part within the 20 Days, it was held the Condition was not broke, though all was not reconveyed within the 20 Days, according to the Letter of the Condi-

tion, which is entire; for it was the Fault of *A.* it was not conveyed, without which it could not be reconveyed. *Hob.* 24. cited to have been reſolved. 26 *El.*

10. If *A.* leaſes to *B.* for 21 Years, and covenants at any time during the Life of *B.* upon Surrender of the old Leaſe, to make a new Leaſe for the Reſidue of the Term, and after *A.* leaſes to a Stranger. Though *B.* by the Words of the Indenture, ought to do the firſt Act, *viz.* make a Surrender, yet becauſe *A.* hath diſabled himſelf to make a new Leaſe, *B.* ſhall not be obliged to ſurrender his old Leaſe without Poſſibility of a new Leaſe, but may bring Covenant without making any Surrender. *Paſch.* 48 *Eliz.* between (i) Sir *Anth. Maine* and *Scot*, 5 *Co.* 20, 21. adjudged.

(i) Moor 452. Pl. 619. S. C. adjudged,

That Covenant lay without making any Requeſt, though by the Covenant the new Leaſe was to be made upon Requeſt. Cro. Eliz. 450. 479. S. C. adjudged; and after affirmed upon a Writ of Error. Poph. 109, 110. S. C. adjudged.

11. So if a Man covenants to enfeoff *J. S.* upon Requeſt, and after enfeoffs another, *J. S.* may have Covenant without making any Requeſt. (k) *Paſch.* 48 *Eliz.* 5 *Co.* 21. a. reſolved *per Curiam.*

(k) Moor 452. Pl. 619. S. C. & S. P. adjudged. Poph. 110. S. C. & S. P. per Curiam.

(Y) (a) In what Caſes the (b) Obligee ought to do the firſt Act.

(a) Where the Condition is to pay all Coſts, as ſhall be ſtated by Two Arbitrators, by the Obligor and Obligee to be choſen, the Obligee muſt chuſe an Arbitrator before he can ſhew any Fault in the Obligor. 1 Vent. 71. (b) Where the Obligor or Covenantor hath diſabled himſelf, the Obligee, &c. may bring an Action without, &c. Sir Anth. Maine, 5 Co. 21. a. Moor 452. Pl. 619. Cro. Eliz. 450, 479. Poph. 109, 110. Walrond and Hill, Hut. 48. Winch. 29, 30. (c) 1 Rol. Abr. 422. Pl. 3. S. P. con. (d) So if the Condition be, That a Stranger ſhall levy a Fine to the Obligee. Walrond and Hill, Hut. 48. per Hobart. Winch. 30. per Hob. & Hutton. —— So if the Condition be to acknowledge a Judgment to J. S. he muſt ſue out an Original. Burnell & Bowle, Winch. 30. cited. Hut. 48. cited. (e) I ſuppoſe this is miſprinted, for I find no ſuch Opinion in the Book.

1. (c) **If the Condition of an Obligation be (d) to levy a Fine to the Obligee: He is not bound to levy it, if the Obligee does not ſue a Writ of Covenant againſt him.** 18 Ed. 3. 27. b. 8 Ed. 4. 2. b. per Markam 21. b. Co. 5. Palmer 127. (e) 7 Ed. 4. 2. b.

2. (f) **If the Condition be to levy a Fine upon Warning given: If he be ſummoned in a Writ of Covenant, this is ſufficient Warning.** 29 Ed. 3. 44. b.

(f) 1 Rol. Abr. 422. Pl. 4. S. P. con.

3. **If a Defeaſance be to pay a ſmall Sum in Diſcharge, &c. he ought to pay it at the Day, though the Plaintiff will not give him any Acquittance for it, becauſe in an Action for the principal Sum, he may plead Payment of the leſs Sum, without any Acquittance.** Quære, 18 Ed. 3. 39. b.

4. **If a Condition be to enroll a Deed in** Guildhall: **He is not bound to do it before Requeſt made by the other.** 39 Ed. 3. 3.

5. If the Condition of an Obligation be, That the Obligor ſhall make all the Linen the Obligee ſhall wear during his Life; the Obligee muſt deliver to the Obligor the Cloth of which it is to be made; for all Corntracts are to be interpreted according to the Intent and Subject Matter. *Hill.* 14 *&* 15 *Car.* 2. between *Oles* and *Thornhill*, 1 *Lev.* 93. adjudged, it not appearing the Obligor was a Sempſtreſs, or ſuch Perſon that uſed to make Linen, and find the Materials.

6. So

9. So if a Taylor is bound, or promiſes to make a Suit of Clothes for me, I ought to deliver him the Cloth, becauſe this is uſual, and not for him to provide it. 1 *Lev.* 93. *per Curiam.*

7. But if a Shoemaker is bound to make me a Pair of Shoes, he is alſo bound to find the Leather, becauſe that is uſual. 1 *Lev.* 93. *per Curiam.*

Fol. 459.

(Z) Condition.

Demand.

Where another than he who is to perform the Condition is to do the firſt Act.

1. If a Man leaſes Land for Life or Years, or, &c. reſerving a Rent, and for Default of Payment, a Re-entry: The Leſſor ought to (a) demand the Rent (b) at the Day, otherways the Condition ſhall not be broke by the Non-payment of the Rent.

(a) What ſhall be a ſufficient Demand of Rent, vide the Diviſions, Title Rent. (b) This Demand muſt be made upon the Land, becauſe that is the Debtor. Co. Lit. 201. b. Yelv. 37. But at what Place Rent ſhall be demanded, vide 2 Rol. Abr. 428. Pl. 1.

2. (c) So if a Man leaſes Land, reſerving a Rent, to be paid at a Place out of the Land, upon Condition of Non-payment to re-enter: Though the Rent be to be paid out of the Land, yet this is a Rent, and not an Annuity; and therefore the Leſſor ought to demand it at the Day, otherways he ſhall not enter for the Non-payment. Co. 4. Boroughs 73. reſolved. Hill. 32 Eliz. B. R. between Smith and Baſtard, per Curiam; and ſaid to be ſo lately adjudged. Hill. 32 El. B. R. admit. Trin. 39. El. in Camera Scaccarii, between (d) Edmunds and Buskin, per Curiam, in a Writ of Error upon a Judgment in B. R. where it was ſo adjudged. But Trin. 39 El. B. R. contra, Co. Kid & Brand 71.

(c) Co. Lit. 202. a. S. P. But for this, vide 2 Rol. Abr. 426. Pl. 3.

(d) Cro. El. 415, 535, 536. S. C. & S. P. by all the Juſtices and Barons, beſides Anderſon, who held, That it being appointed to be paid out of the Land, 'tis but a Sum in Groſs, and no Rent.

3. (e) If a Man reſerves a Rent, and that if the Rent be Arrear, he ſhall forfeit ſo much by way of Nomine Pœnæ: The Nomine Pœnæ ſhall not be forfeited without Demand made. Mich. 10 Jac. B. R. per Curiam. Hobert's Reports 180. per Curiam. between Howel and Sandback. Hobert's Reports 113. between (f) Sir Rich. Grobham and Thornborough, adjudged upon Demurrer.

(e) Hob. 133. S. C. adjudged. 1 Brownl. 179. S. C. adjudged.

(f) Hob. Fol. 82. S. C. adjudged. 1 Br. 75. S. C. Poſt Pl. 17. S. C.

4. If a Man grants a Rent-Charge to another, and for Default of Payment to forfeit a Nomine Pœnæ; (g) no Forfeiture ſhall be of the Nomine Pœnæ without a Demand at the Day. Co. 7. Maund. 28. b.

(g) But vide Thinn & Cholmly, Cro. El. 383. Gouldſ. 129, 186. Moor 357. Pl. 486. Sir Paul Tracy and Dutton, Cro. 617. Palm. 207, 208, &c. 490. & Godb. 154. Hut. 42, 114. Styl. 4. 1 Mod, 89.

5. If a Man leaſes Land for Life or Years, reſerving a Rent, upon Condition, That if the Leſſee does not pay the Rent at the Day, without any Demand made by the Leſſor, that then it ſhall be lawful to the Leſſor to re-enter: In this Caſe, by this ſpecial Agreement of the Parties, the Leſſor may enter for Default

fault of Payment of the Rent, without any Demand. Co. 5. Dormer 40. b.

6. (h) If a Man leaſes Land for Years, reſerving a Rent, with Condition, for Non-payment to be void: In this Caſe the Leſſor ought to demand the Rent at the Day of Payment by the Condition, or otherways the Leaſe is not void, though it be not paid by the Leſſee. Paſch. 149. adjudged. Intratur, Hill. 24. Car. B. R. Rot 312. between Dennis and Raſhley, adjudged upon Demurrer per Curiam, where an Action of Debt for Rent incurred after was brought by the Leſſor againſt the Leſſee, and this Matter pleaded, ſcilicet, Non-payment of the Rent at a Day before; but no Demand pleaded to be made by the Leſſor; and adjudged that the Action lies.

(h) 1 Sid. 7. S. P. arguend. Hanſon and Norcliff S. P. 331. adjudged, and ſaid, That ſo it was in the Election of the Leſſor to continue the Leaſe or not. 1 Jon. 9. adjudged.

7. Where a Man leaſes to another, reſerving a Rent, and the Leſſee covenants to pay the Rent at the Days limited, he ought to pay it without any Demand, at his Peril, inaſmuch as he hath bound himſelf to pay it. Hill. 4 Jac. B. R. between (i) Fretzvile and Molineux, per Curiam. Mich. 7 Jac. B. between (k) Hare and Sir John Savill, adjudged. Paſch. 10 Jac. B. between Manly and Jennings.

(i) Cro. Jac. 144. ſeems to be S. C. but ſame Point does not appear. Noy 117. ſeems to be S. C. but S. P. does not appear.

(k) 1 Brownl. 19. 2 Brownl. 173. ſeems to be the ſame Caſe; but this Point does not appear.

8. If a Man leaſes Land by Indenture for Years, reſerving a Rent, payable at certain Days at London, and the Leſſee in the ſame Indenture covenants to pay the ſaid Rent at the Days and Place aforeſaid: He ought to pay it, by Force of this Covenant, without any Demand of the Leſſor, * otherways he hath broke his Covenant. Paſch. 5 Jac. B. R. between Sir J. Spencer and Sir J. Poines, per Curiam.

* Fol. 460.

9. If a Man leaſes for Years, reſerving a Rent, with a Clauſe of Re-entry; and upon the making the Leaſe the Leſſor lends him 200 l. Stock, and the Leſſee covenants to pay the Rent at the Days and Place; and after, by another Covenant, covenants, That if Default of Payment of the ſaid Rent be made at any of the Days in which it ought to be paid, according to the Effect, Limitation, and true Intent, of theſe Preſents, then the Leſſee covenants to repay the ſaid 200 l. Tho' there needs no Demand of the Rent to make the firſt Covenant to be broke by Non-Payment, yet there ought to be a Demand to entitle him to the 200 l. for this laſt Covenant does not refer to the Covenant before, but to the Reſervation: The Words are [according to the Limitation of the Indenture] which is the Reſervation; and by theſe Preſents is intended the Indenture, or the moſt notable Part thereof, which is the Reſervation. Paſch. 5 Jac B. R. between Sir J. Spencer and Sir J. Poines, by Two againſt one.

10. If a Man leaſes Land by Indenture, reſerving a Rent, and the Leſſee binds himſelf by Obligation, upon Condition to perform all Covenants, Articles and Payments, in the Indenture mentioned: In this Caſe there ought to be a Demand by the Leſſor, to make the Obligation to be forfeited. Paſch. 12 Jac. B. between (l) Baker and Spaine, the ſame Caſe. Hobart's Reports. 11. Hill. 2 Car. in Scaccario, between Chapman and Daviſon, per Curiam, upon a Demurrer; but the Court gave Leave to the Plaintiff to diſcontinue the Suit, becauſe that otherways this would have been a perpetual Bar of the Obligation, if Judgment ſhould be given againſt him.

(l) Hob. Fol. 8. S. C. 1 Brownl. 76. S. C.

11. If a Man leaſes by Indenture certain Coal-Mines, reſerving a Rent, and the Leſſee binds himſelf in an Obligation, with Condition to obſerve, perform, pay, and keep all Payments, Rents, Covenants, Grants, and Agreements, in the

ſaid Indenture mentioned. In this Caſe it is a good Aſſignment of a Breach of the Condition, in an Action of Debt upon the Obligation, that the Leſſee did not pay him the Rent at the Time of Payment thereof by the Reſervation, without alledging that he demanded the Rent at the Day of Payment; for he is not bound to demand it, but the other ought to pay it without Demand. Mich 2. Car. B. R. between (m) Chapman and Chapman, adjudged per Curiam; but a Writ of Error was brought in Camera Scaccarii, and there the better Opinion was to reverſe the Judgment, becauſe the Condition is to perform all, &c. in (n) the Generality, and according to the Indenture. But Trin. 3 Car. the Judgment was affirmed. Mich. 3 Car. B. R. between (o) Polſon and Worner, in Caſe of a Leaſe of Land, adjudged per Curiam accordingly, upon Demurrer. Intratur, Paſch. 3 Car. Rot. 165.

(m) Cro. Car. 76, 77. S. C. adjudged and affirmed upon Error accordingly, becauſe the Defendant having pleaded Performance of all the Payments, &c. it was intended he had really performed them; and when the Plaintiff replied he had not paid ſuch a Rent, it was not neceſſary he ſhould alledge a Demand, for the Defendant could not traverſe it: But it was ſaid, the Obligation being general, it did not alter the Nature of the Rent, but that it ought to be demanded. Hut. 90. 91. S. C. adjudged and affirmed upon a Writ of Error, for the ſame Reaſon as in Croke. And this was ſaid to have been the Reaſon of the Judgment in Specot and Sheers Caſe, there cited; which vid. Cro. El. 829. Moor 636. Pl. 873. but that if the Defendant had pleaded, that he was upon the Land ready to pay it, but that the Plaintiff did not demand it, then the Plaintiff ought to have ſhewed, that he demanded it. Et vid. Hob. 8. (n) Diverſity between a Condition to perform the Covenants in the Indenture of Leaſe, and a Special Condition or Covenant, or Condition to pay the Rent. Moor 636. Pl. 873. Cro. Eliz. 828, 829. Hut. 91. Et vid. Palm. 426. Ow. 111. 2 Leon. 114. Cro. El. 332. Godb. 95. 1 Rol. Rep. 216. Cro. Jac. 423. (o) Palm. 426. S. C. adjudged.

12. If a Man makes a Leaſe, rendring Rent, and covenants by the Indenture of Leaſe to pay the Rent, being lawfully demanded, and enters into an Obligation to perform the Covenants: The Leſſee is not bound to pay the Rent without a Demand. Mich 7 Car. B. R. between Still and Dowding, adjudged upon Demurrer. Intratur, Hill. 6 Car. Rot. 623.

13. If A. leaſes Land to B. by Indenture for Years, reſerving 20 l. Rent per Annum, payable at 4 Feaſts by equal Portions; and after B. is bound in an Obligation to A. upon Condition that if he pays to A. for the Rent of the ſaid Premiſſes, the yearly Rent of 20 l. for ſuch Term, (ſcilicet, the Term demiſed) at four Quarter Days, according to the Tenour and Effect of one Leaſe, thereof made, bearing Date with this Obligation, and made between the ſaid Parties, according to the Tenour and Effect of the ſaid Leaſe, by equal and even Portions, then the Obligation ſhall be void. The Leſſee is not bound * to pay the Rent by this Condition without any Demand of the Leſſor, becauſe it refers to the Indenture of Leaſe, and that it ſhall be paid as a Rent, according to the Indenture. M. 11 Car. B. R. between Horne and Barber, per Curiam reſolved: But (p) this did not come materially in Point of Judgment.

* Fol. 461.

(p) As appears by the Caſe, Cro. Car. 421.

14. If a Man makes a Writing, ſealed, of a Grant of a Rent out of Land, and after deviſes, that the Grantee ſhall have the ſaid Rent according to the Intent of the ſaid Writing; and that if his Heir pays the ſaid Rent according to this Will, then he ſhall have the Diſpoſition of the ſaid Land ſo long as he ſhall perform the Will; and if his Heir does not perform his Will, then that his Executors ſhall have the Diſpoſition of the Land, to the Intent that his Will be performed; and if there be Default in the Heir that his Will be not performed, and Default in his Executor that his Will is not performed, then the Land ſhall be to J. S. In this Caſe, the Grantee of the Rent ought to demand the Rent at the Days of Payment from the Heir, and from the Executor when it comes to him, otherways J. S. ſhall have nothing; for the Will refers to the Writing; and the

Clauſe of the Executor is not that he ſhall pay the Rent, but if there be Default in him, &c. ſo that this is to be paid as a Rent, and then it ought to be demanded. H. 4 Ja. B. R. between (q) Fretzvile and Molineux, adjudged.

(q) Cro. Jac. 144, 145. S. C. adjudged.

15. If a Man deviſes Land to another, upon Condition that if he pays 4 l. Yearly out of the Land to the Wife of the Deviſor for her Life, adding over and above, that his full Intent and Will was, that ſhe ſhould be Yearly paid the ſaid Rent accordingly: The Deviſee ought to pay this Rent to his Wife, (r) at his Peril, without any Demand of the Wife, otherwiſe the Condition is broke, D. 18 El. (s) 348. 13.

(r) But if a Man deviſes Lands to his Wife for Life, ſo long as ſhe ſhall be effectually ready to demiſe it to his Heir at 50 l. paid Yearly, when ſhe ſhall not dwell on it herſelf; yet if ſhe goes and lives at another Place, the Condition is not broke, without a Tender and Refuſal to leaſe. Moor 626. Pl. 860. (s) Lan. 78. S. C. cited, and S. P. debated.

16. If a Man leaſes Lands for Years, upon Condition that if the Leſſee does not pay Yearly 40 s. at the Feaſt of P. during the Term, to D. it ſhall be lawful to the Leſſor to re-enter. In this Caſe the Leſſee ought to pay it, (t) at his Peril, without any Demand, becauſe this is not iſſuing out of any Land. Co. Kidwellie and Brand, adjudged in Effect.

(t) He muſt ſeek D. if in England. Lit. Sect. 345. Co. Lit. 213. b. Dal. 54, 55.

17. If a Man leaſes Lands for Years or Life, rendring Rent, and for Non payment within 40 Days, to forfeit a Sum Nomine Pœnæ: He cannot recover the Nomine Pœnæ if he does not demand it at the Day. Hobart's Reports 113. between (u) Grobham and Thornborough, adjudged.

(u) Hob. Fol. 82. S. C. adjudged Ante. Pl. 3. S. C.

18. If *A.* conveys Lands to *B.* in Tail, upon Condition that *B.* and the Heirs of his Body, ſhall pay to the Daughter of *A.* 200 *l.* or ſo much thereof as ſhall be unpaid at the Death of *A.* according to the Intent of the Will of *A.* and after *A.* by Will deviſes to his Daughter 200 *l. viz.* 100 *l.* to be paid that Day Twelve-month next after his Death, and the other 100 *l.* that Day Twelve-month next after, *&c.* and dies; *B.* is not bound to pay the 200 *l.* without Demand; for the Payment by the Indenture is referred to be according to the Will, and the 200 *l.* was deviſed as a Legacy, which ought to be paid upon Demand, and not at the Peril of the Executor, and therefore the Nature of the Payment is altered by the Will. *Hill.* 38 *Eliz. Slaning*'s Caſe. *Poph.* 102. *&c.* the Opinion of Three Judges certified to the Chancellor accordingly.

(A) What Thing will excuſe the Performance of the Condition.

In what Caſes he who is to have the Benefit ought to do the Firſt Act, *ſcilicet*, by giving Notice.

1. If a Man, in Conſideration that J. S. will deliver a Horſe to a Stranger, promiſes to pay to J. S. 5 l. cum inde requiſitus eſſet: J. S. need not give Notice to him of the Delivery of the Horſe, but he ought to take Notice thereof at his Peril; for he ought to pay it upon Requeſt. P. 5 Ja. B. R. between Pomfrett and Shadd, per Yelverton.

2. If

2. (a) If the Condition of an Obligation be to pay 10 l. to the Obligee at the Day of the Marriage of the Obligee; the Obligee is not bound to give Notice to the Obligor before his Marriage at what Day he will be married, but the Obligor ought to take Notice thereof at his Peril, inasmuch as he hath taken upon him to pay it at the Day. My Reports, 14 Ja. between (b) Beresford and Goodrouse, per Dodridge & Houghton, adjudged, for this becomes a Debt by the Marriage.

(a) Crane and Crampton like Point, Cro. Car. 34. adjudged. Croke dubitante. Hut. 80. adjudged by Three Judges con. Croke. dubitatur.

(b) 1 Rol. Rep. 433, 434. S. C. & S. P. by the same Judges. 3 Bulst. 237. S. C. & S. P.

Fol. 462.

3. (c) If a Man promises to J. S. in Consideration that he will marry A. W. his Cousin, to pay 10 l. to him at the Day of his Marriage: J. S. need not give Notice to him who made the Promise, before he marries with A. W. at what Day he will marry her, but he ought to take Notice thereof at his Peril, inasmuch as he hath taken upon himself to pay it at the Day, though the Marriage is to be had by J. S. himself. My Reports, 14 Ja. between (d) Beresford and Goodrouse, adjudged, for it becomes a Debt by the Marriage. Contra, T. 4 Jac. B. R. between (e) Wheeler and Street, adjudged.

(c) Brenly and Tod. S. P. Yelv. 168. adjudged. Cro. Jac. 229. adjudged. Post Pl. 14. Vide Alfrey and Blackamore S. P. 3 Bulst. 326. adjudged. Lat. 97. adjudged. 1 Rol. Abr. 468. Pl. 1.

(d) 1 Rol. Abr. 468. Pl. 2. 4. S. C. Cro. Jac. 405. S. C. adjudged and affirmed upon a Writ of Error. 1 Rol. Rep. 433. 434. S. C. adjudged, and Two like Cases cited. 3 Bulst. 236, 237. S. C. adjudged, and said, there is a Difference where Money is to be paid, and where a collateral Thing to be done upon the Marriage-Day: But yet vid. Cro. Jac. 102. Cro. Car. 35. Hut. 80.

(e) Yelv. 122. S. C. cited; 168. S. C. cited, and denied per totam Curiam.

4. So a Fortiori, if a Man promises to pay 10 l. to J. S. at the Day of the Marriage of W. N. for there the Marriage is not to be had by him to whom the Promise is made. My Reports, (f) 14 Ja. per Curiam.

(f) 1 Rol. Rep. 433, 434. S. C. & S. P. per Curiam. 1 Bulst. 236, 237. S. C. & S. P. admitted per Curiam. 1 Rol. Abr. 468. Pl. 5. S. C.

5. (g) If J. S. sues an Action against J. D. and J. N. comes to J. S. and promises him, That if he will surcease his Suit against J. D. that he himself will pay him all the Charges, &c. of the said Suit, when he, scilicet J. S. comes into Somersetshire. If J. S. surceases his Suit, and after comes into Somersetshire, J. N. is bound to perform his Promise, without any Notice given of the Coming of J. S. into Somersetshire, because this was a Duty by his Coming there. My Reports, 13 Jac. (h) Richardson's Case adjudged. Vide Hobart's Reports 93. between (i) Richards and Carviniell, it seems this was the same Case; but there the Opinion is contra.

(g) Cro. Car. 470, 471. like Point adjudged con.

(h) 1 Rol. Rep. 314. S. C. cited arguendo; and a like Case cited con. arguendo. 1 Rol. Abr. 469. Pl. 6. S. C.

(i) Hob. Fol. 68. S. C. per Warburton. 1 Brownl. 10. S. C. adjudged pro Quer. though he had not alledged in his Count, that he gave Notice.

6. If A. says to B. That if he will sell certain (k) great Cattle to C. for such Sum as shall be agreed between them, if C. does not pay him the Sum according to the Agreement, he himself will pay it; and B. sells the Cattle to C. for 20 l. to be paid at a Day to come, and C. does not pay the 20 l. at the Day: A. is bound to pay it at his Peril, without any Notice given to him by B. for how much he sells them, or at what Time, because he hath taken upon himself to pay it at his Peril. Mich. 15 Ja. B. R. between Pollington and Lingham, adjudged, this Matter being moved in Arrest of Judgment.

(k) In the Original it is grasse; but I suppose 'tis misprinted, and should be grosse.

7. If A. sells Lands to B. by the Name of 20 Acres, according to the Rate of 200 l. for every Acre; and it is agreed be-

tween the Parties, that the Land shall be measured by J. S. before the First of January next ensuing; and A. covenants to repay according to that Rate for every Acre before the first of May after, if there be not 20 Acres upon the Measure: If J. S. measures it, and it is found there is not 20 Acres, A. ought to repay it before May at his Peril, without any Notice given how many Acres it wants of 20; for he hath taken upon himself to perform it at his Peril. My Reports, 13 Jac. (l) between Goates and Sir Baptist Hixt, per Curiam. (l) 1 Rol. Abr. 469. Pl. 7. S. C.

1 Rol. Rep. 314. S. C. & S. P. admitted per Curiam. Godb. 197. S. C. but S. P. does not appear.

8. So in this Case, if by the Agreement no certain Persons had been appointed to measure it; but that it should be measured by one elected by one of the Parties, and by another elected by the other: If the Vendee elects J. S. and gives Notice thereof to the other, and of a certain Time to measure it, and J. S. does it at the Day, and none comes for the other to join with him, yet he ought to take Notice at his Peril how many Acres it wants of 20, otherways an Action of Covenant lies; for now, by the Matter subsequent, and the Default of the Vendor, it is as much as if J. S. had been appointed at the Beginning to have measured it. My Reports, 13 Jac. between (m) Goates and Sir Baptist Hixt, adjudged. (m) 1 Rol. Abr. 469. Pl. 8. S. C.

1 Rol. Rep. 314. S. C. adjudged upon a Writ of Error. Cro. Jac. 390, 391. S. C. adjudged upon a Writ of Error, and said, That in Point of Covenant, Notice is not so strictly to be given as it is upon an Obligation which is in Point of Forfeiture. Godb. 197. S. C. in B. but S. P. does not appear. Et vid. Cro. Jac. 472. 1 Bulst. 12. Hut. 80.

9. (n) If the Condition of an Obligation be to account before such Auditors as the Obligee will assign, and the Obligee assigns Auditors: He ought to give Notice thereof to the Obligor, otherwise he is not bound to account. (o) 8 Ed. 4. 1. b. per Fairfax. (n) 8 Co. 92. b. bid. (o) Fitz. Arbitrament 15. S. C.

10. If I am bound to enfeoff such Persons as the Obligee shall name; he ought to give Notice of those which he names, otherways I am not bound to enfeoff them. 8 Ed. 4. Arbitrament 15. per Billing. Fol. 463.

11. If the Condition be to seal such Obligation as an Escrow as the Obligee shall write: He is not bound to seal it without Notice of the Escrow written.

12. (p) If the Condition of an Obligation be, That if the Obligee returns from beyond the Seas before the 22d of April next, then if the Obligor pay unto him, at Easter following, 100 l. the Obligation shall be void. If the Obligee returns within the Time, he is not bound to give Notice thereof to the Obligor; but he ought to take Notice thereof at his Peril, for he hath bound himself to this Inconvenience. Mich. 37, 38 Eliz. B. R. between Eue and Dautry, per Curiam. (p) 1 Bulst. 44. like Point adjudged con. per totam Curiam.

13. (q) If the Condition of an Obligation be to pay 20 l. within 10 Days after J. S. hath rode 5 times in 6 Days from London to York, and from York to London: He ought to take Notice of the doing thereof at his Peril, because it is to be done by a Stranger. Mich. 4 Jac. B. R. between (r) Herby and Pope, dubitatur. (q) Hut. 80. like Point agreed per Curiam. Hard. 42. like Point cited. Poph. 164.

like Point put by Dodderidge. 1 Rol. Abr. 469. Pl. 2. like Point. (r) Normanbile and Pope S. C. Cro. Jac. 137, 150. dubitatur.

14. (s) If the Condition of an Obligation be to pay 20 l. to B. the Obligee, within one Year after B. shall marry C. In this Case he is bound to pay it to B. within one Year after the Marriage, without any Notice given of the Marriage by B. for he hath taken upon himself to pay it within an Year; and he may take Notice of the Marriage of C. who is a Stranger to the Condition. Trin. 1651. between Shepherd and Frie; and in another Action between Shepherd and Latch, adjudged upon Demurrer.

(s) Bzenly and Todd like Point. Yelv. 168. adjudged. Cro. Jac. 229. adjudged. Et vide 2 Sid. 116. 1 Sid. 36. Lat. 15. S. P. adjudged; but said per Curiam, it was implied in the Request. — But that a Licet requisitus does not imply Notice. Vide 1 Rol. Rep. 286. 3 Bulf. 86. yet vide Cro. Jac. 229. 3 Bulf. 327. Styl. 57. Tanner and Lawzence. Al. 24. Styl. 53. Poph. 165. Et vide 1 Rol. Abr. 470. Pl. 5.

(t) 15. (u) If A. sells to B. certain Weys of Barley, or other Things, and B. assumes to pay for every Wey as much as he sells a Wey for to any other Man: If he after sells to others certain Weys for a certain Sum, he shall not have an Action upon the Case against B. upon his Promise, till he hath given him Notice for how much he sold the Wey to others; for B. is not bound to pay it till Notice, because it is uncertain, and (w) not known to him; and here he assumes in general, and not in particular, scilicet, to pay so much as J. S. shall pay for a Wey; and so he does not assume to take Notice at his Peril. My Reports, 13 Jac. between (x) Haule and Hemyng, adjudged.

between (y) Homes and Twiste, in Camera Scaccarii, adjudged in a Writ of Error, the same Case. Hobart's Reports 70.

(t) In the Original it is 25, and so appears to be misprinted.

(u) Tanner and Lawrence like Point. Al. 24. adjudged. Styl. 53. adjudged.

(w) Where it lies as much in the Conusance of one as the other, he must take Notice at his Peril. 1 Bulf. 12. 2 Bulf. 143, 144. Cro. Jac. 493. Yelv. 121. Al. 2. 2 Sid. 116. Hard. 42. (x) 1 Rol. Rep. 285. S. C. adjudged. Cro. Jac. 432. S. C. adjudged. 3 Bulf. 85, 86. S.C. adjudged. (y) 1 Rol. Rep. 285. S. C. cited to have been adjudged in the Exchequer-Chamber accordingly. Cro. Jac. 432. S. C. cited to have been adjudged; and that there was a Diversity where to pay as much as a certain Person paid, and where in general as here. 3 Bulf. 85, 86. S. C. cited. Hob. Fol. 51. S. C. and the first Judgment reversed accordingly.

16. (z) But if he had assumed to pay as much for every Wey, as he sold a Wey for to J. S. If J. S. after bought a Wey for a certain Sum, he ought to take Notice thereof at his Peril, without any Notice given, otherways he hath broke his Promise. Mich. 15. Jac. B. R. between Pollington and Lingham, per Curiam.

(z) 1 Jon. 287. like Point adjudged. Cro. Jac. 684. like Point adjudged. Styl. 184. like Point adjudged.

17. If A. is indebted to B. by Obligation in 60 l. for the payment of 30 l. and thereupon, in Consideration that B. will mutuo dare to C. a Stranger, upon Request, so much as will make it 100 l. and will accept C. and D. to be bound to B. for the Payment of the 100 l. and will deliver up the said Obligation of 60 l. A. assumes to B. that the said 100 l. with Interest, shall be paid as certainly as any Money in England. In an Action upon the Case by B. he is not bound to alledge more, but that he lent the 70 l. to make the 30 l. 100 l. to C. without averring, that he gave Notice thereof to A. for the Reason aforesaid. Trin. 22 Car. B. R. adjudged. Intratur, P. 22 Car. Regis.

18. If A. covenants with B. to make such Assurance to him of the Manor of D. as the Counsel of B. shall devise before such a Day; and after the Counsel devises an Assurance: B. ought to give Notice thereof to A. otherways he is not bound to perform it. Pasch. 42 Eliz. B. R. per Gaudy.

19. (a) But if A. covenants to make such Assurance as the Counsel of A. himself shall devise; then if his Counsel devises, he ought to perform it without Notice given by B. Pasch. 42 Eliz. B. R. per (b) Gaudy. Fol. 464.

(a) 1 Leon. 105. S. P. per Shuttleworth.

(b) In the Original it is Caudy, and so misprinted.

20. If in an Action upon the Case upon a Promise, the Plaintiff declares, That the Defendant promised to pay so much for his Passage over certain Locks in a River made by the Plaintiff in his own Soil, as the Lord of Manchester thereafter should appoint to be paid for the Passage of every Boat; and alledges, That the Lord of Manchester after appointed so much in certain to be paid, &c. and that he requested the Defendant such a Day to pay it: This is a good Declaration, without alledging that he gave any Notice to the Defendant of the Appointment of the Sum made by the Lord Manchester, because the Plaintiff is as great a Stranger thereto as the Defendant, and it does not lie more in his Conusance than in the Conusance of the Defendant, this being to be appointed by a Stranger. Mich. 4 Car. B. R. between (c) Jackson and Thornell.

(c) Cro. Car. 132. S. C. adjudged.

21. If A. bargains with B. for certain Land for 100 l. in this Manner, scilicet, he gives him 20 l. presently, and says further, if he likes the Land and Assurance, that then this 20 l. shall be in Part of Payment of the 100 l. but if he does not like it, that then he shall have back his Money again; and after he dislikes the Bargain: He may have an Action of Debt for the 20 l. before any Notice given to B. of his Dislike; for he ought to take Notice thereof at his Peril. Trin. 43 Eliz. B. R. between (d) Thorougood and Easte, adjudged.

(d) Cro. El. 834. S. C. adjudged.

22. If a Man assumes to J. S. to deliver to him, apud Barton-Haven, on Ship-board, 20 Quarters of Barley: Although J. S. ought to bring a Ship there to receive the Barley, yet he need not give Notice to him that he hath brought it there, for he ought to take Notice thereof himself. M. 13 Jac. B. R. between (e) Atkinson and Buckle, adjudged.

(e) 1 Rol. Rep. 312. S. C. adjudged. 3 Bulst. 152, 153. S. C. adjudged and affirmed upon a Writ of Error.

23. If A. assumes to B. in Consideration that B. will deliver to D. certain Wood to the Use of A. that he will pay so much, &c. for every Load to B. upon Request. In an Action upon the Case, if he alledges that he delivered so much, &c. to D. to the Use of A. and that he after required A. to pay so much for every Load, &c. this is good, without alledging any Notice given to A. when he delivered the Wood to his Use to D. for he ought to take Notice thereof at his Peril, though (f) the Time of the Delivery is uncertain. P. 9 Car. B. R. between Jewel and Pampe, per Curiam adjudged.

(f) If Lessee for Years covenants to find necessary Provisions for the Lessor, his Steward and Servant, at all Times when he shall keep Court there; the Lessee must take Notice of the general Summons, and do it without personal Notice given him. Palm. 532. adjudged.

24. If a Condition of an Obligation be to perform an Award, and the Arbitrator awards, that one shall make a general Release of all Things till the Date of the Obligation: It is not an Excuse to him to say that he was all Times ready to make such general Release; (g) but the other never requested him to do it. Mich. 14 Car. B. R. between Rily and Hillman, adjudged upon Demurrer. Intratur, Mich. 13 Car. Rot. 187.

(g) Ow. 7. 1 Leon. 71.

25. After

25. After a Marriage by C. with D. the Daughter of A. B. the Father of C. in Consideration that A. will give 50 l. to C. for the better Maintenance of C. and D. and at the Request of B. B. promises A. to pay 100 l. to D. the Daughter of A. if she survives C. her Husband. In an action upon the Case by the Administrator of A. against B. after the Death of C. it is a good Declaration to aver, that A. paid the 50 l. to C. in his Life, and yet the Defendant B. did not pay the 100 l. to D. who survived C. without averring any Notice given of the Payment of the 50 l. by A. to C. for he hath taken upon himself to pay it at his Peril. Mich. 22 Car. B. R. between (g) Playfield and Collard, adjudged, this being moved in Arrest of Judgment. Intratur, Trin. 22 Car. Rot. 673.

(g) Al. 1. S. C. adjudged. Styl. 6. S. C. but S. P. does not appear. Hard. 42. S. C. cited.

26. If a Man promises another at another Time, upon Request, to make * to him a good and sufficient Assurance of certain Lands for 7 Years: He ought upon Request to make a Lease for the Years, without any Tender of a Lease by him to whom the Promise is made; for he ought to make a good Lease at his Peril, for here the Request does not refer to the Manner of the Conveyance to be made, but only to the Time when the (h) Lease shall be made. Trin. 15 Jac. B. R. between Rowland and Courtman, adjudged.

* Fol. 465.

(h) In the Original this is misprinted, for there 'tis, Request shall, &c.

27. If the Condition of an Obligation be, That whereas the Obligor is Lessee for Years from the Obligee of certain Lands; if he renders up the Possession of the Land at the End of the Term to the Lessor, his Heirs or Assigns, upon Request, then the Obligation shall be void, &c. and after the Lessor assigns over his Reversion, and the Assignee at the End of the Term requests him to render up the Possession to him; he is bound to do it without any Notice given him that he is Assignee; for he ought to take Notice thereof at his Peril, inasmuch as he hath bound himself to render it up to the Assignee. Pasch. 16 Jac. B. R. between (i) Linghen and Pain, adjudged.

(i) Cro. Jac. S. C. adjudged. Bridg. 128, 129. S. C. adjudged.

28. If a Man leases a Mill for Years, and the Lessee covenants to repair the Mill, and the Lessor covenants to find him great Timber for it; the Lessee ought to give Notice to the Lessor how much will suffice for the Reparation, and not to demand in general Timber for Reparations; or otherways the Lessor is not bound to deliver any. Trin. 12 Jac. B. between Holder and Taylor, per Curiam.

29. (k) If the Condition of an Obligation be, That if the Obligor, with Two others, make, and, upon Request, seal to the Obligee, an Obligation of 40 l. then, &c. it is sufficient for the Obligee to make Request only, without tendring any Writing to them, for he ought to do it at his Peril. Mich. 3 Jac. B. Stooke's Case, adjudged in an Action upon the Case upon a Promise to do it.

(k) Cro. Jac. 652. like Point adjudged.

30. If the Plaintiff in an Action upon the Case declares, That in Consideration that he would become bound to the Defendant by Obligation for the Payment of 11 l. at a Day, the Defendant assumed to deliver an Horse to the Plaintiff; and the Plaintiff avers, that he offered to be bound to the Defendant, &c. and did not say the Obligation was sealed, and that he offered to deliver it so sealed, as he ought: This is not good, for he ought to

do it of his Part. Hobart's Reports 25, 105. between (l) Auſten and Gervas.

(l) Hob. Fol. 69, 70. S. C. 1 Brownl. 11. S. C. but S. P. does not appear.

31. If A. being a Bailiff of the Borough-Court of Weſtminſter, in Conſideration of 10 l. given to him by B. promiſes B. to arreſt J. S. at the Suit of B. by Proceſs out of the ſaid Borough-Court. In an Action upon the Caſe upon this Promiſe, it is a good Plea for A. to ſay, that he was always ready after the ſaid Promiſe to arreſt J. S. at the Suit of B. if he had brought to him any ſufficient Warrant to do it; but ſays, B. never brought him any Proceſs out of the ſaid Court to arreſt him: This is a good Plea, becauſe it belonged to B. to ſue out the Proceſs, for it will be Maintenance in A. to do it, and the Law (where the Words are general) will ſo marſhal them, that he ought to do it for whom it is moſt proper. Trin. 7 Car. B. R. between Davis and Ridgeway, adjudged upon a Demurrer.

32. If the Condition of the Obligation be, That the great Bell of Mildenhall ſhall be carried to the Houſe of the Obligor in W. at the Coſts of the Men of Mildenhall, and there ſhall be weighed, and put in the Fire in Preſentia Hominum de Mildenhall, and then the Obligor ſhall thereof make a Tenor, to agree in Tono & Sono to the other Bells in Mildenhall. In this Caſe, the Obligor ought to weigh and put it in the Fire; for he ought to do it to whoſe Occupation it properly belongs to do it, which is the Defendant, who ought to make the Bell. (m) 9 Ed. 4. 3. b.

(m) Br. Condition. 72 S. C. Fitz Barre 87. S. C. Fol. 466.

33. (n) If A. binds himſelf to B. to deliver to B. a certain Quantity of Hops, well picked and conditioned, and that B. ſhall have the Choice of theſe Hops out of 204 Bags of Hops of A. of his own Growth. In this Caſe B. ought to do the firſt Act, ſcilicet, he ought to require A. to ſhew him to view his 204 Bags, out of which B. ſhall have his Election; for otherways B. cannot make any Election, without View of the 204 Bags which are in the Cuſtody of A. himſelf, and A. cannot deliver them before Election. Tr. 14 Car. B. R. between * Brook and Boothe Plaintiffs, and Woodward Defendant, per Curiam, upon Demurrer; but Judgment given againſt the Plaintiff for a Fault in his Declaration. Mich. 15 Car. B. R. between the ſame Parties, in a new Action brought upon the ſame Deed, and thereupon a Demurrer, and the Court of the ſame Opinion; but the Demurrer waved by Conſent, and Iſſue taken. Intratur Tr. 15 Car. Rotul. 434.

(n) Parmenter and Creſſy like Point. Al. 25, 26 adjudged. Styl. 49. 74. * March 74, 75. S. C. accordingly.

34. If a Man covenants to make further Aſſurance at all Time and Times at the Charge of the Covenantee, and the Covenantee demands a Fine after for further Aſſurance: The Covenantor is not bound to levy it if he does not appoint a certain Day when he will have it levied. H. 37 El. B. per Curiam.

35. (o) If a Man promiſes to make ſuch Aſſurance of ſuch Lands as he hath by Copy to another, before ſuch a Day, as his Counſel Learned ſhall adviſe: If he tenders an Aſſurance to him without any Advice of his Counſel, yet he who made the Promiſe is bound to ſeal it, otherways he hath forfeited the Aſſumpſit. P. 38 El. B. R. between (p) Clifton and Gibbon, adjudged,

(o) Moor and Roſwel like Point con. 5 Co. 19. adjudged. Cro. El. 297, 298. adjudged, for if the Party himſelf might adviſe, it would be no Plea to ſay, quod Conſilium non dedit Adviſamentum; & vide Cro. Eliz. 9. (p) Cro. Eliz. 466. S. C. adjudged; for to have Advice of his Counſel, is only for the Strengthning his Aſſurance; and, at his own Peril, he may require it without, if he will.

36. In an Action upon an Assumpsit, if the Plaintiff declares, That whereas he, at the Request of the Defendant, had delivered to the Defendant so much old Lay Metal, to be artificially made by the Defendant into Pewter Vessels, capiendo inde of the Plaintiff tantum quantum for his Labour he shall reasonably deserve: In Consideratione inde the Defendant after, scilicet, the same Day, assumed to deliver to the said Plaintiff Lay Metal artificially made into Pewter, when he should be requested; and avers, that although the Defendant was requested to deliver the said old Lay Metal made into Pewter Vessels, yet he had not delivered it, &c. and the Defendant pleads non assumpsit, and it is found for the Plaintiff. Though it is not avetred, that he tendered to the Defendant so much as he deserved for the making thereof into Pewter Vessels, yet the Declaration is good, for this is not a precedent Condition; but the Words capiendo proinde, &c. is but to shew the Contract between them, upon which he may have an Action of Debt. Though the Defendant may retain the Goods till he be paid as much as he deserves, yet this shall come of his Part, to shew how much he deserves, and that he was ready to deliver it upon Payment thereof; for this ought to come properly of his Part, inasmuch as it does not lie in the Conusance of the Plaintiff how much he deserves, without shewing thereof by the Defendant: And also it is at the Election of the Defendant, either to bring his Action for what he deserves, or retain the Goods till Payment, and therefore it ought to come of his Part; and here the Defendant does not rely upon it, but pleads non assumpsit. P. 1649. between Brocklesby and Brocklesby. adjudged in B. R. in a Writ of Error upon such a Judgment in Banco, and the Judgment affirmed accordingly. Intratur, Mich. 20 Car. Rot. 73.

37. If A. covenants with B. to surrender a Copyhold, which he hath for Life, to the Use of B. who hath the Reversion thereof upon Request made by B. to A. and after B. tenders to A. a Letter of Attorney in Writing, by which he gives Power to Two Attorneys to surrender for him, at the next Court of the Manor, to the Use of B. and this Course is warrantable by the Custom of the Manor. In this Case, upon this Tender and Request to seal, A. is * not bound to seal the Letter of Attorney, nor to surrender in Court or otherways: for A. hath taken upon him to surrender upon Request; so that it is at the Election of A. whether he will surrender in Court or by Letter of Attorney, or any other ways that he may; and this Election (q) cannot be taken away by B. and therefore when B. does not require him to surrender, but only to seal a Letter of Attorney, this is a void Request, and (r) as no Request, and therefore (s) A. is not bound to seal the Letter of Attorney, nor to surrender in Court, or otherways, upon this Request. Pasch. 9 Car B. R. between (t) Simes and Walker Plaintiffs, and Dame Smith Defendant, adjudged upon a Demurrer. Intratur Hill. 6 Car. Rot. I being de Consilio pro Defendente.

* Fol. 467.

(q) Freeborn and Pincras, Al 68, 69. adjudged. Styl. 107. adjudged.

(r) For it ought to be an express Request to make a Surrender, and not an implied one. Cro. Jac. 300.

(s) This in the Original is B. and so misprinted. adsornatur.

(t) Cro. Car. 299, 300. S C. adjudged. 1 Jon. 314, 315. S. C. adjudged. Godb. 445. S. C.

38. If A. and B. assume one to the other to perform the Award of J. who awards, that A. shall pay to B. 8 l. 8 s. or 3 l. and all Costs that B. exposuisset in & circa Prosecutionem cujusdam placiti Transgressionis inter ipsos A. & B. pendent', prout per Notam Attornati predict' B. apparerent, ad Libitum ipsius A. In this Case, B. is not bound to tender a Note of his Attorney to A. of the Cost that he hath expended in it, without Request made by A. to do it, because A. hath Election to pay one or the other, scilicet, the 8 l.

which is certain, or the 3 l. and Costs of Suit, which are uncertain; and B. does not know whether he will pay the one or the other, and therefore A. ought to do the first Act, scilicet, to pay the 8 l. or request B. to give him a Note from his Attorney of the Cost, and if B. refuses to deliver it, A. is excused. Hill. 17 Car. B. between Poller and Kingesmeale, adjudged per totam Curiam, this being moved in Arrest of Judgment: but some of the Judges gave another Reason, scilicet, because they conceived that the Attorney of B. ought by this Award to give the Note; and he is a Stranger, and therefore it need not be shewed before Request made. Intratur Hill. 16 Car. B. Rot. 1483.

39. If A. be bound in an Obligation to B. of which the Condition is, That A. shall pay to B. all such Money as by a true and justifiable Bill under the Hand of the Attorney of B. shall appear before disbursed by B. or his Attorney, or any of them, or by any of their Means or Appointment, upon such a Day, in such a certain Sum, between, &c. In an Action upon this Obligation, if B. assigns for a Breach, that 24 s. by a true and justifiable Bill under the Hand of J. S. the Attorney of B. appeared before to be disbursed, which A. did not pay: This is a good Breach, without alledging that A. had Notice thereof, or that the Bill of the Attorney was shew'd to him; and though it was expressly alledged by A. that no such Bill was tender'd to him, by which it appeared what Sum was disbursed; because the Attorney was a Stranger, of which A. ought to take Notice at his Peril. Hill. 15 Car. B. Rot. 432. between * Dewell and Wilmot, adjudged upon Demurrer.

* March 108, 109. seems to be the S. C. or rather, the next preceeding Case.

40. If *A.* assumes to *B.* that if *B.* will borrow 100 *l.* of *C.* that he will repay it to *C.* at such a Day, and upon such Conditions as shall be agreed between them; and *B.* borrows the Money, and agrees, that it shall be repaid at a Day certain, and the Money is not paid; upon which *C.* sues *B.* and recovers it: Now though *B.* did not give Notice of the Agrement to *A.* before the Day, yet *B.* shall recover his Principal against *A.* but not his Damages; for the Want of Notice shall not discharge *C.* of his Promise. *Hill.* 7 *Jac.* between *Haverly* and *Layhton.* 1 *Bulst.* 12. adjudged by Three Judges against One, upon a Writ of Error.

41. If *A.* upon a good Consideration, promises *B.* to join with him in the Surrender of certain Copyhold Lands; *B.* must give Notice to *A.* when he is ready to join in a Surrender. *Trin.* 24 *Car.* between (u) *Freeborn* and *Pincras. Al.* 68. adjudged; and that the Declaration was not sufficient, although it was alledged, that *B.* was ready to join, and did request *A.* to join; for that it ought to have been alledged, that *B.* did give Notice to *A.* that he was ready to join.

(u) Styl. 107. S. C. adjudged against the Plaintiff, because no Request was shewed.

42. If *A.* devises Lands to *B.* (who is not Heir at Law) in Tail; provided *B.* shall not marry without the Assent of *C.* and if she marries without such Assent, then devises the Land to *D.* *B.* at her Peril, (w) must take Notice of this Condition, for she may as well take Notice of that as of her Estate, and no Body is bound to give her Notice. *Mich.* 23 *Car.* 2. between (x) *Williams* and *Fry.* 2 *Lev.* 21, 22. adjudged.

(w) For this, vide Cro. Jac. 57, 145. Poph. 10. Cro. Car. 392, 577. 4 Co. 82. 1 Jon. 390, 452. Cart. 92. &c. 170. &c.——And what shall be sufficient Notice, vide Palm. 164, 165. 1 Mod. 87. (x) Raym. 236, 237. S. C. adjudged. 1 Mod. 86, 88, 311. S. C. no Judgment. 1 Vent. 199. &c. S. C. adjudged.

43. Other-

43. Otherwiſe where the (y) Deviſe is to the Heir at Law upon ſuch a Condition; for the Heir upon his general Title may enter without Notice of ſuch Will or Condition. (z) *Mich.* 24 *Car.* 2. 2 *Lev.* 22. *per Cur.*

(y) So where a Man makes a Feoffment to the Uſe of himſelf for Life, Remainder to his Heir in Tail, &c. upon Condition, and dies. 3 Mod. 28, 29. &c. adjudged. Et vide 1 Rol. Abr. 469. Pl. 1. (z) Raym. 237. S. C. & S. P. admitted per Curiam. Mod. 86. &c. S. C. & S. P. 1 Vent. 199. &c. S. C. & S. P. per Curiam; by all which Books, the Authority of Francis's Caſe, 8 Co. 92. is allowed, becauſe in Caſe of an Heir, which vide alſo, 1 Browl. 277.

(B) What Thing ſhall excuſe the Performance of the (a) Condition.

(a) In the Original this is Choſe, not Condition, and ſo appears to be miſprinted.

Where he that is to have the Advantage ought to do the Firſt Act.

Where before Notice.

1. If a Man aſſumes to me, in Conſideration that I will enter into an Obligation to J. S. for his Debt, to ſave me harmleſs from all ſuch Obligations in which I ſhall enter to J. S. for his Debt not exceding 500 l. if I enter into an Obligation to J. S. under 500 l. (b) he ought to ſave me harmleſs at his Peril, without any Notice given to him that * I have entered into an Obligation, becauſe he hath bound himſelf to it. Hill. 14 Ja. B. R. Gerrard and Payne, adjudged.

(b) Where a Man ſhall be bound to ſave another harmleſs, * Fol. 461. without Notice, or not, vide Cro. El. 97, 613. 1 Leon. 105. Hob. 14. Cro. Jac. 288, 684. 1 Rol. Rep. 462. Fyner and Jeffry. Al. 21. Styl. 57, 458. Peck and Ambler. 1 Jon. 329, 330. Cro. Car. 350. King and Atkins. 1 Vent 35, 78. 1 Sid. 442. 1 Keb. 529.

(c) 8 Co. 92. b. S. C. cited.

2. (c) If the Condition be, That he ſhall pay ſo much as he ſhall be found in Arrear before ſuch Auditor as the Obligee ſhall aſſign. When the Auditor is aſſigned, he ought to take Notice at his Peril how much he is found in Arrerages, and perform it. 11 E. 4. 18, 24. (d) My Reports, 13 Ja. per Coke.

(d) 1 Rol. Rep. 286. S. P. per Haughton.

(e) 8 Co. 92. b. S. P. cited; and there are a Multitude of Books to this Purpoſe. — And where an Award between A. and B. was made, that A. within Two Months ſhould make a Leaſe, and upon the making thereof, B. ſhould pay him 50 l. 1 Vent. 93. it was adjudged, That A. was not bound to give B. Notice when he would make the Leaſe; though it was objected, that then B. muſt have 50 l. always about him.

3. (e) So if the Condition be to ſtand to the Award of J. S. He ought to take Notice of the Award at his Peril, and perform it. 18 E. 4. 18. 1 H. 7. 15. Contra, 7 H. 8. Kellowey 175.

4. If the Condition of the Obligation be to pay the Damages that ſhall be recovered by J. S. againſt him: He ought to take Notice of the Sum recovered at his Peril, and pay it. 18 E. 4. 18.

5. If a Man promiſes another to pay him ſo much at the Marriage of a Stranger: He ought to take Notice of the Marriage at his Peril, without Notice given. My Reports, 14 Ja. (f) Bereſford and Goodrouſe.

(f) 1 Rol. Rep. 434. S. C. & S. P. per Curiam. 1 Rol. Abr. 462. Pl. 4. S. C.

6. If A. be indicted in a Leet for an Introachment upon the Highway, and after A. dies, and B. his Heir continues the Introachment, and thereupon an Order is made in the Leet, that B. shall reform the Introachment by a Day, upon the Pain of 40 s. and for not reforming thereof, the Lord of the Leet brings an Action of Debt for the 40 s. and declares thereupon as before: This is a good Declaration, without alledging that B. had (g) Notice of the Order made, inasmuch as he is within the Jurisdiction of the Leet, he ought to take Notice thereof at his Peril. Mich. 11 Car. B. R. between Lee and Boothby, adjudged per Curiam, this being moved in Arrest of Judgment. Intratur, Tr. 11 Car. Rot. 1102.

(g) For this, vide 2 Rol. Abr. 136. Pl. 1.

(C) At what Time it ought to be performed where no Time is limited.

1. (a) If A. promises B. in Consideration that he will marry C. his Daughter, that he will give in Marriage Portion to B. with C. such Portion, and as good an Estate in Money, as he had given, or after should give, with any other. In an Action upon this Promise, if the Plaintiff avers, that he married C. and that after (b) A. gave 100 l. in Money and Goods, to D. another Daughter, in Consideration of the Marriage-Portion of D. This is a good Declaration, without any Averment, that he gave Notice of the Marriage of him with C. to (c) A. because he had taken this upon himself. Tr. 22 Car. B. R. between Ward and Green, adjudged. Intratur, P. 22 Car. Rot.

(a) 1 Rol. Abr. 462. Pl. 3.

(b) In the Original 'tis B. and so plainly misprinted.

(c) In the Original 'tis B. and so plainly misprinted.

2. If one promises another, in Consideration that he will marry his Daughter, to give him 20 l. at the Day of his Marriage: He ought to take Notice of his Marriage at his Peril, without any Notice given thereof by the other. My Reports, 14 Ja. (d) Beresford and Goodrouse adjudged.

(d) 1 Rol. Abr. 462. Pl. 4. S. C. with Notes.

3. So if no Time of Payment had been appointed in this Case. Tr. 7 Ja. Rot. 795. adjudged. My Reports, (e) 14 Ja.

(e) 1 Rol. Abr. 462. Pl. 4. S. C. with Notes.

4. So if a Man, in Consideration of 6 d. promises to give me 20 s. at the Day of my Marriage: He ought to take Notice of my Marriage at his Peril, without Notice given by me, because he hath undertaken to pay it at the Day. My Reports, 14 Ja. 44 El. Rot. 238. adjudged.

5. If a Man sells certain Weys of Barley to me, upon which I promise to pay him so much for every Wey as other Men give for a Wey: In this Case, the Action does not lie without Notice before given for how much he sells a Wey to other Men. My Reports, 13 Ja. (f) Haul and Hemmings, adjudged. 14 Ja. (g) Holms and Twist, P. 13 Ja. B. in Camera Scaccarii, for Woad.

(f) 1 Rol. Abr. 461. Pl. 15. S. C. with Notes.

(g) 1 Rol. Abr. 463. Pl. 15. S. C. with Notes.

6. If I promise another, for a Consideration, to give him 20 l. when he comes into Somersetshire: He need not give me Notice when he goes there, because this is a Duty by the coming into

(h) 1 Rol. Abr. 462. Pl. 5. S. C.

Somerſetſhire. My Reports, 13 Ja. Mich. 13 Ja. (h) Richardſon's Caſe, B. adjudged. Contra, my Reports, 13 Ja. Morſe and Gardiner.

7. If a Man ſells Land by the Name of 20 Acres, and covenants to repay ſo much for every Acre under this Number, and that it ſhall be meaſured by ſuch a Man before ſuch a Day: (i) If Part is meaſured accordingly, the Covenantor ought to take Notice thereof at his Peril, without any Notice given by the other. My Reports, 13 Ja. (k) Sir Baptiſt Hixt and Goates.

(i) This is tranſlated according to the Original, in which it ſeems to be miſprinted, and that it ſhould be, If it is meaſured accordingly, ſcilicet, if the whole is meaſured. (k) 1 Rol. Rep. 314. S. C. & S. P. per Curiam. 1 Rol. Abr. 462. Pl. 7. S. C.

8. So in the ſaid Caſe, if the Covenant had been, That the Land ſhould be meaſured by Two Men, ſcilicet, One by the Aſſignment of each Party, before ſuch a Day, and one aſſigns, and gives Notice to the Covenantor of the Time of the Meaſuring: If the other does not aſſign any for him, but he that is aſſigned meaſures it alone, the Covenantor ought to take Notice thereof at his Peril, for it is his Default that his Man was not there, and therefore it is as if the other had been only appointed to meaſure it. My Reports, 13 Jac. (l) Goates and Sir Baptiſt Hixt, adjudged.

(l) 1 Rol. Rep. 314. S. C. adjudged. Cro. Jac. 391. S. C. adjudged, upon a Writ of Error. 1 Rol. Abr. 462. Pl. 7. S. C.

(D) Where the Want of Notice will excuſe the Performance of the Condition.

1. If A. and B. levy a Fine to the Uſe of A. in Fee, if B. does not pay 10 s. to A. at Michaelmas after, and if he does pay, then it ſhall be to the Uſe of A. for Life, and after to B. in Fee, and after B. dies before Michaelmas: The Heir of B. ought to take Notice of this Condition at his Peril; ſo that if he does not pay the 10 s. at Michaelmas, A. ſhall have the Land abſolutely in Fee, for A. is not bound to give him Notice, nor is any other appointed by the Law to give Notice in this Caſe, and therefore he ought to take Notice thereof at his Peril; for he is as privy in Law to the Eſtate limited by the Fine and Indenture of Uſes, as the Anceſtor himſelf, and the Anceſtor had Power to give the Land abſolutely, and divers times in ſuch Caſe it is not known who is Heir. Tr. 13 Car. B. R. (a) between Spring and Sir Julius Cæſar Maſter of the Rolls, adjudged per Curiam, in a Writ of Error upon a Judgment in Banco in a Quare impedit. Intratur, Mich. 11 Car.

(a) 1 Jon. 390. S. C. adjudged. Cooper and Edgar S. C. Winch. 103. 104, &c. 115, 116, 118, 119. with the Arguments at large, but no Judgment.

(b) 1 Rol. Abr. 463. Pl. 12, 13. like Point, with Notes.

2. (b) If A. in Conſideration of 10 l. given to him by B. aſſumes to pay 20 l. when ſuch a Ship, which was ready to go from D. to Hamburgh, beyond the Seas, ſhould go from D. to Hamburgh, and return to the ſame Place, ſcilicet, to D. aforeſaid: It ſeems he ought to pay the 20 l. upon the Return of the Ship, without any Notice given by the Obligee, for he hath taken upon himſelf to pay it at his Peril upon the Return of it. Contra, H. 13 Car. B. R. between Bully and Hubbins, adjudged per Curiam,

in a Writ of Error upon a Judgment in the Marſhalſea, where the Judgment was reverſed for not alledging Notice of the Return.

3. If A. promiſes B. in Conſideration that B. will permit A. and C. to enjoy a Tavern in Sturbridge Fair during the Fair, to pay to B. 10 l. for the Uſe of the Tavern; and alſo that before the End of the Fair he will pay all ſuch Money as B. ſhall diſburſe for Wine and Beer for the ſaid A. and C. during the Fair aforeſaid, to be expended in the ſaid Tavern. In an Action upon this Promiſe, after the End of the Fair, if the Plaintiff does not aver, That he gave Notice before the End of the Fair how much he had diſburſed for Wine and Beer for them to be there expended; this is not good, though he avers how much he diſburſed for it; and a Demand thereof after the Fair is not ſufficient, for A. could not know how much he had diſburs'd without Notice, and Notice thereof after the Fair is not ſufficient, * inaſmuch as it is to be paid for by A. during the Fair. Mich. 1649. between (c) Harris and Gibbon, adjudged in a Writ of Error upon a Judgment in Cambridge, and the Judgment reverſed accordingly. Intratur, P. 1649. Rot. 303.

* Fol. 470.

(c) Styl. 172. S. C. adjudged.

4. If A. and B. agree and promiſe to marry one with another, and after B. the Man, promiſes A. in Conſideration that ſhe will diſengage him of his ſaid Promiſe, he will give her 1000 l. In an Action by A. againſt B. for the 1000 l. if A. avers, that ſhe after the ſame Day exoneravit ipſum (Anglice, did diſengage him) of his ſaid Promiſe, and yet he hath not paid the 1000 l. this is a good Averment of the Performance of the Promiſe, without alledging any Notice given to B. of the Diſengagement; for it ſhall be intended prima Facie, that this Diſengagement was made to B. himſelf, and not in the Abſence of B. for it ſhall be a full Diſengagement made to the Perſon of B. ſo that he ſhould have his Liberty to marry any other. Mich. 1651. between (d) Baker and Smith, adjudged per Curiam, this being moved in Arreſt of Judgment. Intratur.

(d) Sytl. 295. 303, 304. S. C. the Court divided, & adjornatur.

5. If A. promiſes B. a Woman, that if ſhe will leave her Father's Houſe, and come to his Houſe, that he will marry her: In an Action by B. againſt A. upon this Promiſe, if ſhe avers, That ſhe hath left the Houſe of her Father, and come to the Houſe of A. and there obtulit to marry him, and yet the ſaid A. did not marry her; (e) this is a good Averment that B. had Notice thereof, for by the obtulit to marry the Defendant, is intended that ſhe obtulit herſelf to the Perſon of the Defendant himſelf, inaſmuch as this is a Perſonal Act to be done between them. Tr. 1651.

(e) Vid. the Notes upon 1 Rol. Abr. 463. Pl. 14.

(f) adjudged per Curiam, after a Verdict for the Plaintiff.

(f) Peck & Ingram, Styl. 263, 273. S. C. adjudged.

(E) What Collateral (a) Thing ſhall be ſaid a Satisfaction.

(a) Dal. 105.

1. If the Condition of an Obligation be to pay 10 l. at a Day; if at the Day of Payment he enters into another Obligation to the ſame Obligee for the ſame Sum as the firſt was, and this with a Surety, (b) which was more than was done in the other, yet this is not any Diſcharge of the firſt Obligation, (c) becauſe it is but a thing in Action, and no preſent Satisfaction;

(b) An Adminiſtrator gave a Bond in Satisfaction of his Inteſtate's Bond; and whether this was not good, Blyth & Hill, 1 Mod. 221, 225. dubitatur. 2 Mod. 136, 137. dubitatur.

(c) Co. Lit. 212. S. P. con.

and

and this was adjudged twice in Banco. Mich. 13 Ja. upon Demurrer, and there (d) other Judgments cited accordingly, quod vide, Tr. 13 Ja. B. between (e) Hawes and Birch adjudged. Hobart's Reports (f) 94. between (g) Lovelace and Arthur, adjudged upon Demurrer.

(d) Beard and Hains, Moor 872. Pl. 1212. Cro. Car. 86. Lit. Rep. 58. adjudged.

(e) 1 Brownl. 71. S. C. adjudged. (f) Hob. Fol. 68. S. C. (g) 1 Brownl. 47. S. C.

2. If a Man be bound in 20 l. in a Statute, and he makes an Obligation to him for it, and he accepts it; this is not any Satisfaction, because the Statute is of greater Advantage than the Obligation. 12 H. 4. 23. b.

3. If the Condition of an Obligation be to pay 25 l. at Michaelmas, and the Obligor leases Land to the Obligee, rendring 39 l. Rent at the said Feast of St. Michael; and after, before the said Day of Payment, concordatum & agreatum fuit, that the said Obligee, being the Lessee, should retain 25 l. of the said Rent, in Satisfaction of the said Obligation, and for the Residue of the Rent, that he should remain answerable to the Obligor; and after, at the said Day, because of the said Agreement, the Obligor does not pay the said 25 l. This Obligation is forfeited, for this Agreement cannot be any Discharge of the Obligation, inasmuch as the Rent at the Time of the Agreement made was not due. M. 41, 42 Eliz. B. R. between Harington and Andrews, adjudged.

(h) Cro. Jac. 579. like Point, where a Bond was given in Satisfaction of a Judgment. 1 Brownl. 29.

4. (h) If the Condition of an Obligation be to pay 10 l. at a Day, which is not paid at the Day, but after the Day the Obligee accepts a (i) Statute Staple from the Obligor for the same Debt, in full Satisfaction of the Obligation; yet this is not any Satisfaction; for though the Statute be a Matter of Record, and higher than the Obligation, yet the Obligation remains in Force; and the Obligee hath his Election to sue the one * or the other. (k) Braithait's Case cited in Co. 6. Higgen's Case 44. b. adjudged.

* Fol. 471. like Point adjudged. Noys and Hopgood, Cro. Jac. 649, 650. adjudged, where pleaded, That an Annuity was granted in Discharge of a Bond. (i) So where one Bond is given in Satisfaction of another. Wanhood and Crick, Cro. Eliz. 716. adjudged. Cro. Car. 86. cited. Et vid Lit. Rep. 58. Cro. El. 727. for one Deed cannot determine the Duty upon another. Cro. El. 304. 1 Brownl. 74. (k) Cro. Car. 86. seems to be S. C. cited.

(l) Co. Lit. 212, 213. F. P. (m) Cro. Eliz. 697. S. C. cited and agreed, because the Agreement at the Day to remain, is as a Payment.

(l) 5. If the Condition of an Obligation be to pay 100 Marks at a Day, and at the Day the Obligor and Obligee accompt together at another Place, and because the Obligee owes to the Obligor 20 l. by another Contract, the Obligee allows the 20 l. in Payment of the 100 Marks: This is a good Satisfaction of the Condition, for this is all one as if the Obligor had paid the Obligee, and he had repaid him. (m) 12 R. 2. Barr 243. This is a Payment by Way of Retainer.

6. If the Obligee and Obligor, before the Day of Payment of the Money to be paid by the Condition, agree together, That the Obligor shall do several particular Things, as, amongst other Things, to assign his Interest in the Farm of the Customs of French Wines, and he pleads, that he did all in particular, shewing how, and it appears to the Court, that he could not by Law assign his Interest in the said Customs, they being in Covenant only: Though the Obligee had enjoyed them accordingly, yet this is not any Discharge of the Obligation, inasmuch as this is like an Accord; so that all ought to be performed, other-

ways it is not good, because the Obligee hath not any Remedy for that which is not performed. Trin 6 Car. B. R. between (n) Simons and Mowleston, adjudged, this being moved in Arrest of Judgment.

(n) Cro Car. 193. S. C. adjudged.

7. (o) If an Obligation or Feoffment be conditioned for the Payment of Money at a certain Time and Place; a lesser Sum cannot be paid at the Time and Place in Satisfaction thereof, because it is apparent that a lesser Sum of Money cannot be a Satisfaction of a greater. *Co. Lit.* 212. b.

(o) Pinnel's Case S. P. 5 Co. 117. a. resolved per Curiam. Moor 677. Pl. 923. per Curiam. Moor. 47. Pl. 142. S. P. cited to be adjudged.

8. (p) But if the Obligee or Feoffee accepts a lesser Sum before the Day, or at another Place; this is a good Satisfaction. *Co. Lit.* 212. b.

(p) Pinnel's Case S. P. 5 Co. 117. a. adjudged. Moor. 677. Pl. 923. adjudged. Cro. El. 304. S. P. per Gaudy.

9. (q) Or if the Obligee or Feoffee at the Day receives Part, and thereof makes (r) an Acquittance in full Satisfaction of the whole; this is sufficient, because the Deed amounts to an Acquittance of the Whole. *Co. Lit.* 212. b.

(q) 5 Co. 117. b. S P.
(r) For this vid. Moor 47. Pl. 142.

(F) By whom the Collateral Thing being given, it shall be a good Satisfaction.

1. IF the Condition of an Obligation be to pay 20 l. at a Day, and a Stranger surrenders a Copyhold to the Use of the Obligee in Satisfaction of the 20 l. which the Obligee accepts: This is a good Satisfaction and Discharge of the Obligation. Trin. 39 Eliz. B. R. between (a) Grimes and Blofield.

(a) Cro. El. 541. S. C adjudged by Popham and Clinch, ceteris Justiciariis absentibus.

(G) (a) In what Cases the Dispensation or Extinguishment of Part of the Condition shall be of the Whole.

(a) Styl. 316, 317.

1. IF a Man leases for Years, upon Condition that the Lessee or his Assigns shall not alien without Licence of the Lessor; and after the Lessor licenses the Lessee to alien to whom he pleases, who after aliens to J. S. The Condition is quite gone by this Licence; for by the Dispensation to the Lessee, the Condition is utterly discharged, as to the Assignees. Co. 4. (b) Dumper against Sims 119. B Pasch. 43 Eliz. B. R. adjudged; for a Condition is to be taken strictly; and by his Alienation with Licence, the Condition is satisfied. M. 3 Jac. B. between (c) Walker and Bellamy adjudged.

(b) Cro. El. 815, 816. S. C. adjudged.
(c) Cro. Jac. 102. S. C. but S. P. does not appear.

2. If a Man leases Land, upon Condition that he shall not alien the Land, nor any Part thereof, without the Assent of the Lessor; and after he aliens Part with the Assent of the Lessor: He may after alien the Residue without his Assent; for all the Condition is gone by this, for it cannot be divided or appor-

tioned. Co. 4. Dumper's Caſe. Contra, D. 16 Eliz. 334. 32. adjudged.

3. If a Man be bound to build an Houſe, and the Obligor diſcharges one Poſt; he is diſcharged of the whole. 4 H. 7. 6. b. per Keble.

4. If a Man be bound to go with A. C. and D. and the Obligor diſcharges him from D. he is diſcharged by this from going with A. and C. though that which is diſcharged is for his Advantage, for the Condition is entire. Contra, 4 H. 7. 6. B. per Brian.

5. So if the Condition be to plough my Land in ſuch a Town, and I diſcharge him of Parcel; this alſo diſcharges the reſt. Contra, (d) 4 H. 7. 6. B. per Brian.

(d) Moor 205. S. C. cited.

6. (e) If a Man hath a Power of Revocation, and he by his own Act extinguiſhes his Power of Revocation in Part, as by levying a Fine of Part; yet the Power of Revocation remains for the Reſidue, becauſe this is in Nature of a Limitation, and not of a Condition. Co. Lit. 215. cited, the Earl of Shrewsbury's Caſe, in Curia Wardorum, Paſch. 39 Eliz. & Mich. 40 & 41 Eliz. reſolved.

(e) Co. Lit. Fol. 472. 237. a. S. P. Hob. 313. S. P.

7. If A. leaſes Land to Three, upon Condition, that they, or any of them, ſhall not alien without Licence of the Leſſor; and after one aliens with the Licence of the Leſſor: This diſcharges all the Condition as to the other Two alſo. Trin. 28 Eliz. B. between (f) Leeds and Crompton, adjudged; cited, Co. 4. 120.

(f) Godb. 93. S. C. 4 Leon. 58. S. C. but by neither of theſe Books does the S. P. appear; but Noy 32. S. C. & S. P. is cited; ſo Cro. El. 816.

8. If the Owner of a Ship covenants with B. that he will receive ſuch Lading as he ſhall appoint at York by ſuch a Day, and then to go with the firſt Wind to R. and there to unload, and take in other Wares; and after B. diſcharges him from taking in Goods at Y. but that he ſhall receive his Lading at R. This Diſcharge of Parcel of the Covenant is not any Diſcharge of the Reſidue. Trin. 11 Jac. B. between Smith and Barnes, per Curiam, for theſe are ſeveral.

(g) So if a Stranger hath Execution by Elegit. Moor. 71. Pl. 193. Dal. 72. Moor. 91. Pl. 225. Et vid. 4 Leon. 28.

2. If (g) Leſſee for Years hath Execution by *Elegit* of a Moiety of the Rent and Reverſion againſt the Leſſor, where the Leaſe is upon Condition; this is a Suſpenſion of all the Condition during the Time of the Extent; and though but a Moiety of the Rent is extended, yet the entire Condition is ſuſpended. *Paſch.* 2 *Eliz. Moor* 22. *Pl.* 75. adjudged.

(h) Dyer 152. Pl. 7. S. P. by Three Judges againſt Two; but 4 Co. 120. b. the Opinion of the Two Judges is cited as Law. Et vid. Whitchcot & Fox, Cro. Jac. 398. 1 Rol. Rep. 70, 390. 2 Bulſ. 290, 291.

10. (h) If a Man leaſes for Years, upon Condition that the Leſſee, his Executors or Aſſigns, or any other who ſhall have the Term, ſhall not alien without Licence of the Leſſor, but only to his Wife or Children, and the Leſſee deviſes the Term to his Wife, and dies; the Wife cannot alien without Licence, for ſhe is reſtrained by expreſs Words as well as the Leſſee. *Mich.* 41 *&* 42 *Eliz.* between *Thornhill* and *King*. *Cro. El.* 737. adjudged by Three Judges; but *Walmſley* doubted, becauſe the Words are, That the Leſſee or his Aſſigns, *&c.* ſhould not alien but to his Wife or Children; and the Wife is not within theſe Words, for ſhe cannot alien to her ſelf.

(H) In

(a) (H) In what Caſes, after Refuſal, (b) he ſhall ſay *uncore priſt.*

1. (c) A Man bound in 20 Quarters of Corn, upon Condition (d) for 10 Quarters: If it be refuſed at the Day, he may plead it, without ſaying uncore priſt. Co. 9. Peytoe 79. for it is bonum periturum. Contra, 28 H. 8. 25. 154.

(a) 1 Rol. Abr. 448. D. (b) But for this vid. 2 Rol. Abr. 523, 524. (c) Co. Lit. 207. a. S. P. (d) The Senſe is imperfect; and I ſuppoſe ſhould be, for the Delivery of, &c.

2. A Man bound in a Statute, Recognizance, or (e) Obligation, (f) defeaſanced for a leſſer Sum: The Obligee refuſes at the Day, it is gone for ever. Co. 9. Peytoe 79. b.

(e) Co. Lit. 207. a. S. P. becauſe it is no Parcel of the Sum contained in the Obligation. Cro. Eliz. 755. S. P. adjudged. Moor 36. Pl. 119. S. P. adjudged. (f) Secus, where an Obligation is conditioned for the Payment of a leſſer Sum. 1 Rol. Abr. 448. Pl. 1. Cro. El. 755. per Curiam.

3. If a Man makes a Feoffment in Fee, (g) by Way of Mortgage, upon Condition to be void upon Payment of Money by the Feoffor to the Feoffee at a Day; if the Feoffor tenders the Money at the Day, and the Feoffee refuſes it, the Feoffee is without Remedy at the Common Law to recover his Money. *Lit. Sect.* 335. *Co. Lit.* 207. a.

(g) This muſt be intended to be made without any Loan or Duty preceding; for otherwiſe the Duty remains notwithſtanding, and may be recovered in an Action of Debt. Co. Lit. 209. a. b.

(I) (a) What (b) Things will deſtroy a Condition, what not.

Acts by the Reſervor.

1. (c) D. 14 Eliz. 309. 75. agreed per Curiam, by the Grant of the Reverſion of Part of the Land, upon a Leaſe for Years, upon which a Rent upon Condition is reſerved, all the Condition is confounded, becauſe it is penal, and therefore cannot be divided; and (d) he muſt deſtroy his own Grant, if the Condition ſhall remain, although alſo this Condition was reſerved (e) upon ſeveral Rents. Co. 5. (f) Knight 55. b. reſolved.

(a) Where ſuſpended, &c. by the Feoffor, Leſſor, &c. taking back an Eſtate. 1 Rol. Abr. 939. Pl. 9. 10. (b) Where deſtroyed by the Feoffment of him that was to take Advantage of it. Co. Lit. 379. a. b.

(c) Co. Lit. 215. S. C. & S. P. cited. 4 Leon. 27, S. P. adjudged. (d) But if Leſſee for Years, upon ſuch Condition, aſſigns Part, yet the Condition remains, for he cannot by his own Act diſcharge the Eſtate of the Condition. Godb. 336. adjudged. (e) Moor 52. Pl. 152. Dal. 53, 54. Moor 98. (f) 1 And. 173, 174. S. C. & S. P. admitted per Curiam. 2 Leon. 124. S. C. & S. P. admitted per Curiam. Gouldſ. 15, 19. S. C. & S. P. admitted per Curiam. Moor 199. &c. Pl. 349. S. C. & S. P. admitted per Curiam. Et vid. 4 Leon. 187. Styl. 316, 317.

2. (g) Co. 5. (h) Knight 55. b. reſolved, the King grants Part of the Reverſion: His Patentee ſhall not take Advantage of the Condition; but the King by his Prerogative may, becauſe it remains in him.

(g) Co. Lit. 215. S. P. (h) 1 And. 173, 174. S. C. 2 Leon. 124. S. C. Gouldſ. 15, 19. S. C. Moor 199 &c. Pl. 349.

3. If

3. If a Man leaſes for Life upon Condition, the Remainder over; the Condition is deſtroyed, becauſe that otherways he ſhall deſtroy the Remander which he hath created.

4. So if a Man deviſes for Life upon Condition, the Remainder to another; this deſtroys the Condition. 29 Aſſ. 17. Co. 10. Ma Port 40. b. and there, 41. b. he cites, 4 Ma. per Curiam, contra, 2 Ma. 127. 52. becauſe it is made at the ſame Time.

5. If a Man leaſes for Years upon Condition, and after leaſes for Years (i) by Indenture to another, to commence preſently: This Second Leaſe hath not given away the Condition, for it is but by Eſtoppel between the Parties. Paſch 41 Eliz. B. R. per Curiam.

(i) The Word per is wanting in the Original.

6. If a Man leaſes for Years, upon a Condition to be performed on the Part of the Leſſor, and before the Time of the Performance of the Condition, he leaſes to a Stranger for Years by Indenture; the Condition is not ſuſpended or deſtroyed, but may be performed notwithſtanding, for 'tis an Eſtoppel only between the Leſſor and Second Leſſee. *Trin.* 41 *Eliz.* between (k) *Ferrers* and *Borroughs*, *Cro. El.* 665. adjudged *per totam Curiam*; and *Coke*, Attotney-General, being in Court, ſaid it was a clear Caſe.

(k) Ow. 65. S. C. adjudged.

7. But if a Man makes a Feoffment upon ſuch Condition, and after levies a Fine to a Stranger, the Condition is gone. *Trin.* 41 *Eliz. Cr. El.* 665. *per Curiam.*

(K) Acts in Law.

Fol. 473.

1. D. 14 Eliz. 309. 75. per Curiam, if the Reverſion of a Leaſe for Years be ſevered in any Part, the entire Condition reſerved upon the Leaſe for Years ſhall not be deſtroyed, if the Severance be by Diſcent, Eviaion, or Act of the Law: Otherways (a) by the Act of the Party.

(a) Vid. 1ſt Part, Title Appoztionment.

2. If a Man makes a (b) Feoffment to the Uſe of himſelf for Life, the Remainder to another, &c. with Power of Revocation; and after makes a Leaſe (c) for Years: He cannot (d) after revoke during the Leaſe. Paſch. 3 Jac. B. between Yeoland and Fettis, per Curiam agreed.

(b) So if a Man makes a Feoffment in Fee, upon Condition to re-enfeoff, &c. and the Feoffor after diſſeiſes the Feoffee, and leaſes for Years: This is a Diſpenſation with the Condition during the Term. 2 Co. 59. b. adjudged. But for this, vid. under Title Extinguiſhment. (c) If for Life, 1 Vent. 42. doubted, whether it only ſuſpends the Power, as a Leaſe for Years would do, or extinguiſhes it as a Feoffment. (d) But whether he may not revoke the Remainder, vid. 2 Brownl. 228. & Q. (e) Moor 788. Pl. 1087. S. C. and the Court divided. — But by Coke Chief Juſtice; if one makes a Conveyance with Power to make Leaſes, and with Power to revoke, if he makes a Leaſe he may notwithſtanding revoke for the Reſidue. Moor 788. and vid Cro. Jac. 180, 181.

3. But after the Leaſe expired he may revoke. Dubitatur, P. 3 Jac. B. between Yeoland and Fettis.

4. If a Man leaſes two Acres, one of the Nature of Borough *Engliſh*, and the other at the Common Law, upon Condition, *&c.* and the Leſſor, having Iſſue Two Sons, dies; each of them ſhall enter for Breach of the Condition. *Co. Lit.* 215. a.

I

(L) Into

(L) Into what Thing the Entry may be for the Condition broke.

1. If a Man leaſes two Mills, upon Condition that if the Leſſee leaſes them, or aſſigns either of them to another, it ſhall be lawful to him to re-enter: If he leaſes one, the Leſſor may enter into both, for the Condition goes to both. 38 E. 3. 34.

2. If *A.* leaſes a Meſſuage for Years, rendring Rent, with a Condition of Re-entry for Non-payment; and the Leſſee aſſigns his Term in Part to one, and in other Part to another, and in another Part to another, and retains Part himſelf; and after *A.* by Fine grants the Reverſion of the whole. If Rent be Arrear, afterwards the Grantee may enter into all the Meſſuage; (a) for the Leſſee, by Apportionment of the Land, cannot deſtroy the Condition, as the Leſſor may, by Grant of Part of the Reverſion. *Trin.* 21 *Jac. Palm.* 382. *per Curiam*; and it was ſaid by *Chamberlain*, that it had been ſo adjudged before in this Court.

(a) If there be Two Leſſees for Years, upon Condition that they, nor either of them, ſhall not alien without Aſſent of the Leſſor, and they make Partition; and after one aliens without Aſſent of the Leſſor; this is a Forfeiture of the whole. Cro. El. 163. adjudged. Et vid. 1 Leon. 292. Cro. El. 35.

(M) At what Time he may enter for the Condition broke or performed.

1. If A. makes a Feoffment of the Land to J S. in Fee, upon Condition that if he pays 10 l. to J. S. the firſt of May, 6 Car. that it ſhall be lawful for him to re-enter, and after he pays the 10 l. before the Day, ſcilicet, the firſt of April, and J. S. accepts it: Though this is a good Performance of the Condition, inaſmuch as Payment before the Day is Payment at the Day, yet A. cannot re-enter and reveſt his old Eſtate by Force of the Condition till the firſt of May, becauſe the Condition does not give him Power to re-enter till the ſaid Day. Mich. 8 Car. B. R. between (a) Burgoyne and Spurling, held by Berkly, in the Caſe of a Surrender of a Copyhold.

(a) Cro. Car. 273, 283. S. C. but S. P. does not appear. 1 Jon. 306. S. C. but S. P. does not appear.

(N) (a) Who (b) may enter for the Condition broke.

(a) The Succeſſor of a Biſhop for a Breach in Time of his Predeceſſor, or in Time of Vacation.

1. If a Feoffment be made, upon Condition to enfeoff a Stranger, and the Feoffee does not perform it, (c) the Stranger

(b) If the Condition of a Feoffment be to enfeoff J. S. and his Heirs, and he refuſeth, the Feoffor may re-enter; for by the expreſs Intent of the Condition, the Feoffee ſhould not have any Benefit, but be only an Inſtrument to convey over the Land. Co. Lit. 209. a. 1 Leon. 266. 2 Leon. 222. 1 Rol. Abr. 452. Pl. 4. — But if the Condition had been to make a Gift in Tail, or to grant a Rent-Charge to J. S. and he refuſed, the Feoffor ſhould not re-enter, becauſe the Feoffee was to retain the Land. Co. Lit. 209. a. 1 Leon. 266. 2 Leon. 222. 1 Rol. Abr. 452. Pl. 5. (c) 1 And. 184. 2 And. 22, 23. 1 Rol. Abr. 407. Pl. 1. Moor. 52. Pl. 152.

cannot enter for the Breach of it, because he is a Stranger to the Condition. 21 Ed. 4. 56.

2. But in this Case the Feoffor himself may enter for the Condition broke. 21 E. 4. 56.

3. He in Remainder cannot enter for a Condition broke by the particular Estate. (d) 29 Ass. 17.

(d) Br. Condition 111. S. C.

4. If the King's Tenant aliens upon Condition and dies, his Heir in Ward to the King for other Land, the King may enter in the Right of the Heir for the Condition broke. (e) 18 Ass. 18. adjudged. Lord Clifford's Case.

(e) Br. Condition 105. S. C.

5. If the King's Tenant aliens in Fee upon Condition, and dies, his Heir within Age, the King may enter in the Right of the Heir for the Condition broke. (f) 17 Ass 20.

(f) Br. Condition 104. S. C.

6. (g) If a (gg) Man leases (h) for Years, upon Condition if the Rent be Arrear, (i) that the Lease shall cease, and after grants over the Reversion; and after the Condition is broke, the Grantee of the Reversion may enter into the Land, for the Lease * is determined before Entry, (k) by the Breach of the Condition. H. 41 El. B. R. between (l) Darcy and Matthewe.

(g) Co. Lit. 214. b. S. P.

* Fol. 474.

2 Brownl. 225, 228. S. P. where the Condition was to be performed on the Part of the Lessee. Secus, if to be performed on the Part of the Lessor. 1 Leon. 60, 61. S. P. adjudged. Et vid. in the Arguments in Sir Moil Finch's Case. 2 Leon. 134, 135. &c. Poph. 27. (gg) In this Case, Lessee for Years made an Under-Lease upon Condition, &c. Cro. El. 650. Moor 525. Pl. 694. (h) Secus, if a Lease for Life, because a Freehold cannot cease before Entry. Co. Lit. 214. b. 2 Leon. 134. 1 Rol. Rep. 360. per Coke. (i) Otherways by the Common Law, if the Condition had been upon Non-payment to re-enter; for nothing in Action, Entry, or Re-entry, can be granted over. Co. Lit. 214. a. 215. a. 3 Leon. 269. — But now vid. the Statute 32 H. 8. Cap. 34. (k) So where an Estate determines by reason of a Limitation annexed. Co. Lit. 214. b. (l) Cro. Eliz. 650. S. C. & S. P. by Two Judges, the other doubting whether he might enter by the Common Law; though 'twas agreed by all, he might by the Statute. Moor 525. Pl. 694. S. C. adjudged.

(m) Co. Lit. 202. a. S. P. 336. b. S. P. Br. Condition 71. S. P.

7. (m) If a Man seised of Lands in the Right of his Wife, makes a Feoffment in Fee upon Condition, and dies; and after the Condition is broke, the (n) Heir of the Husband shall enter; for though no Right descended to him, yet the Title of Entry by Force of the Condition, which was created upon the Feoffment, and reserved to the Feoffor and his Heirs, descended. 8 *Co.* 43. b. 44. a.

(n) So if a Man makes a Feoffment in Fee of Lands in Borough-English, &c. the Heir at Common Law shall enter. Godb. 3. Quære, If the younger Son shall after enter upon him.

(o) Ruddal and Miller S. P. Moor 212. Pl. 353. adjudged. 1 Leon 298. appears. Sav. 76, 77. adjudged.

8. (o) If *Cestuy que use*, after the Statute of *Rich.* 3. and before the Statute 27 *H.* 8. had made a Feoffment in Fee upon Condition, the Feoffee should not have enter'd for the Condition broke, but the *Cestuy que use*. *Co. Lit.* 202. a. 215. a.

9. If a Man seised in Fee makes a Lease for Life, rendring Rent, and for Default of Payment, a Re-entry, *&c.* and after dies without Heir, living the Tenant for Life: Though the Lord by Escheat shall have the Rent, as incident to the Reversion, and may distrain for it, yet he cannot enter, *&c.* *Lit. Sect.* 348. *Co. Lit.* 215. b.

10. Guardian in Chivalry or Socage, in the Right of the Heir, may take Benefit of a Condition by Entry or Re-entry by the Common Law. *Co. Lit.* 215. b.

(O) What Things ſhall be avoided by Entry for the Condition broke.

1. If the Baron be enfeoffed in Fee, upon Condition for the Non-payment of a certain Rent to re-enter, and after the Baron dies; and after the Condition is broke, and the Feoffor enters upon the Heir for the Breach thereof, the Wife of the Baron ſhall not be endowed, for her Title is defeated by the Entry for the Condition broke. (a) 22 E. 3. 19. b. Curia.

(a) Fitz Condition 12. S. C.

(P) How he ſhall be ſaid in who enters for the Condition broke.

(a) Of the ſame Eſtate.

1. (b) Regularly he ſhall be in of the (c) ſame Eſtate that he was when he parted with the Poſſeſſion.

(a) A Remainder is granted upon Condition; and after the particular Eſtate determines, and the Condition is broke, the Grantor ſhall have the Land in Poſſeſſion. 2 Rol. Rep. 60. (b) Co. Lit. 202. ſame Rule. (c) A Condition or Limitation annexed to an Eſtate ought to deſtroy the whole Eſtate. 1 Rep. 86. b. 6 Rep. 40. b.

2. If an Eſtate for Life be upon Condition, the Remainder over; admitting it a good Condition if he enters for Breach thereof, it ſhall defeat the Remainder, becauſe the Livery is defeated. D. 3. Ma. 127. 54.

3. A Gift in Tail, Remainder to the right Heir of the Donee, upon (d) Condition that if the Donee or his Heir alien, &c. this ſhall defeat the Tail only. D. 23. Ma. 127. 55.

(d) This is very much miſprinted in the Original, for there it is ſur deviſe pur vie ſur Condition, and ſo inſenſible.

4. (e) Leſſee for Life makes a Feoffment upon Condition, and enters for Breach, he ſhall be Leſſee for Life, and reduce the Reverſion to the Leſſor. (f) 8 H. 6. 3. b.

(e) 8 Co. 44. a. S. P. Co. Lit. 202. b.
(f) I ſuppoſe this is miſprinted in the Original, for I find no ſuch Opinion in the Book, and believe it ſhould be 4 H. 6. which vide, Fitz. Entry Congeable 1. Br. 38.

5. If Leſſee for Life enfeoffs the Reverſioner upon Condition, and enters for Breach thereof, he ſhall be Leſſee again, and the Rent due to the Leſſor ſhall be revived. (g) 7 H. 6. 3.

(g) Fitz Rent revive, 1. S. C.

6. (h) Feoffment of Two Acres upon Condition to enter into one; if he enters for Breach thereof, it ſhall be but into one. D. 3. Ma. 127. 55.

(h) Co. Lit. 202. b. S. P.

7. Leſſee for Life and the Reverſioner join in a Feoffment upon Condition, reſerved to the Leſſee: If he enters for Breach thereof, this ſhall not defeat the entire Eſtate. D. 3. Ma. 127. 55.

8. Deviſe for Life upon Condition, Remainder over, (admitting it a good Condition;) the Entry ſhall defeat the Remainder, though it is not created by Livery, and the Remainder may be without a particular Eſtate by Deviſe, for he ought to be in of

(i) Br. Condition 111. S. C. Fitz. Aſſiſe 281. S. C.

the ſame Eſtate which he had at the Time of the Deviſe. (i) 29 Aſſ. 17. admitted per Curiam. Co. 9. Ma. Port 41. b. Contra, D. 3. Ma. 127. 54.

9. If a Man leaſes for Life, the Remainder to another in Fee, reſerving a Rent, upon Condition that if the Rent be Arrear, to enter and retain for all the Life of the Leſſee: If he enters for the Condition broke, he ſhall defeat the Remainder, and ſhall be ſeiſed in Fee. Dubitatur, (k) 29 Aſſ. 17.

(k) Br. Condition 111. S. C. Fitz Aſſiſe 281. S. C.

(l) Fitz Entry Congeable 1. S. P. Br. 38. S. P. Br. Condition 71. S. P. 8 Co. 44. a. S. P.

10. (l) If a Man ſeiſed of Lands in the Right of his Wife, makes a Feoffment in Fee upon Condition, and dies, and after the Condition is broke, and the Heir of the Feoffor enters, (m) 'tis impoſſible he ſhould have the ſame Eſtate which the Feoffor had at the Time of the Condition made, for that was in the Right of his Wife, which was diſſolved with the Coverture; and therefore when the Heir hath enter'd for the Condition broke, and defeated the Feoffment, his Eſtate vaniſhes, and preſently the Eſtate is veſted in the Wife. *Co. Lit.* 202. a. 336. b.

(m) So if a Man ſeiſed of Lands as Heir on the Part of his Mother, makes a Feoffment in Fee upon Condition, and dies, the Heir on the Part of the Father, who is Heir at Common Law, ſhall enter for the Condition broken, but the Heir of the Part of the Mother ſhall enter upon him, and ſhall enjoy the Land. Co. Lit. 12. b.

(n) 1 Co. 133. b. S. P.

11. (n) If *Ceſtuy que uſe*, after the Statute of *R.* 3. and before the Statute of 27 *H.* 8. had made a Feoffment in Fee upon Condition, and had after entered for the Condition broke; though at the Time of the Condition made he had but a bare Uſe, yet by his Feoffment the whole Eſtate and Right being diveſted out of the Feoffees, he ſhould have been ſeiſed of the whole Eſtate in the Land. *Co. Lit.* 202. a.

12. Tenant in Special Tail hath Iſſue, his Wife dies, and he makes a Feoffment in Fee upon Condition; the Iſſue dies, the Condition is broke, the Feoffor re-enters; he ſhall be only Tenant in Tail after Poſſibility of Iſſue extinct, though when he made the Feoffment he had an Eſtate Tail. *Co. Lit* 202. a. b.

13. If a Man makes a Feoffment in Fee, reſerving Rent, upon Condition if the Rent be not paid, to re-enter, and hold till ſatisfied, *&c.* The Feoffor by his Re-entry gains no Eſtate of Freehold, (o) but only an Intereſt by the Agreement of the Parties to take the Profits in Nature of a Diſtreſs. *Co. Lit.* 202. b. 203. a.

(o) For this, vide where there ſhall be an Intereſt, and yet no Eſtate in Fee for Life or Years, under Title Eſtate.

14. If a Man makes a Gift in Tail to *A.* the Remainder to *A.* and his Heirs, upon Condition that he ſhall not alien: The Condition is good, as to reſtrain any Diſcontinuance of the Eſtate-Tail; but as to the Fee-ſimple, it is void and repugnant; and therefore ſome are of Opinion, that this is a good Condition, and that it ſhall defeat the Alienation (p) for the Eſtate-Tail only, and leave a Fee-Simple in the Alienee. *Co. Lit.* 224. a.

(q) By Special Words, the Condition may extend to the parcular Eſtate, or to the Remainder only. Co. Lit. 230. b.

15. If the Father ſurrenders Copyhold Lands to the Uſe of the Son in Fee, upon Condition that he ſhall perform certain Covenants, and the Son after Admittance ſurrenders to the Uſe of *A.* in Fee, upon Condition that if the Son pays 10 *l.* the Surrender ſhall be void; and the Son pays not the 10 *l.* nor performs the Covenants, and the Father enters, and dies ſeiſed, and it deſcends to the Son; yet *A.* cannot enter upon him, for by the Entry of the Father, both the Surrenders were defeated, and the Son may confeſs and avoid the Eſtate of *A. Trin.* 33 *Eliz.* between *Simonds* and *Lawnd. Cro. Eliz.* 239. adjudged.

How he ſhall be ſaid in who enters for a Condition broke.

In Reſpect of (a) Collateral Qualities.

(a) The Lord grants over the Seigniory upon Condition, which is after broke, &c. and whether the ancient Seiſin will ſerve,, vide and after enters for the Condition broke, it ſhall not be holden by Homage Anceſtrel again, for the Right of the Preſcription and Privity of Eſtate were interrupted for the Time. *Co. Lit.* 202. b. So if a Copyhold eſcheats, (b) and the Lord makes a Feoffment in Fee upon Condition, *&c. Co. Lit.* 103. a. 202. b.

1. A Man being entitled to be Tenant by the Curteſy, makes a Feoffment in Fee upon Condition, and enters for the Condition broke, and then his Wife dies, he ſhall not be Tenant by the Curteſy; for though the Eſtate given by the Feoffment was conditional, yet his Title to be Tenant by the Curteſy was abſolutely extinct by the Feoffment. *Co. Lit.* 30.

2 Rol. Abr. 465. Pl. 1. — The Baron grants the Term of the Wife upon Condition, enters for the Condition broke, vide 1ſt Part 704. Pl. 15, 16, 17.

2. Tenant by Homage Anceſtrel makes a Feoffment in Fee upon Condition, and enters for the Condition broke, it ſhall not be holden by Homage Anceſtrel again, for the Right of the Preſcription and Privity of Eſtate were interrupted for the Time. *Co. Lit.* 202. b. So if a Copyhold eſcheats, (b) and the Lord makes a Feoffment in Fee upon Condition, *&c. Co. Lit.* 103. a. 202. b.

(b) For notwithſtanding the Entry for the Condition broke, the Seigniory is extinct, for that was excluſively extinct by the Feoffment. Co. Lit. 30. b.

3. * If Tenant for Life makes a Feoffment in Fee upon Condition, and enters for the Condition broke, he ſhall be Tenant for Life again, but ſubject to the Forfeiture; for though the Eſtate is reduced, yet the Forfeiture is not purged. *Co. Lit.* 202. b. 252. a.

* For this, vid. 1 Rol. Abr. 856. O. 1.

4. (c) If the Conuſee of a Statute, *&c.* or he that hath Lands till ſuch a Sum levied, ſurrenders to the Reverſioner upon Condition, and after enters for the Condition broke; he ſhall not hold over after the Extent incurred, or ſuch Time as the Money might have been levied. 4 *Co.* 82. b.

(c) Br. Statute Merchant 41. S.C. But for this, vid. 2 Rol. Abr. 479. Pl. 3.

5. If Leſſee for Life or Years, upon Condition to have a Fee, if, *&c.* grants his Eſtate upon Condition, and after enters for the Condition broke, and performs the firſt Condition; perhaps the Fee will accrue, for the Poſſibility was not abſolutely deſtroyed; and when he enters for the Condition broke, he is in of his old Eſtate. 8 *Rep.* 75. b.

Where the Cauſe or Conſideration of the Grant ſhall make a Condition.

1. IF a Man grants an Annuity *pro una Acra Terræ*, the Word (a) *pro* ſhews the Cauſe of the Grant, and amounts to a Condition; for if the Acre be evicted by an elder Title, the Annuity ſhall ceaſe. *Co. Lit.* 204. b.

(a) But where the Word pro makes a Condition, vid. Hob. 41. 2 Leon. 128. 4 Leon. 70. 1 Bulſ 167.

2. So if an Annuity is granted *pro decimis, &c* and the Grantee is unjuſtly diſturbed of the Tithes, the Annuity ceaſeth. *Co Lit.* 204. a.

3. But if a Man makes a Feoffment-Leaſe for Life, *&c. pro Conſilio impenſo, &c.* or *pro una Acra Terræ*; tho' he denies Counſel, or the Acre be evicted,

evicted, yet he ſhall not re-enter, for (b) the Eſtate being executed, it ſhall not be avoided without legal Words of Condition. *Co. Lit.* 204. a.

(b) But for Eſtates made Cauſa Matrimonii prolocut', vid. Co. Lit. 204. F. N. B. 205. Dyer 146, 147, 312. a. 2 Co. 74. a. Hob. 10.

Condition Impoſſible.

The Effect of a Condition (a) which becomes impoſſible after the Making.

(a) Where it muſt be performed as near the intent of the Condition as may be. Co. Lit. 219. b.

1. IF the Condition of a Feoffment, *&c.* be poſſible at the Making thereof, and after becomes impoſſible by the Act of God, yet the Eſtate of the Feoffee ſhall remain. *Co. Lit.* 206. a.

2. As if the Condition of a Feoffment, *&c.* be, That the Feoffor, *&c.* ſhall appear in ſuch a Court next Term, and the Feoffor dies before; the Eſtate of the Feoffee, *&c.* is abſolute, becauſe executed, and not to be redeemed back but by Matter Subſequent. *Co. Lit.* 206. a.

3. But if the Condition of a Bond, Recognizance, *&c.* is poſſible at the Making, but before it can be performed, becomes impoſſible by the Act of God, of the Law, or of the Obligee, *&c.* the Obligation is ſaved. *Co. Lit.* 206. a.

Who ſhall be bound by a Condition, (a) as Aſſignees.

(a) 1 Leon. 3. 1 And. 124.

1. (b) IF *A.* leaſes to *B.* for Years, upon Condition that *B.* his Executors or Aſſigns, ſhall not alien, and *B.* makes his Wife Executrix, and dies, and the Wife takes Husband, and he aliens: This is a Breach. *Paſch.* 28 *H.* 8. *Dyer* 6, 7. by *Brown* and *Shelley contra Baldwin*, for the Land is tied with the Condition, into whoſe Hands ſoever it comes.

(b) 1 Leon. 3. S. P. by Mead and Periam, and vide Moor 11. Pl. 40. 21. Pl. 71.

2. (c) If a Leaſe for Years is made upon Condition the Leſſee, his Executors, or Aſſigns, ſhall not alien without the Aſſent of the Leſſor, and the Leſſee dies Inteſtate; his Adminiſtrator cannot aſſign without Licence, for he is an Aſſignee in Law. *Paſch* 26 Eliz. (d) Sir *William More*'s Caſe, *Cro. Eliz.* 26. adjudged.

(c) Dal. 83. S. P. dubitatur. Moor 44. Pl. 136. like Point.

(d) 1 Leon. 3. S. C. and S. P. by Periam Juſtice, Contra. 1 And. 123, 124. S. C. adjudged by Three Judges againſt One, who held the Adminiſtrator was no Aſſignee, becauſe he came in by the Act of the Ordinary only. Cro. Eliz. 657. S. C. cited.

3. If a Man leaſes an Houſe for 80 Years, upon Condition the Leſſee, his Executors and Aſſigns, ſhall maintain it in Repairs; and if, upon lawful Warning given by the Leſſor, that the Houſe is in Decay, it is not repaired, *&c.* within Six Months, the Leſſor, *&c.* may re-enter; and the Leſſee leaſes it to *A.* for 30 Years, and *A.* leaſes it to *B.* for 15 Years: If the Houſe is out of Repair, Warning muſt be given to the firſt Leſſee, and not to *B.* for he is no Aſſignee of the Term, but hath only a Petit Intereſt under the great Leaſe. *Paſch.* 1 *Jac.* between (a) *Sweeton* and *Cuſh.* *Yelv.* 36. adjudged; and (b) that Warning need not be given at the Houſe, but to the Perſon of the Leſſee that hath the grand Intereſt.

(a) Moor 680. Pl. 932. S. C. but S. P. does not appear Cro. Jac. 9. S. C. adjudged; and that Notice to B. (being a Perſon not concerned) tho' upon the Land, is not ſufficient. Ow. 114. S. C. adjudged. (b) Moor 680. Pl. 932. S. C. and S. P. adjudged. Ow. 114. S. P. per Poph.

Condition, Covenant.

What Act or Thing will excuse the Performance.

1. IF Leſſee for Years covenants to do all reaſonable Chairs for his Leſſor with his Carts, Carriages, and otherways, upon Requeſt, and the Leſſor requires him to bring him Three Load of Coals: If the Leſſee at the Time hath no Cart nor Carriage, he is excuſed; for he is not bound to keep Carts to ſerve the Leſſor. *Mich.* 2 *Car.* between *Manners* and *Veſy.* *Latch.* 202. by *Jermin*, and *Jones* inclined accordingly.

Condition to enlarge or encreaſe the Eſtate.

1. A Reverſion may be granted in Tail, upon Condition, That if the Grantee pays 20 *s.* he ſhall have a Fee, for there is no Neceſſity that the accruing Eſtate ſhould merge the firſt Eſtate. *Trin.* 7 *Jac.* (a) Lord *Stafford*'s Caſe. 8 *Co.* 73, 74. adjudged upon ſuch a Grant made by Queen *Elizabeth.*

(a) 2 Brownl. 248, 249 &c. S. C. adjudged

2. (b) But there are Four Things neceſſary to encreaſe an Eſtate by force of ſuch a Condition. 1. A (c) particular Eſtate, as a Foundation upon which the greater Eſtate muſt be erected. 2. That the particular Eſtate (d) continue in the (e) Leſſee or Grantee till the Increaſe happen. 3. The greater Eſtate muſt veſt (f) at the Time the Contingency happens, or otherways it ſhall never veſt. 4. The particular Eſtate and the Increaſe ought to take Effect by the ſame, or by ſeveral Deeds delivered at the ſame time. 8 *Co.* 75. a. *per Curiam.*

(b) 2 Brownl. 251. S. C. and S. P.

(c) Which muſt be permanent, and not revocable at the Will of the Grantor or Leſſor. 8 Co. 75. a. (d) The Privity muſt continue; but perhaps if the particular Eſtate is granted upon Condition, and there is a Breach and Re-entry before the Contingency happens, 'tis well enough. 8 Co. 75. b. (e) But there is no Neceſſity for the Continuance of the Eſtate on the Part of the Leſſor, for he can by no Act derogate from his own Grant. 8 Co. 78. a. 2 Brownl. 252. (f) If there be a Leaſe for Years upon Condition the Leſſee ſhall have a Fee if ouſted by the Leſſor, eo inſtante the Leſſor ouſts him, the Leſſee hath a Fee. 8 Co. 76. a.

3. If a Man grants an Advowſon, *&c.* for Years, upon Condition, That if the Leſſee pay 10 *s.* within one Year, that he ſhall have it for Life; and that if he after the Year pays 20 *s.* that he ſhall have a Fee, and the Leſſee pays both Sums according to the Condition, yet he ſhall have but an Eſtate for Life; for the Eſtate for Life at the Time of the Grant was but in Contingency, and a Poſſibility cannot increaſe upon a Poſſibility, and the Fee cannot increaſe upon the Eſtate for Years, for that was merged by the Acceſſion of the Eſtate for Life. 8 *Co.* 75. a. b.

4. (g) If a Leaſe be made to Two, with ſuch Condition, to have a Fee, and one dies, the Survivor may perform the Condition, and have the Fee. 8 *Co.* 75. b.

(g) 2 Brownl. 251. S. C. and S. P.

5. But if they make Partition, the Condition is deſtroyed, for the Eſtate in Fee ought to increaſe to them jointly. 8 *Co.* 76. a.

Confir-

Fol. 475.

(a) Quælibet confirmatio aut eſt perficiens, creſcens ſive diminuens. Co. Lit. 295. b. 9 Co. 142. a.

(a) Confirmation.

(A) The Acceptance of whom ſhall affirm the Leaſe.

1. If (b) Baron and Feme leaſe by Deed, and after the Baron dies, and ſhe takes a ſecond Husband, who accepts the Rent: This affirms the Leaſe againſt the Feme perpetually, for (c) ſhe hath put her (d) Agreement into the Mouth of her Husband. D. 4. 5. Ma. 159. 36.

(b) Diverſity, where Baron and Feme join in a Leaſe of the Land of the Feme, and where the Baron only makes the Leaſe reſerving Rent and dies, and the Feme accepts the Rent. Br. Acceptance 6. and vid. the Caſe of Smallman and Aybozough. Cro. Jac. 417. 3 Bulſ. 272. 1 Rol. Rep. 401. 441. Bridg. 42, 43. and the Caſe of Harvey and Thomas. Cro. Eliz. 217. 1 Leon. 247. and vid. 8 Co. 54. b. (c) In the Original it is, El ad miſt ſa gree en Bourh ſa Baron. (d) 1 Part. 714. Pl. 2. 3. 2 And. 42. Brid. 43. (e) 3 Rol. Rep. 132. S. C. cited.

2. If the Baron ſeiſed in Fee makes a Feoffment, reſerving 100 Marks Rent yearly for 20 Years next enſuing to him and his Wife, and dies, and his Wife accepts the Rent; yet this ſhall not make any Bar in a Writ of Dower, (f) becauſe ſhe demands a Freehold, and that of the Third Part only. Tempore 1 E. 65. adjudged.

(f) A Right or Title to a Freehold cannot be bound by any Collateral Satisfaction. 4 Co. 1. b. but yet vid. Cro. El. 128.

3. If a Provoſt in the Cathedral Church of *W.* leaſes Part of a Rectory belonging to his Provoſtſhip for Years, rendring Rent, and this is confirmed by the Dean, but not by the Biſhop; and after, the Deanery is granted to the King, and by Act of Parliament a new Deanery is incorporated, and by the ſame Act it is enacted, That the Dean, at the next Avoidance of the Provoſtſhip ſhall have the Provoſtſhip and the Poſſeſſions thereof as Dean; and *J. S.* is made Dean, and the Provoſt dies, and *J. S.* receives Rent from the Leſſee: Yet this is no Confirmation, becauſe *J. S.* was a new Grantee by Act of Parliament, and not a Succeſſor. *Mich.* 2 *&* 3 *Eliz.* (g) *New Benloe* 80. *Pl.* 126. adjudged.

(g) Dyer 239. S. C. adjudged; becauſe by the Death of the Provoſt the Leaſe was void.

4. If the Maſter and Fellows of a College grant Lands in Fee, rendring Rent, and the Maſter dies, and the Succeſſor accepts the Rent, and gives an Acquittance for it: Yet this ſhall not bind the College during the Life of this Maſter, for he cannot by his Acceptance diveſt or conclude any Right or Intereſt which was in him and the Fellows. *Paſch.* 13 *Jac.* (h) *Magdalen College.* 11 Co. 66. 79. adjudged; and ſaid, That it was ſo clear a Point, that it was not worth arguing.

(h) Warren and Smith. S. C. 1 Rol. Rep. 151. adjudged. 2 Bulſ. 146. S. C. but S. P. does not appear. Cro. Jac. 364. S. C. but S. P. does not appear.

(B) What

(B) What Act ſhall be a Confirmation of a Leaſe.

1. (a) IF a Man leaſes for Life, reſerving Rent, upon a Condition of Re-entry; if after the Condition is broke by Non-payment of the Rent, the Leſſor (b) diſtrains for the (c) ſaid (d) Rent: This Act ſhall be a Confirmation of the Leaſe, ſo that he cannot enter for the Condition broke. 14 E. 3. Entry Congeable 41. Iſſue upon it, and adjudged.

(a) Co. Lit. 211. b. like Point. 3 Cro. 64. b. Cro. El. 3. S. P.

(b) So if the Feoffor, &c. brings an Aſſize. Co. Lit. 211. b. 3 Co. 65. a.

(c) So if he only receives the ſaid Rent, for he cannot receive it as due upon any Contract, tho' if he enters firſt, he may after have Debt for the ſaid Rent. 5 Co. 65. Nota, by the Reporter, and vid. Kelw. 112. b. 1 Rol. Rep. 20. 70. —But Co. Lit. 211. in caſe of a Feoffment rendring Rent with ſuch a Proviſo, ſeems con. —And 'tis otherways in caſe of a Leaſe for Years, for there Debt lies for the ſaid Rent, as well before as after Entry. Co. Lit. 211. b. Cro. El. 3. 1 Leon. 262. —But if he makes him an Acquittance for it, in which he calls him his Farmer or Tenant; this is a Confirmation. Cro. El. 3. adjudged. —So if he makes an Acquittance for it as a Rent. 1 Leon. 262.

(d) If the Leſſor receives the Rent due at a Day after, this confirms the Leaſe. Co. Lit. 211. b. 3 Co. 64. b. Kelw. 112. b. Godb. 47.

2. So if the Rent be Arrear for Two Years, being demanded, and after the Leſſor diſtrains for the Rent of the firſt Year: This hath affirmed the Leaſe, for the taking of the Diſtreſs affirms the Leaſe to have Continuance at the time of the Diſtreſs taken, for otherwiſe he could not diſtrain. Contra 14 E. 3. Entry Congeable 41. admit by the Iſſue.

3. (e) If Leſſee for (f) Years rendring Rent, upon Condition of Non-payment to be void: If the Rent be demanded at the Day, and not paid, the Leaſe is abſolutely void; ſo that it cannot be confirmed by Acceptance of Rent after. M. 32, 33 El. B. R. between (g) Sir Moil Finch and Throgmorton, adjudged.

(e) 3 Co. 64. b. S. P.

(f) Secus, in caſe of a Leaſe for Life, becauſe that determines not before Entry. 3 Co. 64. b. 65. a.

(g) Cro. El. 220, 221. S. C. adjudged. 1 And. 303, 308. S. C. adjudged, and affirmed upon a Writ of Error in Cam. Scac'. Moor 291, 296. S. C. adjudged, and affirmed upon a Writ of Error in Cam. Scac'. Poph. 25. S. C. 2 Leon. 134, 135, &c. S. C.

4. So if the King, after ſuch Forfeiture, being Leſſor, accepts the Rent from the Leſſee of Record in the Receipt of the Exchequer; yet this ſhall not confirm the Leaſe, this being void before. M. 32, 33 El. B. R. between (h) Sir Moil Finch and Throgmorton, adjudged.

(h) 1 And. 303, 308. S.C. adjudged, and Poph. 25, 26. affirmed upon a Writ of Error accordingly. Moor 291, 296. S. C. and S. P. admitted. S. C. and S. P. ſeems to be admitted. 2 Leon. 134, 135, &c. S. C.

5. If the Diſſeiſor makes a Charter of Feoffment to *A.* with a Letter of Attorney, and (i) before Livery the Diſſeiſee confirms the Eſtate of *A.* or the Deed made to *A.* This is void, tho' Livery be made after. *Co. Lit.* 301. a.

(i) So of a Confirmation of a Deed of Grant of a Reverſion before Attornment. Co. Lit. 301. a.

6. But if a Biſhop had made a Charter of Feoffment with a Letter of Attorney, and the Dean and Chapter before Livery had confirmed the Deed; this had been a good Confirmation, Livery being made afterwards. *Co. Lit.* 301. a.

7. (k) If the Diſſeiſor grants a Rent out of the Land to the Diſſeiſee, and he grants it over: This is a Confirmation. *Co. Lit.* 302. a.

(k) N. Dyer 240. a. Margine.

8. (l) So if a Diſſeiſor leaſes for Life, Remainder to the Diſſeiſee in Fee, and the Diſſeiſee grants over the Remainder, and the Leſſee for Life attorns, *&c.* *Co. Lit.* 302. a.

(l) 5 Co. 15. a. S. P.

(C) (a) In (b) what Cases an (c) Acceptance of a Rent or Service shall be a Confirmation.

(a) What Acceptance shall be an Estoppel. vide 1 Rol. Abr. 871.

(b) A Disseisor claims for Twenty Years only, and the Disseisee accepts Rent from him, he is concluded. Godb. 384.

1. (d) If a Copyholder commits a Forfeiture in cutting down of Trees, and after the Lord, not having Notice thereof, * accepts the Rent from him; yet this shall not affirm the Lease, but he may well after avoid it. 5 Jac. B. R. between (e) Mantell and Wachington, per Curiam, agreed.

(c) Where the Acceptance of Rent by the Issue in Tail from the Discontinuee of his Father does not extinguish, but only conclude the Right of the Issue. Hulme and Gee. Moor 301. Pl. 449. Poph. 112, 113. (d) 1 Bulst. 190. S. P. arguendo. Godb. 47. S. P. dubitatur. What shall be a Dispensation with such a Forfeiture: Vid. The Divisions, Title Copyhold. (e) Cro. Jac. 166. S. C. but no Judgment.

Fol. 476.

2. If a Man leases for Years rendring Rent, upon Condition, That if the Lessee assigns it without Licence of the Lessor, the Lease shall be void; and after the Lessee assigns the Term to B. from whom the Lessor accepts Rent after due, having Knowledge of the Assignment: Yet this does not make the Lease good, in as much as the Lease by the Assignment was absolutely void, and not voidable only. M. 14 Car. B. R. (f) between Omulcoury & Aires, adjudged, per Curiam, in a Writ of Error upon a Judgment in Ireland, upon a special Verdict there, and the Judgment given to the contrary reversed accordingly. Intratur, M. 13 Car. Rot. 332.

(f) Cro. Car. 512. S. C. adjudged, upon a Writ of Error, and the first Judgment reversed accordingly.

(g) Marsh and Curtis. S. P. 2 And. 42, 90. dubitatur. Cro. El. 528. 1 Brownl. 78. Moor 425. Pl. 594. Noy 7. 5 Co. cited.

3. (g) If *A.* leases certain Lands to *B.* for Years, upon Condition to re-enter if *B.* assigns the same, or any Part thereof, without the Assent of *A.* and after *B.* assigns Part without the Assent of *A.* and before (h) Notice thereof *A.* receives from (i) *B.* Rent due after the Assignment: Yet this is no Confirmation, for the Condition being collateral, it may be so secretly contrived, that it may be impossible, for the Lessor to have Notice. *Trin.* 38 *Eliz.* (k) *Penant*'s Case. 3 *Co.* 64. adjudged.

(h) Where it shall be intended that the Lessor had Notice, unless in Pleading 'tis shewed by him to the contrary. Whichcot and Fox. Cro. Jac. 398. adjudged. 2 Bulst. 290. 1 Rol. Rep. 70, 390. (i) Secus, If he had received Rent from the Assignee, for thereby he takes notice of the Alienation. Cro. El. 572. 1 Rol. Rep. 70, 390. (k) Harvy and Oswold. S. C. Moor 456. Pl. 626. adjudged. Cro. El. 553, 572. adjudged. Moor 426. cited. 2 And. 91. S. C. cited.

(l) So in Case of a Provost, &c. that comes in by Presentation or Collation, and not by Election.

4. (l) If a Parson, Vicar, or Prebend, leases for Years, rendring Rent, and dies, and his Successor accepts the Rent: This is no Confirmation, (m) for the Lease was void by his Death. 3 *Co.* 65. a. (n) Otherways if it had been a Lease for Life. 3 *Co.* 65. a.

Dyer 239. Pl. 41. agreed per Curiam; and vide 3 Leon. 158. 2 Bulst. 47. Bridg. 94. 1 Rol. Rep. 361. (m) Co. Lit. 45. b. 341. b. (n) Dyer. 239. Pl. 41. S. P. Co. Lit. 45. b. 2 Bulst. 47. Bridg. 94. 1 Rol. Rep. 361.

(o) Dyer. 239. Pl. 41. S. P. seems to be admitted per Curiam.

5. (o) But if a Bishop, Abbot, *&c.* makes a Lease for Years, and the Successor accepts the Rent, this is a Confirmation, for the Lease was only voidable. 3 *Co.* 65. a.

(D) What ſhall be a ſufficient Acceptance to make a Confirmation.

1. If a Biſhop leaſes for Life certain Land, Parcel of the Manor of D. reſerving Rent, and dies, and another Biſhop is made, and the Bailiff of the Manor comes to him, and ſhews him in a general Manner, that there are certain Rents of the ſaid Manor arrear, upon which the Biſhop commands him to receive the ſaid Rents, and he receibes them accordingly, and amongſt them receibes the ſaid Rent reſerved upon the ſaid Leaſe, and after delibers over all the ſaid Rents to the Biſhop, without giving him Notice of the ſaid Leaſe: This is a Confirmation of the ſaid Leaſe, for the Biſhop of himſelf ought to take Notice of the Leaſes made by his Predeceſſor. Hill. 5 Jac. between (a) Wheeler and Danby, per Curiam, adjudged.

(a) Cro. Car. 95, 96. S. C. cited. Hut. 24. S. C. cited.

2. If Lands are given to Baron and Feme, and the Heirs of the Body of the Baron. and the Baron leaſes for 40 Years, and dies, and the Iſſue in Tail accepts the Rent in the Life of the Feme, *&c.* This is no Confirmation ſo as to bind the Iſſue after the Death of the Feme, for at the Time of the Acceptance no Rent was *in eſſe*, or (b) due to him. 3 *Co.* 64. b.

(b) 4 Co. 1. b. like Point.

3. If an Abator marries with the right Heir, and after makes a Leaſe for Life rendring Rent, and he and his Wife die, and their Iſſue accepts the Rent, and makes an Acquittance for it; tho' he hath the meer Right on the Part of his Mother, yet becauſe he hath accepted the Recompence, he ſhall not avoid the Leaſe. 8 *Co.* 54. b.

4. If Tenant in Tail enfeoffs *B.* rendring Rent, and dies, and *B.* enfeoffs *C.* and *B.* after pays Rent to the Iſſue in Tail, he ſhall not be concluded by this Payment made by one who had nothing in the Land at that Time. *Mich.* 38 & 39 *Eliz.* between (c) *Holme* and *Gee. Poph.* 112. adjudged.

(c) Moor 301. Pl. 449. S. C. but S. P. does not appear.

5. If Tenant in Tail makes a Feoffment in Fee to the Uſe of himſelf and his Heirs, and after leaſes for Years rendring Rent, and dies, and the Iſſue accepts the Rent: This ſhall not confirm the Leaſe, becauſe the Iſſue in Tail was remitted to the Eſtate Tail by Deſcent; and ſo the Leaſe made by the Father, being then Tenant in Fee-Simple, was utterly void. (d) *Mich.* 13 *Jac. Moor* 846. *Pl.* 1143. Ruled upon a Trial at Bar. *B. R.*

(d) 2 Rol. Abr. 422. Pl. 8. S. C. which vide, and the Note there.

(E) What

(E) What ſhall be a Leaſe or Grant confirmable.

(a) Poph. 50.

1. (a) TO make a Parſonage chargeable, Three Things are neceſſary, viz. That the Charge be made by the Parſon, Patron, and Ordinary. (b) 14 H. 4. 18. b.

(b) Br. Dean. and Chapter 6. S. C.

2. If upon a Suit for Tithes by a Parſon, which he claims by Preſcription, the Parties ſubmit themſelves to the Award of the Commiſſary, who awards, That the Defendant ſhall pay an Annuity to the Parſon for the Tithes, which Award is confirmed by the Ordinary, but not by the Patron: This ſhall not bind the Succeſſor. (c) 14 H. 4. 18. b.

(c) Br. Dean and Chapter 6. S. C.

3. If a Parſon grants an Annuity in Fee; tho' this is determinable by his Death, yet if the Patron and Ordinary confirm it, it ſhall bind perpetually. (d) 26 Aſſ. 38. per Norton, 16 E. 3. 14. admit.

(d) Br. Confirmation 15. S. C. Br. Grants 73. S. C.

4. If a Parſon had leaſed or charged his Glebe to commence after his Death, and the Patron and Ordinary had confirmed it: This ſhould have bound his Succeſſor. (e) *Paſch.* 5 *Ed.* 6. *Dy.* 69. *Pl.* 30. but *Mountague* doubted.

(e) Hob. 7. S. C. cited.

(a) (F) Who ſhall be a ſufficient Perſon to make a Confirmation.

(a) I think this Title ſhould rather be, Who ſhall be a ſufficient Perſon to make a Leaſe confirmable.

1. IF a Layman be preſented, inſtituted and induced to a Benefice, and before the Statute of the 13 Eliz. makes a Leaſe for Years of his Benefice, which is confirmed by the Patron and Ordinary, and after the Incumbent is deprived, becauſe he was a meer Lay-Perſon, (b) yet the Leaſe is good, for he was Parſon de Facto for the Time, and ſo the Leaſe not void, and therefore well enough confirmed. Trin. 42 Eliz. B. R. between (c) Cuſtor and Windate, adjudged; which Intratur Paſch. 42 Eliz. Rot. 127.

(b) 2 Rol. Abr. 347. Pl. 3.

(c) Coſtard and Windate. S. C. Cro. Eliz. 775. adjudged. Moor 606. Pl. 836. adjudged.

2. If a Parſon makes a Leaſe or Grant, or ſuch like, and this is confirmed by the Patron and Ordinary, and after the Parſon is deprived for a Pre-contract; (this was when Prieſts could not marry) yet the * Grant ſhall be good. (d) 9 H. 6. 33. b. for he was a lawful Parſon at the Confirmation.

* Fol. 477.

(d) Br. Non eſt factum 3. S. C.

3. If the Church be full of a Parſon, and after another is made Parſon, and induced by the Ordinary, and he makes a Grant, which is confirmed by the Patron and Ordinary; yet the Grant is void, becauſe he was not Parſon at the Time of the Grant. (e) 9 H. 6. 34.

(e) Br. Non eſt factum 3. S. C.

4. If a Church be void, and one enters, and occupies of his own Wrong, without any Preſentation or Inſtitution, and occupies it as Parſon, and makes a Grant, which is confirmed by the Patron and Ordinary; yet this is void, becauſe the Grantor was not Parſon. (f) 9 H. 6. 34. Curia. One cannot be Parſon without a Preſentation or Collation. (g) 10 H. 6. 11.

(f) Br. Non eſt factum 3. S. C.

(g) Fitz. Brief 65. S. C. Br. Dean and Chapter 23. S. C.

5. *A.* Being

5. *A.* being lawfully created and conſecrated Biſhop of O. in *Ireland*, the King accepted his Fealty, and a Writ iſſued to the Eſcheator to reſtore his Temporalities; and after, the King, by Letters Patents under the Great Seal of *Ireland*, directed to the Dean and Chapter, ſignified, That he had appointed and elected *B.* to that Biſhoprick, being void, and appointed them to elect him; and he was accordingly elected, and all Things done for his Conſecration and Reſtitution of his Temporalities, and otherways as was requiſite to make him a perfect Biſhop; and after *B.* entered into Lands belonging to the ſaid Biſhoprick, and in the Life of *A.* leaſed them for 100 Years; and this was confirmed by the Dean and Chapter: Yet *Mich.* 17 *Jac.* between *Obrian* and *Knivan*, *Cro. Jac.* 552. 554. after the Death of *A.* and *B.* tho' *B.* ſurvived *A.* it was adjudged, That this Leaſe was void to charge the Poſſeſſions of the Biſhoprick, tho' it was objected, That *B.* being by legal Ceremony created Biſhop, and having the Temporalities reſtored unto him, was Biſhop *in facto.*

(G) In (a) what Caſes the Confirmation of the Patron and Ordinary is neceſſary.

(a) If a Parſon or Vicar leaſes for 21 Years, or 3 Lives, as they may do at this Day, their Leaſe muſt be confirmed by the Patron and Ordinary, for they are excepted out of the Statute of 32 H. 8. Co. Lit. 44. b.

1. IF a Prior and a Parſon, upon a Debate of the Patronage of the Parſonage, ſubmit themſelves to the Ordinary, who ordains, That the Prior ſhall give to the Parſon certain Tythes, and the Parſon grants to the Prior an Annuity, with the Aſſent of the Ordinary; and after, the Parſon dies, and the Succeſſor takes the Tythes, he may be charged with the Annuity, tho' the Patron never confirmed it, for in as much as he is ſeized of the Tythes, he hath quid pro quo. 16 Ed. 3. 24. adjudged.

2. The Patron muſt conſent to the Grants of a ſole Corporation, as of Parſons, Prebends, Vicars, *&c.* that have not the abſolute Fee in them. *Co. Lit.* 300 b.

3. But the Grants of Corporations aggregate of many, as Dean and Chapter, Maſter and Fellows, Abbot and Covent, *&c.* are good, without the Confirmation of their Founder or Patron, tho' the Abbot, *&c.* were preſentable. *Co. Lit.* 300. b.

(H) (a) By the (b) Dean and Chapter of the Grant of the Biſhop.

(a) By 32 H. 8. cap. 28. Any ſeiſed in the Right of their Church (except Parſons and Vicars) may leaſe for 21 Years, or Three Lives, in ſuch manner as by the Act is directed; and ſuch Leaſes made by a Biſhop, &c. are good without any Confirmation. Co. Lit. 44. b. But for this, vide the Notes upon this Statute under the Subdiviſions of Leaſes, Title, Eſtate. — But if a Biſhop, &c. makes a Grant of any ancient Office of Neceſſity with the ancient Fees, as he may do notwithſtanding the Statutes of 1 Eliz. and 13 Eliz. it muſt be confirmed by the Dean and Chapter. Co. Lit. 44. a. 10 Co. 62. a. —So if a Biſhop leaſes for 21 Years, and thoſe being near ſpent, leaſes to another for 21 Years, this not being a Leaſe within 32 H. 8. but good only, becauſe not reſtrained by 1 Eliz. it muſt be confirmed by the Dean and Chapter. Co. Lit. 45. a. 10 Co. 60. b. (b) Whether a Confirmation made by a meer Commendatory or Dean de facto ſhall be good or not: Vide Evans and Aſcuith. Palm. 457. &c. Noy 93.

1. BY the Feodal Law, the Biſhop non poteſt dare in feodum a Thing that had uſed to be given in feodum, without the Aſſent of the Chapter. Antonii Contii Methodus 52. It is there ſaid, that this is a great Queſtion.

2. By the Law of Scotland, Episcopi nec Abbates possunt de Terris suis aliquam partem donare ad remanentiam sine Assensu & confirmatione Domini Regis, quia eorum Baroniæ sunt de eleemosyna Domini Regis & Antecessorum suorum. Skene Regiam Majestatem 48. 1, 2.

3. A Grant by the Bishop of Meath in Ireland, by the Assent of his Clergy, he not having any Dean and Chapter, is a good Grant without other Confirmation. Davies's Case of Priories 1. admit.

(c) Co. Lit. 301. S. P.

4. (c) If a Bishop hath two Chapters which used to confirm Grants made by him, as the Bishop of Coventry and Lichfield had the Prior and Convent of Coventry, and the Dean and Chapter of Lichfield, and a Grant of the Bishop is confirmed by the Prior and Convent only, and not by the Dean and Chapter: This is no good Confirmation to bind the Successor. Temp. R. 2. fol. 104. D. 11 El. 282. 27. Statham. Ass. 50 Ed. 3. but it is not in the Book in print.

(d) Co Lit. 301. S. P.

5. (d) If the Dean and Chapter of Christchurch and St. Patrick used a Tempore, &c. to confirm the Grants made by the Archbishop of Dublin, and yet Christchurch is known to be the eldest Chapter to the See; and the Dean and Chapter of St. Patrick, by their Chapter-Seal, give and surrender to the King in Fee all their said Church, House, Lands, and Possessions, but without the Licence, Will, or Consent of their Bishop, being their chief Ordinary, and Patron, for the most Part, of all the Prebends; and after a Lease made by the Bishop, is confirmed only by the Dean and Chapter of Christchurch: This Confirmation shall bind the Successor Bishop, because the Corporation and Chapter of St. Patrick, which was the other Chapter, was dissolved, and determined lawfully, and without the Consent of the Archbishop. D. 11 El. 283. 27.

* Fol. 448.

6. If the Prior of Bath, and Dean and Chapter of Wells, have used * de Tempore, &c. to confirm Grants made by the Bishop of Bath and Wells; and after by the Statute of the 31 H. 8. the Priory of Bath is dissolved, and a Lease made by the Bishop is confirmed by the Dean and Chapter of Wells only, the other Chapter being dissolved by the Statute: It seems this Confirmation shall bind the Successor Bishops. D. 37 H. 8. 58. 7. Quære. But 34 H. 8. cap. 15. an Act of Parliament is recited, That it was a great Doubt, whether it was a good Confirmation; and therefore it is enacted, That all the said Confirmations, and all after to be made by the Dean and Chapter, should be good in Law.

(e) Co. Lit. 301. a. S. P.

7. (e) If a Bishop makes a Lease for Years to the King, and before Enrolment of the Lease the Dean and Chapter confirms it, and after the Lease is enrolled: This is a good Confirmation, tho' the Lease was not in esse at the Time of the Confirmation, for this is but an Assent, which may as well be before the Lease as after. Trin. 8 Jac. Scaccario. (f) Sir Edw. Dimmock's Case.

(f) Lane 31, 35, 60, &c. S. C. adjudged.

(I) By the Bishop, Dean and Chapter.

What shall be said a good Confirmation.

1. 8 E. 1. ROtulo Cartarum. M. 8 Part. 46. Release of the Bishop of London, ex assensu & consensu Decani & totius Capituli.

(K) Confirmation of the Grant of the Dean.

What ſhall be a good Confirmation.

1. If a Dean leaſes any of his Poſſeſſions, of which he is ſole ſeized, with the Aſſent of the Chapter: This is a good Confirmation, becauſe the Dean only had the Eſtate. D. 29 H. 8. 40. b. 72. and the Writ de ſine aſſenſu Capituli will prove, that there needs but one Aſſent.

2. (a) If a Dean is ſole ſeized, and not with the Chapter, of certain Poſſeſſions, and leaſes it by ſuch Words in the Deed, quod Decanus ex aſſenſu totius Capituli dimiſit, and the Seal of the Chapter is annexed to the Deed: This is a good Confirmation, for it is a good Aſſent. D. 29 H. 8. 40. b. 72.

3. (b) So if an Abbot leaſes with the Aſſent of the Covent, and annexes their Seal to the Deed: This is a good Confirmation, becauſe the Abbot hath all the Eſtate, and there requires only the Aſſent of the Covent which paſſes nothing. D. 29 H. 8. 40. 72.

(b) 4 Leon. 11. S. P. by two Juſtices, arguend. for the Monks and Friers being dead Perſons in Law, cannot be Parties to the Leaſe. 1 Rol. Abr. 480. Pl. 1. S. P. and vide Fitz. Abbey 11. Dett. 35. Dyer 106. Pl. 21.

4. (a) If a Dean and Chapter are jointly ſeized, and the Dean leaſes with the Aſſent of the Chapter, and annexes the Seal of the Chapter to the Deed: This is void, and ſhall not bind the Chapter, becauſe they have an Eſtate in them, as well as the Dean hath in him, and may make a Grant. D. 29 H. 8. 40. b. 72. Paſch. 10 Jac. B. between Tomlinſon and Croke, agreed.

(a) 4 Leon. 11 like Point, adjudged, by Two Judges againſt One. And vide Br. Corporations. 66.

5. The Dean of Wells may paſs his Poſſeſſions with the Aſſent of the Chapter, without any Confirmation of the Biſhop; and after, this Deanery is ſurrendered and diſſolved, and this Diſſolution confirmed by Parliament, and a new Deanery erected by the Act, and the Nomination by Letters Patents of the new Dean and his Succeſſors given to the King and his Succeſſors: And it is enacted alſo, That the new Dean, and his Succeſſors, may grant, demiſe, and depart with their Poſſeſſions, in the ſame Manner and Form as the ancient Deans might and uſed to do. In this caſe, there needs no Confirmation from the Biſhop, of the Grant made by the new Dean, becauſe his Confirmation was not neceſſary to the Grants of the old Dean; nor is the Confirmation of the King of the Grant of the new Dean wanting, becauſe this is not a meer Donative, but is made of the ſame Nature as the old Dean was. D. 10 Eliz. 273. 37. per Curiam.

(L) Con-

(L) Confirmations by Parſon, Patron, and Ordinary.

Fol. 479.

What ſhall be ſaid ſufficient.

1. (a) If the Biſhop of Sarum be Patron of the Church Preſentative of S. which lies within his Dioceſs, and this is the Body of a Prebend in the Church of Sarum; and the Biſhop of Sarum is Patron alſo of the Church of D. which is alſo Preſentative, and this lies in the Dioceſs of the Biſhop of Winton; and after the Church of D. is annexed and united lawfully, by the Aſſent of the Biſhops, Deans and Chapters of both Dioceſſes, to the Prebend of S. and after the Biſhop of Sarum collates J. S. to the ſaid Prebend, which now by the Union conſiſts of both Churches, and inſtals him in the Cathedral Church of Sarum; and after the Prebendary makes a Leaſe for Years before the Statute of the 13 Eliz. and not warrantable by the Statute of the 32 H. 8. and this is confirmed by the Biſhop, Dean and Chapter of Sarum, and not by the Biſhop of Winton: Yet this is a good Confirmation, for by the Union, the Biſhop of Winton hath annexed it to the Prebend of S. and ſo hath ouſted himſelf of his Power of Confirmation as Ordinary; for after the Union, the Prebendary is inveſted in both Churches by his Inſtalment, without any other Preſentation, Admiſſion, Inſtitution, or Induction, in the Church of D. or S. Paſch. 10 Jac. B. R. between Leigh and Hellier, reſolved, per Curiam, upon Evidence upon a Tryal at Bar for Part of the Poſſeſſions of the Church of Husband-Tarrant in the County of Southampton, which was annexed to the Prebend of Burbage in the County of Wilts, this being a Prebend in the Cathedral Church of Sarum.

(a) Cro. Eliz. 587. S. P upon the ſame Parſonage, ruled at the Bar upon Evidence; and Poph. ſaid, That in his Time it had been a great Queſtion, but in two or three Caſes hath ſince been reſolved: And vide the Caſe of Gie and Wider. 1 Sid. 75. 1 Keb. 280.

2. If a Parſon makes a Leaſe, and it is after confirmed by a ſucceeding Biſhop and ſucceeding Patron, neither of them being Biſhop or Patron when the Leaſe was made: This is a good Confirmation. *Trin.* 2 *Car.* Sir *Robert Baviſter*'s Caſe. *Cro. Car.* 38. adjudged.

(M) Confirmation by the Patron and Ordinary.

Patron.

Who ſhall be ſufficient to make it.

1. If a Dean and Chapter are Patron, a Confirmation by the Preſident or Commiſſary (who is a (a) Deputy) is not good without the Confirmation of the Dean, becauſe the Preſident can do nothing to charge the Church. (b) 11 H. 4. 84. b. Davis 1. (c) 48. b.

(a) A Dean cannot make a Deputy to confirm Leaſes. Palm. 461. (b) Br. Corporation 17. S. C. Br. Dean and Chapter 5. S C. (c) This is miſprinted in the Original as here, and ſhould be Davis 47. b. which vid. Palm 462. cited con. and vid. Palm 479.

(d) Co. Lit. 300. b. S. P.

2. (d) If a Biſhop be Patron of a Prebendary, and he confirms a Leaſe made by the Prebend: This is not good without the

the Confirmation of the Dean and Chapter, (e) for this Patronage is Part of the Poſſeſſions of the Biſhoprick, of which he cannot bind his Succeſſor without the Dean and Chapter. P. & Tr. 15 Jac. B. R. between (f) Smith and Bowles: This was ſo agreed.

(e) Secus, where the Biſhop is not Patron. Co. Lit. 300. b. S. P.

(f) Poſt 139. Pl. 1, 2. S. C. 3 Bulſ. 290. S. C. but ſeems con. for the Confirmation being by the Archbiſhop Patron, without the Dean and Chapter, it was held good, per totam Curiam; but Note, It does not appear by the Caſe, whether the Archbiſhop was living or not. Cro. Jac. 458. S. C. but S. P. does not appear.

3. But it ſeems that ſuch a Confirmation made by the Biſhop ſhall bind the Biſhop himſelf during his Time, and all thoſe who come under him; for the Confirmation of the Dean and Chapter, is requiſite, that the Biſhop may not prejudice his Succeſſor. Paſch. & Trin. 15 Jac. (g) Smith and Bowles; it was a Queſtion.

(g) Poſt 139. Pl. 1, 2. S. C. 3 Bulſ. 290. S. C. and the Confirmation held good, tho' it doth not appear whether the Biſhop was living or not. Cro. Jac. 458. S. C. but S. P. does not appear.

4. If *A.* Parſon of *B.* is Patron of the Church of *C.* as belonging to his Church of *B.* and preſents *D.* who by the Aſſent of *A.* and of the Ordinary, grants a Rent-Charge out of the Glebe: This is not good without the Aſſent of the Patron of *A. Co. Lit.* 300. b.

(N) Who in Reſpect of his Eſtate.

1. If Baron and Feme are Patrons in the Right of the Feme; if they confirm by Deed the Leaſe of the Parſon, this is not good againſt the Feme and her Heirs, but only during Coverture, for the Deed of the Feme is void: Vide for this, D. 3, 4 Ma. 133. 1.

2. (a) If Tenant in Tail of an Advowſon confirms a Leaſe made by the Parſon: This ſhall not bind the Preſentee of the Iſſue after the Death of the Confirmor, but he ſhall avoid it. My Reports. 14 Jac. (b) Maund againſt French.

Fol. 480.

(a) Lit. Sect. 528. Co. Lit. 300. b. S. P. (b) 1 Rol. Rep 361. S. C. and S. P. by Two Judges. 2 Rol. Rep. 9. S. C. adjornatur. Poph. 94, 95. S. C. adjudged, for the Confirmation ſhall bind only according to the Eſtate of the Patron that makes it; and vide 1 Leon. 234.

3. If the Chaplain of a Chantery or Free Chapel, which is a Donative, makes a Leaſe for Years before the 32 H. 8. and the Patron of the Chapel being ſeized of the Patronage in Tail, confirms it: This ſhall not bind the Chaplain of the Iſſue. D 8 El. 252. 95. admit: But there the Queſtion was, the Patronage came to the King by the Statute of Chanteries, (c) ſaving the Leaſes and Intereſts of all other, except the Patrons and Donors, and their Heirs; and yet it was held the King ſhould avoid it; but after it appeared, that the Donor had levied a Fine after the Confirmation, by which the Iſſue was barred to avoid it, and then the King might not avoid it.

(c) In the Orignal, 'tis Devant aſcune done per l'Iſſue & Donor & ſes Heirs except, and ſo ſeems miſprinted; and therefore vide the Caſe at large in Dyer.

4. If the Incumbent of an Uſurper makes a Grant, and this is confirmed by the Uſurper and Ordinary; and after in a Quare impedit the true Patron recovers, and removes the Incumbent:

cumbent: The Grant by this is defeated, because here was never any Perſon and Patron in Right. (d) 9 Hen. 6. 33.

(d) Br. Mon eſt factum 3 S. C.

5. (e) If A. be ſeized of an Advowſon in Fee, which is full of B. the Incumbent, and after A. grants the next Avoidance to C. and after B. grants a Leaſe of the Rectory for Years, and this is confirmed by A. and the Ordinary before the Statute of 13 Eliz. and after B. dies, and C. preſents E. who is Inſtituted and Inducted, and enters into the Rectory, and after dies, and A. preſents F. who is Inſtituted and Inducted, F. ſhall hold this Church diſcharg'd of the Leaſe, because this Leaſe was totally avoided by the Entry of E. who came in by the Preſentation of C. which was not ſubject to the Confirmation of A. the Patron in Fee, for E. by his Inſtitution and Induction was ſeized of the Fee in the Right of his Church, as fully as any could be. Paſch. 16 Car. B. R. between (f) Sir Edmund Plowden and Oldfield, adjudged, per totam Curiam, in a Writ of Error upon ſuch Judgment in Banco, upon a ſpecial Verdict for Land, Parcel of the Rectory of Aſſam in the County of Southampton. Intratur in B. R. Mich. 15 Car. Rot. 86. and the Judgment affirmed accordingly.

(e) Co. Lit. 46. S. P. Dyer 72. Pl. 5. S.P. adjudged. Hob. 7. like Point, adjudged. 7 Co. 8. a. S. P. and vid. Dyer 133. Moor 67. a. 1 Leon. 235.

(f) Cro. Car. 582. S. C. adjudged. 1 Jon. 582. S. C. adjudged.

6. If a Feme Covert and two others are Copartners and Patrons of an Advowſon, and the Baron and Feme and two others join with the Parſon and Ordinary in a Leaſe, and the Parſon dies, and the Biſhop collates by Lapſe, *&c.* The Confirmation as to the Feme Covert is void, and the Aſſent of the others being in a Matter of Intereſt ſhall not bind her. *Mich.* 32 *&* 33 *Eliz.* (g) *Lancaſter* and *Lucas.* 1 *Leon.* 231, 232. *adjornatur.*

(g) N. Dyer 72. b. Margine, S. C. cited to have been adjudgd, That this Leaſe was well confirmed, and that the Collatee ſhould not avoid it.

(O) Confirmation by the Patron and Ordinary.

What Act.

1. (a) If an Abbot makes a Deed by ſuch Words, Sciant Preſentes me Abbatem, of ſuch a Place, ex aſſenſu Conventus dediſſe, or dimiſiſſe: This is good, tho' the Covent did not grant, but aſſent. (b) 14 H. 6. 17.

(a) 1 Rol. Abr. 478. Pl. 3. S. P. (b) Br. Faits 45. S. C.

2. (c) If the Patron and Ordinary give Licence [by Deed, (d) as it ſeems to be intended] to the Parſon, to grant an Annuity, &c. This is a ſufficient Confirmation by them, 7 H. 4. 16. the Parſon granting it accordingly.

(c) Co. Lit. 300. b. S. P. (d) Such Aſſent cannot be without Deed. Brid. 94. adjudged.

3. (e) Lit. 144. If the Parſon grants a Rent with the Aſſent of the Patron and Ordinary, this is a good Confirmation.

(e) 4 Leon. 11. S. P. by two Juſtices, arguend. for the Parſon is the principal Grantor, and the others have not any expreſs Intereſt in the Land charged. Hob. 7.

4. If the Confirmation be made and delivered (f) before the Grant of the Parſon: This is no good Confirmation, tho' the Grant be after made by the Parſon. (g) 8 H. 6. 6. Vide Trin. (h) 8 Jac. Scaccario.

(f) A precedent Licence to grant, is a ſufficient Confirmation. Co. Lit. 300. b.——So by a Dean and Chapter in caſe of a Grant by a Biſhop. Ow. 33. (g) Br. Faits 28. S. C. (h) Lan. 31. 36, 60, &c.

5. So in this Caſe, if after the Grant the Confirmation be delivered again, yet it is no good Confirmation, becauſe by the firſt Delivery it is a Deed; and this ſecond Delivery will not amount to an Aſſent, becauſe the Aſſent (i) ought to be by Deed. Contra, (k) 8 H. 6. 6. b. becauſe the firſt Delivery was void.

(i) Bridg. 94. adjudged.

(k) Br. Faits 28. S. C.

6. (l) If the Patron accepts a Leaſe for Years from the Parſon: This is not any Confirmation by the Patron. Co. 5. Newcomen 15. admit.

Fol. 481.

(l) So if the Patron under ſuch Leaſe receives the Profits for the Uſe of his Son; This is no Confirmation, for altho' the Aſſent of the Patron is ſufficient, yet it ought to be by Deed. Bridg. 94. adjudged.

7. (m) But if the Patron after Acceptance grants it over; This is a good Confirmation. Co. 5. Newcomen 15. My Reports. 14 Jac. (n) Maund againſt French.

(m) Co. Lit. 392. a.

(n) 1 Rol. Rep. 261.

S. C. and S. P. by two Judges. 2 Rol. Rep. 8. 9. S. C. adjornatur. Poph. 92, 93. &c. S. C. and S. P. admitted.

(P) Confirmation by the Biſhop and Chapter.

In what Caſes it is requiſite.

1. (a) If a Prebend or Parſon leaſes Parcel of his Prebendary or Parſonage, and the Biſhop who is Patron confirms it; yet this ſhall not bind the Succeſſor Biſhop without the Confirmation of the Dean and Chapter, becauſe the Patronage is Parcel of the Poſſeſſions of the Biſhopzick. P. & Tr. 15 Jac. B. R. between (b) Smith and Bowles, agreed by the Counſel at the Bar. 33 H. 8. Brook Leaſes Placito 64. D. 19 Eliz. 357. admitted. 1, 2 Ma. 106. admitted. D. 5 Eliz. 221. 18. Com. 528. pleaded; ſo per 33 H. 8. Brook Confirmation 21. 30.

(a) Co. Lit. 300. S. P.

(b) Ante 136. Pl. 2. S. C. which vide, and the Notes there.

2. But this ſhall bind the Biſhop, and all thoſe Prebends who come under him. Paſch. & Trin. 15 Jac. B. R. between (c) Smith and Bowles', clearly held by the better Opinion, becauſe the Confirmation of the Dean is required only, for that the Poſſeſſions ſhall not be alienedin Prejudice of the Succeſſor. D. 19 Eliz. 357.

(c) Ante 136. Pl. 2. S. C. which vide, and the Notes there.

3. (d) If a Prebend leaſes for Years, and the Dean and Chapter confirms it without the Biſhop: This ſhall not bind the Succeſſor, becauſe the Biſhop is (e) Patron and Ordinary thereof. D. 36 H. 8. 61. Quære.

(d) 2 And. 167. S. P.

(e) He is Patron of all the Prebends, becauſe their Poſſeſſions are derived from him. 3 Co. 75. b. Cro. Eliz. 79.

(Q) Con-

(Q) Confirmation by the Biſhop, Dean and Chapter.

In what Caſes it is neceſſary.

1. If an Appropriation be made to an Abbot, Patron of the Church, by the Aſſent of the King and Biſhop: This is ſufficient without the Confirmation of the Dean and Chapter, and this ſhall bind the Succeſſor Biſhop; for the Biſhop gives nothing by his Aſſent, nor hath any Right as Patron, but only as Ordinary. Contra 46 Aſſ. 4. Brooke, Dean and Chapter 18.

2. If a Parſon grants a Rent, the Confirmation of the Patron and Biſhop is ſufficient without the Dean and Chapter, and ſhall be good againſt the Succeſſor Biſhop; for he makes this Confirmation but as Ordinary, and the Biſhop only is compleat Ordinary. Ergo.

(R) Confirmations of Grants of Donatives.

(a) Co. Lit. 301. a. b.

1. (a) The Grants made by Donatives ought to be confirmed by the Patrons of them, or otherways they are not good againſt their Succeſſors. D. 10 Eliz. 273.

2. The Dean of Wells was ſurrendered and diſſolved, and this Diſſolution confirmed by Parliament, and a new Dean erected by the Act; and the Nomination of the new Dean and his Succeſſors by Letters Patents given to the King and his Succeſſors: And it is further enacted, That they ſhall paſs their Poſſeſſions in the ſame manner as the ancient Deans might, the new Dean may * grant his Poſſeſſions as the old Dean might with the Aſſent of the Chapter, without the Confirmation of the King, tho' he comes in by the Letters Patents of the King, for the ſpecial Words of the Statute. D. 10 Eliz. 273. 37.

* Fol. 482.

(S) Who may Confirm in Reſpect of his Eſtate.

(a) The Diſſeiſee confirms the Rent, &c. granted by the Diſſeiſor, &c. becauſe he had a Power to defeat the Rent. Kelw. 103. a 1 Co. 147. a.

1. None can confirm, unleſs he hath a (a) Right at the Time. (b) 19 H. 6. 62.

(b) Br. Confirmation 10. S. C.

(c) Yet vid. 2 Inſt. 66. b. where the Heir Apparent joined with his Anceſtor in an Alienation without Licence, and therefore ſhould not avoid it.

2. If Tenant in Tail of an Advowſon and his Son and Heir Apparent join in a Grant of the next Avoidance, and after Tenant in Tail dies, (c) his Son ſhall avoid it, for this

can be no Confirmation by him, (d) in as much as he hath nothing in it at the time of the Grant. M. 12 Jac. B between (e) Wivell and Scroope, Plaintiffs, and Eubank and Topſon, Defendants, adjudged.

(d) Bridg. 96.
(e) Hob. 45. S.C. adjudg'd. 1 Brownl 165. S.C. adjudg'd.

3. If *A.* grants a Rent-Charge (f) out of his Land to *B.* for Life, and after *A.* confirms the Eſtate of *B.* in the ſaid Rent, to hold in Fee-Tail or Fee-Simple: This Confirmation is void, as to enlarge his Eſtate, becauſe he that confirmeth hath no Reverſion in the Rent. *Lit. Sect.* 548. *Co. Lit.* 308. a. But if the Deed of Confirmation contains a Clauſe of Diſtreſs, this amounts to a new Grant.

(f) Secus, If he grants a Rent in eſſe. Co. Lit. 308. a.

4. (g) If Baron and Feme are Tenants in ſpecial Tail, Remainder to the Baron and his Heirs, and the Baron levies a Fine with Proclamations to the Uſe of *J. S.* and his Heirs, and dies, and the Wife enters; and *J. S.* reciting the Gift in Tail, and that the Wife was ſeiſed in Tail by force thereof, confirms her Eſtate, (h) *Habend'* to her and the Heirs of the Body of her late Husband and ſelf, *&c.* the Confirmation is void, *& nihil operatur. Paſch.* 10 *Jac.* (i) *Beamont's* Caſe. 9 *Co.* 138, *&c.* adjudged.

(g) Baker and Willis, S. P. con. Cro Car. 476. by Croke and Jones, contra Berkly; and that the Confirmation created a new Eſtate deſcendable to the Iſſue, but the Caſe was ended by Compoſition. 1 Jon. 393, 394. agrees with the Report in Cro. and vide March 146. (h) By the Habend' the Tenements there is a new Eſtate-Tail extracted out of the Reverſion. Cro. Car. 478. (i) Hob. S. C. cited.

(T) Confirmation by Way of Enlargement.

Who may Confirm in Reſpect of his Eſtate.

1. He that hath but a (a) Right in Reverſion cannot enlarge the Eſtate of the Leſſee. 3 H. 4. 10.

(a) Non valet Confirmatio niſi ille qui confirmat ſit in poſſeſſione Rei vel juris unde fieri debet confirmatio, &c. Co. Lit. 295. b.

2. If the Diſſeiſee and a Stranger diſſeiſe the Heir of the Diſſeiſor, and the Diſſeiſee confirms the Eſtate of his Companion: This ſhall not extinguiſh his Right that was ſuſpended. *Co. Lit.* 298. b.

3. So if the Grantee of a Rent-Charge and a Stranger diſſeiſe the Tenant of a Land, and the Grantee confirms the Eſtate of his Companion, and the Tenant of the Land re-enters, the Rent is revived, for the Confirmation extended not to the Rent ſuſpended. *Co. Lit.* 298. b.

(U) To whom it may be.

1. A Confirmation to Leſſee (a) for Life, and a Stranger, to have for their Lives, is void; for there is no Privity. Contra, 18 E. 3. 18 b. admit.

(a) Secus if for Years. Palm 31. and vide 3 Leon. 15. N. Ben. 199. Pl. 237.

2. If a Diſſeiſor leaſes for Years to begin at a Day to come, and the Diſſeiſee confirms the Eſtate of the Leſſee: This is void, becauſe he hath but *intereſſe Termini*, and no Eſtate in him upon which the Confirmation may enure. *Co. Lit.* 296. b.

3. An Alien purchaſed Lands in Fee, and the Queen confirmed them to the Alien, *&c.* (b) *Mich.* 29 *Eliz.* 1 *Leon.* 47. *dubitatur* whether the Confirmation ſhould bind the Queen; and it was objected, That the Eſtate of an Alien is ſo weak, that a Confirmation cannot enure upon it.

(b) 4 Leon. 82. S. C. dubitatur. Goulſ. 29. S. C. dubitatur. By which it appears, the Queen made him a Denizen, and confirmed his Eſtate.

(X) What Conveyance ſhall enure to a Confirmation.

1. **If a Man makes a Charter of Feoffment to a Man who is ſeized of the** (a) **Freehold, by theſe Words,** (b) Dedi conceſſi & confirmavi, &c. **This ſhall enure by Way of Confirmation.** (c) 19 H. 6. 45.

(a) So if a Charter of Feoffment is made by theſe Words to Leſſee for Years. Goulſ. 25. —So if J. S. be Tenant at Will, and the Leſſor grants and demiſes to J. S. for Life. 3 Leon. 15. Dyer 269. Pl. 20. N. Benl. 199. Pl. 237. —For where a Man is in Poſſeſſion, the Words, Grant, &c. enure by way of Confirmation, Cro. Jac. 127. And vid. 2 Leon. 192. 3 Leon. 128. Ow. 1. (b) The Words dedi or conceſſi will amount to a Grant, Feoffment, Leaſe, Releaſe, Confirmation, Surrender, &c. Co. Lit. 301. b. —But the Word confirmavi will not amount to a Grant, &c. becauſe this is a proper and peculiar Conveyance, and deſtined to a particular End. Co. Lit. 301. b. (c) Br. Confirmation 9. Fitz. Confirmation 2.

2. **If there be Leſſee for Years, the Reverſion for Life, the Reverſion in Fee, and he in the Reverſion in Fee makes a Charter of Feoffment in Fee and Livery to Leſſee for Years, admitting this to be void for the mean Eſtate for Life, this ſhall enure by Way of Confirmation to the Leſſee to enlarge his Eſtate.** M. 40, 41 Eliz. B. R. **between** (d) Knotsford **and** Eedes, per Curiam.

(d) Ow. 66. ſeems to be the ſame Caſe; but ſaid, that it was adjudged that by the Feoffment Nihil operatur.

3. **If there be Tenant in Tail, the Remainder in Fee, and Tenant in Tail grants a Rent in Fee to him in the Remainder; and after he in the Remainder grants over** redditum Prædictum: **This ſhall be a Confirmation of the Rent, ſo that the Remainder ſhall be charged with it after the Death of Tenant in Tail without Iſſue.** M. 15 Jac. B. R. **between** (e) Dutton **and** Ingham. **It was a Queſtion, for** Houghton **inclined that it ſhould not be a Confirmation, but** Mountague **inclined the** Contra, **and the others did not ſpeak to it upon their laſt Argument.**

(e) Cro. Jac. 428. S. C. and S. P. appears. Poph. 131. S. C. and S. P. per Mountague.

4. If *A.* leaſes to *B.* for Years, and after *A.* by his Deed, *voluit quod haberet & teneret terram pro termino vitæ ſuæ:* This is a good Confirmation for Life by the Word *volo.* *Co. Lit.* 301. b.

(Y) In what Caſes it ſhall be good.

Fol. 483.

Confirmation of a void (a) Thing.

1. If a Man be attainted of Treaſon, and the King reverſes it by his Letters Patents: This is void, becauſe he cannot do it without a Legal Proceeding; and after, the Parliament reciting the Patent, ratifies, confirms, and approves it, and that he ſhall be reſtored to his Land, &c. This Act of Parliament is a ſufficient Reverſal of the Judgment, becauſe it recites the Patent, and ſo gives Life to the Patent which was void. (b) 29 E. 3. 25. adjudged.

(a) If A. takes the Villein in groſs of B. claiming him to be his, and B. confirms to A. the Eſtate which he hath in the Villein, the Confirmation is void, for A. was not poſſeſſed of him as his Villein. Lit. Sect. 541. Co. Lit. 306. b. Hob. 99. For of the Perſon of a Man there can be no Poſſeſſion without a Right. (b) Fitz. Grant 100. S. C.

(Z) Every Confirmation ought to enure upon a Thing *in eſſe*.

1. If a Biſhop collates to a Prebendary, and dies before Induction, and after the King before Induction confirms to him for his Life: Yet this is not good, becauſe he hath not any Poſſeſſion upon which the Confirmation may enure at the time of the Confirmation. (a) 11 H. 4. 7. Com. 528. b.

(a) Br. Confirmation 7. S. C. Fitz. 5. S. C.

(A) A Confirmation (a) ſhall not enlarge an Eſtate.

(a) 1 Bulſ. 136.

1. If Leſſee for Life grants a Rent to another for his Life, and the Leſſor confirms it: This ſhall make the Rent good for the Life of the Grantee, tho' before by Limitation of Law it ought to have determined by the Death of the Leſſee. (b) 45 Aſſ. 13.

(b) Br. Confirmation 16. S. C. Br. Rents 25. S. C.

2. (c) So if Leſſee for Life grants a Rent (d) in Fee to another, and he in the Reverſion confirms it: This is a good indefeaſible Rent in Fee.

(c) Co. Lit. 301. a S. P. 1 Co. 147. b.

(d) But if he grants a Rent to another, and his Heirs, during the Life of the Grantor, and the Leſſor confirms the Grant, yet it ſhall determine by the Death of the Leſſee for Life. 1 Co. 147. b.

3. If Leſſee for Life grants a Rent for Life or in Fee to another, and after ſurrenders to him in the Reverſion, and after he confirms it: This hath made the Rent indefeaſible. (e) 26 Aſſ. 38. per Wilby.

(c) Br. Confirmation 15. S. C. Br. Grant 73. S. C.

Con=

Confirmation.

For Part of the Lands or Eſtates.

1. IF a Diſſeiſee makes a Confirmation to the Diſſeiſor in Tail, or for any particular Eſtate: This is a good Confirmation for ever, for the Diſſeiſee had a Fee-Simple, and the Confirmation cannot make a Fraction of his Eſtate, ſo as to extend to Part of it only. *Co. Lit.* 296. b.

(a) 5 Co. 81. b. S. P. (b) But if he makes a Leaſe for Years, the Diſſeiſee may confirm it for Part of the Lands, or Part of the Term. 5 Co. 81. b. Co. Lit. 297.

2. (a) So if the Diſſeiſor makes a (b) Gift in Tail, and the Diſſeiſee confirms the Eſtate of the Donee for the Life of the Donee only, the Confirmation enures to the whole Eſtate. *Co. Lit.* 296. b.

(c) N. Dyer 72. b. Margine. S. C. cited to have been adjudged, That the Leaſe was well confirmed, and that the Collatee ſhould not avoid it.

3. If a Feme Covert, and two others, are Patrons of an Advowſon, and the Baron and Feme and two others join with the Parſon and Ordinary in a Leaſe; and the Parſon dies, and the Biſhop collates by Lapſe, *&c.* the Succeſſor may avoid the whole Leaſe, and not in Part only; for the Leaſe is one entire Act, and cannot be avoided in Part, and ſtand for the Reſidue. *Mich.* 32 *&* 33 *Eliz.* between (c) *Lancaſter* and *Lucas.* 1 *Leon.* 231, 232. *adjornatur.*

(d) Dyer 338. b. N. Benl. 238. Pl. 265. (e) 1 And. 47. S. C. adjudged. Cro. Eliz. 447. 472. S. C. adjudged.

4 A Prebend *temp. H.* 8. made a Leaſe for 70 Years, and the Biſhop Patron of the Prebendary, and the Dean and Chapter, by ſeveral Inſtruments under their Common Seal, reciting the ſaid Leaſe, confirmed (d) *Dimiſſionem præd' in forma præd' fact' pro termino* 51 Years, *& non ultra. Paſch.* 37 *Eliz.* between (e) *Beresford* and *Ford.* 5 *Co.* 81. a. It was adjudged, That the Confirmation extended to the intire Term; for when the Biſhop, Dean and Chapter, reciting the Demiſe for 70 Years, had confirmed *dimiſſionem præd' in forma præd'*, theſe Words, *pro termino* 51 *annorum & non amplius* came too late, and it was repugnant to confirm *dimiſſionem præd'* for 51 Years.

5. But if the Biſhop, Dean and Chapter, had recited the Leaſe, and confirmed the Land to the Leſſee for 51 Years: This would have been well enough, for then there would have been no Repugnancy. *Paſch.* 37 *Eliz.* 5 *Co.* 18. a. *per Curiam.*

(f) Co. Lit. 198. a. S. P.

6. (f) So they might have confirmed the Leaſe as to Part of the Land only. *Paſch.* 37 *Eliz.* 5 *Co.* 81. b. *per Curiam.*

7. But if a Prebend had leaſed for Life, made a Gift in Tail or Feoffment in Fee, Confirmation for an Hour had been good for ever, for the Freehold and Inheritance are intire. 5 *Co.* 81. b. *per Curiam.*

The (a) Effect thereof.

(a) It is a general Rule That what I may defeat by my Entry, I may make good by my Confirmation. Co. Lit. 300. a. (b) But if Tenant in Tail makes a Leaſe for Life, the Remainder in Fee, rendring Rent, and dies, and the Iſſue in Tail accepts the Rent from the Tenant for Life; This confirms both Eſtates. Jeffry and Coit. Cro. Eliz. 252, 253. adjudged. 1 Leon. 243. So if Tenant in Tail leaſes to two, and the Iſſue in Tail accepts the Rent from one of them; and ſaith, he will accept him only for his Tenant; yet it is a Confirmation to both. Cro. Eliz. 253.

1. IF a Diſſeiſor leaſes to *A.* for Life, Remainder to *B.* in Fee, and the Diſſeiſee (b) confirms the Eſtate of *A.* This ſhall not enure to *B.* *Co. Lit.* 297. a.

2. (c) But if he had confirmed the Eſtate of *B.* he ſhould not have enter'd upon *A.* for the Remainder of *B.* depends upon the Eſtate of *A.* *Co. Lit.* 297. a.

(c) So if the Diſſeiſor leaſes for Life, reſerving the Reverſion to himſelf, and the Diſſeiſee confirms the Eſtate of the Diſſeiſor, he ſhall not enter upon the Tenant for Life; for he cannot avoid the Eſtate of the Leſſee for Life, but he muſt avoid the Eſtate of the Leſſor alſo, which he cannot againſt his own Confirmation. Co. Lit 298. a 302. a.

3. So if a Diſſeiſor makes a Gift in Tail to *A.* Remainder to the right Heirs of *A.* if the Diſſeiſee confirms the Eſtate-Tail, it ſhall not extend to the Fee-Simple. *Co. Lit.* 297. a.

4. But if the Diſſeiſor makes a Leaſe for Life to *A.* and *B.* and the Diſſeiſee confirms the Eſtate of *A.* *B.* ſhall take Advantage thereof, (d) for the Eſtate of *A.* was joint with *B.* *Co. Lit.* 297. b.

(d) So if there be two Diſſeiſors, and the Diſſeiſee confirms the Eſtate of one without more ſaying. Co. Lit 298. a. —But if he confirms the Eſtate of one in the Lands to have and to hold the Lands, or the Right of the Diſſeiſee to him and his Heirs, he ſhall hold out the other. Co. Lit. 298. a. and vide Co. Lit. 298. b.

5. So if a Diſſeiſor enfeoffs *A.* and *B.* and the Heirs of *B.* and the Diſſeiſee confirms the Eſtate of *B.* for his Life: This ſhall not only extend to *A.* but to the whole Fee-Simple, becauſe to many Purpoſes *B.* had the Fee in him, and the Confirmation ſhall be taken moſt ſtrongly againſt him that makes it. *Co. Lit.* 297. b.

6. If a Feme Leſſee (e) for Life marries, and the Leſſor confirms the Eſtate of the Husband and Wife to hold for their Two Lives, the Huſband holdeth only in Right of his Wife for her Life, but ſhall take a Remainder for his Life. *Co. Lit.* 299. a.

(e) Secus if for Years, for then by ſuch a Confirmation the Term would be drowned, and the Husband and Wife Jointenants for their Lives. Co. Lit. 300. a.

7. So if the Leſſor confirms the Eſtate of the Husband and Wife, to hold the Land to them Two and their Heirs, they are Jointenants of the Fee-Simple, and the Husband ſeized in the Right of his Wife for her Life. *Co. Lit.* 299. b.

8. If there be two Tenants in Common for Life, and the Leſſor confirms their Eſtate to hold to them and their Heirs, they are Tenants in Common of the Inheritance; for regularly the Confirmation ſhall enure according to the Quality and Nature of the Eſtate that it enlarges. *Co. Lit.* 299. b.

9. If Lands are given to two Men and the Heirs of their Body, and the Donor confirms their Eſtates in the Land to hold the Land to them Two and their Heirs, whether they ſhall be Jointenants or Tenants in Common of the Fee. *Co. Lit.* 299. b. *dubitatur.*

(f) Moor 66. Pl. 180 S. P. per Curiam. (g) Otherwise, if a Biſhop had made two Leaſes, and the Dean and Chapter had confirmed the ſecond Leaſe, and after the firſt; for no Intereſt paſſed by the Confirmation, but it was only to make it perdurable and effectual. Moor 66. Pl. 180. adjudged, and vide Moor 481. a.

10. (f) If Tenant for Life leaſes for 30 Years, and after leaſes to another for 60 Years, and the (g) Leſſor confirms the Leaſe for 60 Years, and after confirms the Leaſe for 30 Years, and the Tenant for Life dies: The ſecond Leaſe ſhall take Effect, becauſe firſt confirmed by the Leſſor who had Power to confirm which he would. *Co. Lit.* 296. a.

(h) The Rector of Chedington's Caſe. 1 Co. 153, &c. S. C. and S. P. appears.

11. A Parſon leaſed for 80 Years to *B.* if he lived ſo long, and ſhould not alien, and if *B.* died within the Term, or aliened, then the Eſtate of *B.* ſhould ceaſe; and then *A.* by the ſaid Indenture demiſed to *C* for ſo many Years as ſhould be unexpired after the Death or Alienation of *B.* if *C.* ſhould ſo long live, and not alien, *&c.* and the Patron and Ordinary reciting the Leaſe confirmed *dimiſſionem præd'. Mich.* 37 & 38 *Eliz.* between (h) *Lloyd* and *Wilkinſon. Moor* 478. *Pl.* 684. adjudged, That the Confirmation is good, and ſhall extend to the Poſſibility of *C.* tho' it was objected that they had not confirmed *factum* or *indenturam præd.*

Where it ſhall not alter the (a) (b) Quality of the Eſtate.

(a) Not unleſs the Eſtate it ſelf is enlarged. 9 Co. 142. and vid. 1 Rol. Rep. 183. —But if Leſſee for Years without Impeachment of Waſte accepts a Confirmation of his Eſtate for Life; by this he hath loſt the Privilege annexed to his Eſtate for Years. 8 Co. 76. a, b. 1 Rol. Rep. 183. (b) The Heir confirms the Eſtate of Tenant in Dower, and ſhe after grants it over, and her Aſſignee does Waſte, the Action lies againſt her. 9 Co. 142. a. (c) Kettle and Maſon, S. C. Poph. 50. adjudged.

1. IF *A.* enfeoffs *B.* upon Condition, and *A.* and *B.* join in the Grant of a Rent Charge to *C.* and after *A.* enters for the Condition broke, yet he ſhall not avoid this Rent; for this was a good Confirmation by *A.* and ſhall not be avoided by reaſon of a Condition in another Deed. *Hill.* 35 *Eliz.* (c) *Mayowe*'s Caſe. 1 *Co.* 146, 147. adjudged; and ſaid the Caſe was the ſtronger, becauſe the Grant and Confirmation were by the ſame Deed, ſo that the Rent was never ſubject to any Condition.

2. If *A.* enfeoffs *B.* upon Condition, and after *A.* confirms the Eſtate of *B.* yet the Condition remains. *Hill.* 35 *Eliz.* 1 *Co.* 147. a. b.

(d) Poph. 50. S. C. and S. P. by Gaudy, but Poph. denied it. 9 Co. 142. S. C. cited.

3. (d) But if *B.* had enfeoffed *C.* ſo that the Eſtate of *C.* had been only ſubject to the Condition in another Deed, and after *A.* had confirmed the Eſtate of *C.* this had extinguiſhed the Condition which was annexed to the Eſtate of *B. Hill.* 35 *Eliz.* 1 *Co.* 147. a. b.

(e) Baker and Willis. S. P. Cro. Car. 476. by Berkly againſt Croke and Jones, but ended by Compoſition. 1 Jon. 393, 394. reported as in Cro. and vide March 146. (f) By the Habendum the Tenements there is a new Eſtate-Tail extracted out of the Reverſion. Cro. Car. 478.

4. (e) If Baron and Feme are Tenants in Special Tail, Remainder in Fee to the Baron, and the Baron levies a Fine with Proclamations to the Uſe of *J. S.* and his Heirs, and dies, and the Wife enters, and *J. S.* reciting the Gift in Tail, and that the Wife was ſeized in Tail by force thereof, confirms her Eſtate, (f) *Habendum* to her and the Heirs of the Body of her late Husband and ſelf, *&c.* The old Eſtate as to the Iſſue

in Tail being barred by the Fine, the Confirmation cannot add any diſcendible Quality thereto. *Paſch.* 10 *Jac.* (g) *Beamont's* Caſe. 9 *Co.* 138, 139, *&c.* 141. b. adjudged.

(g) Hob. 257. S. C. cited.

5. So if there be Lord and Tenant, and the Tenant having Iſſue is attainted of Felony, and the King pardons him, and the Lord confirms his Eſtate, and the Tenant dies, his Iſſue ſhall not inherit, but the Lord ſhall have it againſt his own Confirmation; for that could not enable him to take by Deſcent, who by the Attainder of his Father was diſabled. 9 *Co.* 141. *per Curiam.*

At what Time it may be.

1. IF the Diſſeiſor makes a Charter of Feoffment to *A.* with a Letter of Attorney, and before Livery the Diſſeiſee confirms the Eſtate of *A.* or the Deed made to *A.* This is void, tho' Livery be made after. *Co. Lit.* 301. a.

2. (a) So in Caſe of a Confirmation of a Deed of Grant of a Reverſion before Attornment. *Co. Lit.* 301. a.

(a) 3 Leon. 17 S. P. 4 Leon. 23. S. P.

3. But if a Biſhop had made a Charter of Feoffment with a Letter of Attorney, and the Dean and Chapter before Livery had confirmed the Deed: This had been a good Confirmation, Livery being made afterwards. *Co. Lit.* 301. a.

4. The Grant of a Parſon muſt be confirmed by the Patron and Ordinary in the Life of the Parſon, and during his Incumbency. *Co. Lit.* 301. a.

5. So in Caſe of a (b) Biſhop, or any other ſole Corporation. *Co. Lit.* 301. a.

(b) Godb. 25. S. P. arguendo.

Where it ſhall enlarge an Eſtate.

1. (a) WHere a Confirmation ſhall enlarge an Eſtate, there muſt be Privity, as in Caſe of a Releaſe. *Co. Lit.* 296.

(a) Co. Lit. 305. a. b. S. P.

Where it ſhall (a) abridge Services, &c.

(a) But upon ſuch Confirmation, new Services cannot be reſerved. may confirm

1. SErvices cannot be abridged by a Confirmation, unleſs there be Privity. *Co. Lit.* 305. b.

Lit. Sect. 539. Co. Lit. 306. a. 9 Co. 142. a. — But the Lord in ancient Demeaſn to his Tenant to hold at Common Law. 9 Co. 142. a. 1 Part. 662. Pl. 15.

2. If there be Lord and Tenant by Fealty, and 20 *s.* Rent, the Lord by his Deed may confirm the Eſtate of the Tenant to hold by 12 *d. &c. Co. Lit.* 305. a. b.

3. But if there be Lord, Meſne and Tenant, the Lord cannot confirm the Eſtate of the Tenant to hold by leſſer Services. *Co. Lit.* 305. b.

4. A Rent-Charge or Common cannot be abridged by Confirmation. *Co. Lit.* 305. a.

Con-

(a) (b) (c) Conſtable.

(a) Tything-man and Conſtable all one in ſome Places. 1 Mod. 78.

(b) He is one of the moſt ancient Officers in the Realm for the Conſervation of the Peace; and if he finds any breaking it, he may impriſon him till he finds Sureties by Obligation to keep it. Poph. 13. Ow. 105. 4 Inſt. 265. —But he cannot take Sureties by Recognizance, becauſe he is no Officer of Record, and therefore ſuch Bond ſhall be taken in his own Name, and not in the Name of the King, and ſhall be certified at the Seſſions. Cro. Eliz. 375. 376. (c) May be indicted for refuſing to execute a Juſtice's Warrant. 2 Rol. Rep. 78. For not taking the Oath of a Conſtable. Rol. 78. And vide, Styl. 362. (d) But the Juſtices may appoint a Conſtable in ſuch Place where there was never any before. 1 Mod. 13. Such Order confirmed in B. R. (e) By the Common Law, they are to be choſe at the Leet or Town. 4 Inſt. 265. (f) Where a Writ of Reſtitution in ſuch Caſe ſhall be granted. 1 Rol. Abr. 535. Pl. 1, 2, 3. (g) 1 Mod. 13.

By whom made, or removed.

1. A Conſtable elected by the Inhabitants of a Hamlet, (d) according to (e) Cuſtom, and ſworn in the Leet, cannot be diſplaced by the Juſtices of Peace; but the Lord that approved of the Choice may for juſt Cauſe remove him. *Mich.* 9 *Jac.* 1 *Bulſ.* 174. by Two Judges, and an (f) Order made in *B. R.* accordingly: and that the Conſtable made by the Juſtices of Peace ſhould be removed, and (g) the Conſtable elected by the Inhabitants ſhould ſerve.

(h) They were not ab origine, but came in with Juſtices of the Peace. 1 Mod. 13. per Twyſden.—They were created by the 13 Ed. 1. cap. 6. and their Duty thereby limited, tho' ſubſequent Statutes have inlarged their Power; but being created by Act of Parliament, they have no more Authority than the Act that created them, or ſome ſubſequent Act of Parliament hath given them, and cannot preſcribe as an Officer by the Common Law may. 4 Inſt. 267.

2. But (h) Conſtables of Hundreds, or High Conſtables, being choſe by the Juſtices of Peace, may for juſt Cauſe be removed by them. *Mich.* 9 *Jac.* 1 *Bulſ.* 174.

3. But *per* 13 *&* 14 *Car.* 2. *cap.* 12. *par.* 15. in caſe any Conſtable, Headborough or Tythingman, ſhall die, or go out of the Pariſh, any Two Juſtices of Peace may make and ſwear a new Conſtable, *&c.* until the Lord ſhall hold a Court, or until next Quarter-Seſſions, who ſhall approve of the Officer ſo made and ſworn, or appoint another; and if any Officer continues above a Year in his Office, the Juſtices of Peace in their Quarter-Seſſions may diſcharge him, and put another in his Place till the Lord of the Manor holds a Court. 1

(a) His

(a) (b) His (c) Power and Authority.

(a) As to their Power and Authority by ſeveral Statutes, vide the Acts by which given.

1. IF one aſſaults, and with opprobrious Words abuſes a Conſtable in the Execution of his Office, he cannot commit him to Priſon there to remain till puniſhed for the Offence, but muſt (d) carry him before a Juſtice of Peace, who may commit him, *&c.* *Trin.* 31 *Eliz.* between *Fulwood* and *Gaſcoign.* *Sav.* 97, 98. adjudged.

(b) Whether he may impriſon an Inhabitant for refuſing to watch. Stretton and Brown. Cro. Eliz. 204. dubitatur. 3 Leon. 208. dubitatur. (c) He may arreſt one that he finds in a ſuſpicious Houſe with Women, &c. ſo of Night-Walkers, and may oblige others to be aſſiſtant to him therein. Br. Treſpaſs 432. (d) 1 Leon. 327. Ow. 98.

2. But a (e) Conſtable for a (f) Breach of the Peace in his (g) Preſence may impriſon a Man in the Stocks. *Trin.* 31 *Eliz.* *Sav.* 98.

(e) Otherways of the High-Conſtable. Ow. 105. Cro. Eliz. 397. (f) Upon himſelf, 1 Rol. Rep. 238 2 Bulſ. 329. Fitz. Barre 141. (g) Otherways if not broke in his Preſence, for he hath no Authority to take an Oath, &c. Ow. 105. Cro. Eliz. 375. and vide Fitz. Barre 202. Br. Faux Impriſonment 6.

3. If *J. S.* lays a Child of the Age of Two Months in the Church-yard of *B.* to the intent to deſtroy it, or charge the Pariſh with the keeping of it, the Conſtable of *B* may arreſt *J. S.* and put him in the Stocks; for this is an ill Practice, and good Cauſe to ſtop and impriſon him. *Mich.* 34 and 35 *Eliz.* between (h) *Beal* and *Carter.* *Cro. Eliz.* 287. adjudged.

(h) Poph. 12. S.C. adjudg'd. Moor 284. Pl. 436. S. C. adjudged; and by theſe Books the Impriſonment was until J. S. agreed to take up the Infant again, &c. Ow. 98. S. C. and S. P. 1 Leon. 327. S. C. and S. P. per Curiam, for any Body may ſtop him, a fortiori the Conſtable; but by the Report in Ow. and Leon. the Juſtification was held naught, becauſe not ſhewed that J. S. the Plaintiff refuſed to carry the Infant away; but the Judges would not for the ill Example give Judgment, but moved the Parties to compound.

4. If *A. as a Treſpaſſer, takes the Corn of B.* the Conſtable upon the Requeſt of *B.* cannot detain *A.* till *B.* procures a Warrant from a Juſtice of Peace, *&c.* for the Conſtable hath not Power to ſtop any Man unleſs for Felony. *Mich.* 11 *Jac.* between *Ringhal* and *Walſh.* 1 *Brownl.* 198. adjudged.

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Continuance and (a) Diſcontinuance.

(a) Where an Appeal was diſcontinued, becauſe there was a Day meſn between the Return of one Proceſs, and the Date of the next. 1 Part 499. Pl. 8, 9.

(A) To what (b) Time it may be.

1. UPON an Original, a Term, or Two or Three Terms, may be Meſn between the Teſte and the Return; and this ſhall be a good Continuance, for the Defendant is not at any Prejudice by it, and the Plaintiff may give a Day to the Defendant beyond the common Day if he will. D. 2 Eliz 175. 23.

2. A Continuance by (c) Capias (d) ought to be made from Term to Term, and there cannot be any meſn Term, becauſe the Defendant ought not to ſtay ſo long in Priſon. (e) 8 E. 4. 12. per Cumber. D. 2 Eliz. 175. 23.

(b) In a Pie-Powder-Court, the Adjournment was entered idem dies dat' eſt, where it ſhould have been eadem hora. Moor 459. Pl. 637. and yet adjudged good.

(c) So a Capias Utlegatum ought to be Returnable the Term after it is awarded. Cro. Eliz. 467. (d) But an Exigent may be awarded in Eaſter-Term, returnable in Michaelmas-Term, for the Nature of the Writ requires it, for in ſo ſhort a Term five Counties cannot be held. Dal. 104. —So a Grand Cape in a real Action requires 9 Returns, and therefore if it is awarded in Eaſter-Term, it ſhall be returnable about Cras' animarum. Dal. 104. (e) Fitz. Continuance 3. S. C. Br. 48. S. C.

3. But by Diſtreſs, a Continuance may be made with (f) more than a Term Meſn. (g) 8 E. 4. 13. per Cumber. D. 2 Eliz. 175. 23.

(f) In the Original it is Duſter un Term meſn.

(g) Fitz Continuance 3. S. C. Br. 48. S. C.

4. If a Continuance be made in an inferior Court, ad proximam Curiam ibidem tenendam, without alledging any Day to which it is adjourned; yet if the Court be to be held by Cuſtom, not at any certain Day, as every (h) Week, or de tribus in tres, &c. but die Lunæ, when the Judges thereof pleaſe: This is a good Continuance. P. 8 Car. B. R. between (i) Laxe and Jeſſon adjudged, and a Judgment given in Coventry affirmed in a Writ of Error: This being moved for Error.

(h) In the Original it is ſemain.

(i) Cro. Car. 254. S. C. and Judgment affirmed upon a Writ of Error by Three Judges. Croke dubitante.

5. In Writs of Execution the Juſtices may give a Day at their Pleaſure. (k) 24 Ed. 3. 31. b.

6. (l) As in a Scire Facias to execute a Fine. (m) 24 E. 3. 31. b.

(k) Fitz Jour. 9. S. C.

(l) Adams and Flyth. Cro. Jac. 371. S. P. adjudged. 2 Mod. 59. cited. 1 Vent. 181.

(m) Fitz. Jour. 9. S. C.

7. If a Continuance be in an inferior Court that hath Power to hold Plea de tribus in tres, or any other certain Time, and not otherways, there the (n) Continuance ought to be, (o) ad proximam Curiam, scilicet, and (p) alledge the Day, otherways it is not good: And it is not sufficient to say, ad quam quidem proximam Curiam, scilicet such a Day, &c. because the Party ought to know the certain Day upon which the Entry of the Continuance is. P. 8 Car. B R. between (q) Laxe and Jesson, in a Writ of Error upon a Judgment in Coventry, agreed per Curiam. D. 9 Eliz. 252.

(n) So the Process must be returnable at the next Court of a certain Day. Cro.Eliz.105. Johns and Smith. Cro. Jac. 314. adjudged. 2 Bulst. 36. adjudged. So as well as to

1 Mod. 81. 2 Mod. 59. Raym. 205. (o) The Continuance ought to be to the Court the Day. Styl. 58. 70. (p) Where it was ad prox' Curiam, scilicet 16 Diem, where the Court was not held that Day, but the 26th Styl. 97. the Judgment reversed, and vide Styl. 66. 122. (q) Cro. Car. 254. S. C. and S. P. seems to be admitted per Curiam. 1 Rol. Abr. 486. Pl. 2. S. C.

8. Continuance of a Plea cannot be by one Term or more then, upon the Prayer of the Defendant. M. 15 Jac. B. R. between Shotbolt and Leech, per Curiam, agreed.

9. (r) But the Continuance of a Plea (s) upon Advice of the Court by a Term or more between, is not good. M. 1 Car. at Reading-Term, B. R. between Norris and Johnson. In a Writ of Error upon a Judgment given in Banco, it was adjudged to be a Discontinuance, where the Case was, That in Trespass in Banco the Defendant pleaded a special Plea, upon which the Plaintiff demurred, and the Court upon an Advisare vult gave Day from Easter-Term to Michaelmas-Term, intermitting Trinity-Term, and therefore adjudged to be a Discontinuance, and the Judgment reversed accordingly; because, if this should be allowed, the Court might delay Men perpetually, for as well as they might intermit one Term, they might * intermit One Year or Twenty Years. Contra, M. 15 Jac. B. R. between Shotbolt and Leach, per Curiam.

(r) 1 Bulst. 144 S. P. adjudged, con. per totam Curiam.
(s) 3 Bulst. 233.

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10. If a Man declares in an Action upon the Statute of Monopolies, as the King's Patentee of Sope, and after the Defendant in Easter-Term pleads, that the King did not make any such Letters Patents, and Issue is joined thereupon, and Day given to the Plaintiff till Michaelmas-Term; (t) but there is no Continuance between Easter and Trinity-Term, it is a Discontinuance; (u) for tho' the Court might give Day to bring in the Letters Patents in Michaelmas-Term, omitting Trinity-Term, yet there ought to be a Continuance between Easter and Trinity-Term by a Curia advisare vult till Trinity-Term, or otherwas it is a Discontinuance. Tr. 1652. between (x) Friend and Baker, adjudged.

(t) Molineux and Molineux, like Point, Yelv. 169. Cro. Jac. 236.
(u) The Original is misprinted, for the Words,

To bring in the Letters Patents, are both before and after these Words. (x) Styl. 339. S. C. adjudged.

(B) (a) What

(a) 1 Rol. Abr. 487. Pl. 4, 5, 6, &c.

(B) (a) What ſhall be a Diſcontinuance.

(b) 2 Rol. Rep. 111. S. P. per Dod.

1. (b) THe Courſe of the Court of the King's Bench is to enter no Continuance upon the Roll till after Iſſue or Demurrer, and then to enter the Continuance of all upon the Back (c) before Judgment. Tr. 16 Jac. B. R. Sir George Trencher's Caſe by the Clerks. M. 31, 32 Eliz B. R. between Ruſſel and Prat, by the Clerks; and if it is not entered, it is Error. See the principal Caſe. P. 16 Jac. B. R.

(c) A Diſcontinuance can never be objected, Pendente Placito, for before Judgment it may be continued at the Pleaſure of the Court, tho' not after Judgment in another Term. Cro. Jac. 211, 212. —But at what time Continuances may be entred, Mid. Sav. 54. Lit. 4. — To avoid the Statute of Limitation. 1 Sid. 53. —To warrant a new Fi. fa. or Elegit. 1 Sid. 59, 60.

2. If a Pluries Replevin be returned in Michaelmas-Term, that the Defendant claimed Property, and after nothing is done, nor any Appearance nor Continuance till Eaſter-Term after, at which Term they appeared and pleaded, and Judgment was thereupon given: Tho' no Continuance was between Michaelmas and Eaſter, yet this is not any Diſcontinuance, becauſe there is not any Continuance till Appearance, for the Parties have not any expreſs Day in Court; and where there is not any Continuance, there cannot be any Diſcontinuance. Tr. 38 Eliz. B. R. between (d) Gawen and Ludlow, adjudged.

(d) Moor 403. Pl. 537. S. C. adjudged, That the Plaintiff may have a Writ De proprietate probanda, without Continuance of the Replevin, tho' it be Two or Three Years after, becauſe by the Claim of Property the firſt Suit is determined. Cro. Eliz. 46. S. C. but S. P. does not appear. 1 Rol. Abr. 581. E. 1. 2. S. C.

3. In a Quare impedit in Banco againſt Two, One pleads to Iſſue, and the other demurs, and a Verdict is given againſt him who pleads to Iſſue, and after ſeveral Continuances are made upon the Demurrer, but no Cotinuance is made upon the Verdict till Judgment is given; but after Judgment is given upon the Verdict, and alſo upon the Demurrer for the Plaintiff: Yet this is not any Diſcontinuance, for it is not the Uſe to make any Continuance after Verdict till Judgment. Mich. 7 Car. B. R. between (e) Ekins and Sir John Lambe, adjudged, in a Writ of Error; which Intratur Trin. 7 Car. Rot. 1165.

(c) Cro. Cat. 236. S. C. adjudged; for by the Verdict, he againſt whom it was found was out of Court, and no Day ſhall be given to a Defendant againſt whom a Verdict is found, for he hath no Day in Court to plead any Thing. But vid. Cro. Jac. 528.

4. In an Ejectione firmæ, if the Defendant at the Day of Niſi prius at the Aſſiſes pleads, That the Plaintiff entered into Parcel of the Land pending the Writ, and the Juſtices of Niſi prius accept the Plea, and diſmiſs the Jury; tho' they do not give any Day to the Parties in Banco, yet this is not any Diſcontinuance, altho' the Plea is collateral; for the Day of Niſi prius, and the Day in Bank, are but one Day; for the Court in Banco gave Day to the Jurors in Banco, Niſi prius Juſticiarii ad Aſſiſas venerint, and to the (f) Parties Day is given there abſolutely. M. 8 Jac. Scaccario. (g) Sir Hugh Brown's Caſe, adjudged.

(f) If the Iſſue is found againſt the Defendant, 'tis not material whether he had a Day given or not. Palm. 333. (g) Lane 81, 86, 89. S. C. adjudged; and ſeveral Caſes cited where the Judge of Niſi prius ſhall give a Day in Bank or not.

5. If a Man recovers upon Demurrer, or by Default, &c. and a Writ of Inquiry of Damages is awarded, there ought to be Continuances all times between the firſt and ſecond Judgment, otherways it will be a Diſcontinuance; for the firſt is but an Award, and not compleat, till the ſecond Judgment upon the Return of the Writ of Inquiry of Damages. Trin. 14 Jac. B. R. between (h) Pipe and Agar, by the Clerks. Tr. 23 Car. B. R. between Jennings and Sanders, adjudged, per Curiam, upon Demurrer.

(h) 1 Rol. Rep. 408 S C and S. P. per Clericos, 3 Bulſt. 208, 209 S. C. And per Clericos, There is no neceſſity to have a Continuance entered after the Writ of Enquiry awarded; and per Coke, it is good either way.

6. But he needs not in this Caſe to make any Continuance after the ſecond Judgment. Tr. 14 Jac B. R.

7. If a Judgment be given upon Nil dicit, a Writ of Inquiry of Damages may iſſue the ſame Term, in which the Judgment is given without any Continuance, but not in another Term. (i) M. 10 Jac B. per Curiam, and ſaid to be adjudged, and that the Precedents are ſo: This is the Courſe de B. R. but in Banco it is otherways: For (k) there the Uſe is, That if a Writ of Inquiry be awarded returnable the next Term, no idem dies is given to the Plaintiff; (l) but otherwiſe it is in Banco R. Paſch. 16 Car. B R. between Leman and Mapowder, per Curiam adjudged in a Writ of Error upon hearing the Prothonotaries de Banco. Intratur Tr. 15 Car.

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(i) Godb. 195 ſeems to be S. C. and S. P. per Curiam.

(k) So it ſeems to be otherways in inferior Courts, for tho' by the firſt Judgment the Defendant is out of Court, yet the Plaintiff ought to attend de die in diem. Harrington and Lanſdon. Such Judgment reverſed, becauſe no Day was given to the Plaintiff Yelv. 97. Noy 120. and vide Cro Eliz. 144, 774. (l) Sir John Leydon's Caſe. Same Diverſity agreed. 11 Co. 6. b. Rol. Rep. 30, 31 Preſton and Tooley. Same Diverſity. Cro. Eliz 75. 1 Rol. Rep. 31. cited; and vide Cro. 1 Eliz. 144. 1 Sid. 16.

8. In an Action of Debt in an inferior Court, if the Defendant acknowledges the Action at one Court, and no Judgment is entered at this Court, but at the next Court Judgment is given for the Plaintiff, if there be no Continuance between the ſaid Courts, this is a Diſcontinuance. P. 11 Car. B R. between Thornton and Wade. per Curiam, adjudged, and a Judgment given in York reverſed accordingly. Intratur M. 11 Car. Rot. 318.

9. If a Judgment be given in Treſpaſs, or other ſuch Action by Default, or upon Demurrer, and a Writ of Enquiry of Damages awarded returnable the next Term, no Continuance per idem dies ſhall be given to the Defendant, becauſe he is out of Court by his own Default: This is the conſtant Courſe de B. R.

10. If the Defendant in an Action imparl till (m) Octabis Michaelis, at which Day the Term is adjourned to Menſe Michaelis, to which Day there is no Continuance, but to Octabis Hilarii after there is a Continuance: This is a Diſcontinuance. H. 10 Jac. B. R. per Curiam, between (n) Hunſley and Osban.

(m) But when a Day was given, Octab. Michaelis, but nothing done between the Parties till Octab. Martini, yet it was held no Diſcontinuance, becauſe in the ſame Term. Vide Kelw. 56. b. (n) 1 Part 243. Pl. 1. S. C. Cro. Jac. 445, 446 S. C. adjudged.

11. If in Treſpaſs for breaking his Houſe, and taking and carrying away his Goods, the Defendant juſtifies the whole, and the Plaintiff *quoad fractionem domus*, and the taking the Goods, *necnon materia in ea contenta*, demurs upon the Defendant's Bar, and the Defendant joins in Demurrer in this manner, *Quia placitum præd' quoad fractionem domus*, and the taking the Goods *ſufficiens, &c.* and thereupon Judgment is given: Here is a Diſcontinuance, for in the Offer of the Demurrer *ex parte querentis*,

rentis, nothing is alledged ſpecially, but only *quoad* the breaking the Houſe and taking the Goods; and tho' the ſubſequent Words, *necnon materia in ea contenta* goes to all the Matter in Bar, *viz.* the Aſportation; yet when the Defendant joins in Demurrer, he joins but ſpecially, *quoad* the breaking the Houſe and taking the Goods, but ſays nothing as to carrying them away. *Trin.* 44 *Eliz.* between (o) *Johnſon* and *Turner*. *Yelv.* 5, 6. adjudged.

(o) 1 Brownl. 192. S. C. adjudged.

12. If Four bring a Writ of Error, and upon a *Scire facias quare Executionem habere non, &c.* one of them only appears, and all the reſt make Default, and he that appears aſſigns Errors by himſelf, and the Defendant pleads *in nullo eſt Erratum:* The Writ of Error is diſcontinued, for tho' a Writ of Error is but a Commiſſion to examine the Errors, and may be lodged in the Court for Seven Years without being diſcontinued, yet after the Parties have once proceeded thereupon, it may be diſcontinued as well as another Action; and in this Caſe, he that appeared ought to have prayed Proceſs *ad ſequendum ſimul, &c. Trin.* 44 *Eliz.* between (p) Lord *Cromwell* and *Andrews*. *Yelv.* 3, 4. adjudged.

(p) Cro. Eliz. 891, 892. S. C. adjudged; but for this, vid. Under Title Error, How Errors may be aſſigned.

13. If in Trover in an inferior Court Judgment is given by Default, and a Writ of Inquiry awarded returnable at the next Court, *ad quem Diem* the Writ is returned ſerved, *& jurata ponitur in reſpectu uſque ad prox' Curiam, &c.* when they appear and give Damages, *&c.* Here is a Diſcontinuance; for the Jury cannot be continued over by a *ponitur in reſpectu*, for being only an Inqueſt of Office, they can have no Continuance, but by a *non miſit Breve*. *Hill.* 4 *Jac.* between (q) *Harrington* and *Lanſden*. *Yelv.* 97. adjudged.

(q) Noy 120. S. C. adjudged.

14. If upon a Writ of Error upon a Judgment in Ejectment, the Plaintiff aſſigns for Error the want of an Original, and the Defendant pleads that ſuch a Day an Original was delivered to, *&c.* and concludes to the Country, and thereupon the Judgment is reverſed: Here is a Diſcontinuance; for (r) when the Defendant concludes to the Country where the Matter of his Plea, *viz.* the Delivery of the Original, was triable by Record, and the Plaintiff does not reply or demur upon the Defendant's Plea; here is not any perfect Record. *Mich.* 5 *Jac.* between *St. John* and *Comyn*. *Yelv.* 117. adjudged, and the Judgment upon a Writ of Error in *B. R.* in *Ireland* reverſed upon a Writ of Error here accordingly.

(r) Diſcontinuance, by not concluding to the Country. Yelv. 138.

15. In an Action of Treſpaſs againſt *A. B.* and *C. A.* confeſſed Judgment, and *B.* and *C.* ſeverally pleaded Not guilty, and ſeveral *Venire's* were awarded to try theſe Iſſues, *&c.* but no Day given to *A. Trin.* 12 *Jac.* between (s) *Cob* and Sir *John Heydon*. 1 *Rol. Rep.* 30, 31. reſolved, upon a Writ of Error upon a Judgment *in Banco*, That it was according to the Courſe of that Court, and that if it was a Diſcontinuance, it was help'd by the Verdict againſt *B.* and *C.*

(s) 11 Co. 5, 6. S. C. adjudged.

16. In an inferior Court the Plaint was entered before ſuch a one Mayor, and the Suit was continued before another Mayor, and it was not ſhewed that the firſt Mayor was removed, or that the other Mayor was lawfully elected and ſworn, and whether the *Venire* was not diſcontinued. *Trin.* 24 *Car. Styl.* 118. *dubitatur*, for by *Rolle*, the Continuances in inferior Courts ought to ſhew the Manner of the Continuances, and it ought not to be expreſſed generally.

(C) Con-

(C) Continuance (a) *per* (b) *idem Dies.*

(a) A Day given before the Court, is called, Dies datus; but when after it, is called, An Imparlance Hard. 365. 366. — If upon a Dies datus the Defendant makes Default, the Plaintiff ſhall not have Judgment, but Proceſs, &c. Stuckly and Thyne. N. Benl. 153. Pl. 214. adjudged. Moor 79. Pl. 209. adjudged. 3 Leon. 14. adjudged. But for this, vid. 1 Rol. Abr. 487. Pl. 5. (b) In a Scire Facias againſt the Heir and Tertenants, the Heir appears, & Nil dicit, and the Tertenants plead a Plea, upon which there is a Demurrer, & Dies datus eſt partibus prædt', until another Term. This is a good Continuance as to all. Cro. Eliz. 740. per totam Curiam, præter Gaudy, who held that there ought to have been ſeveral Continuances.

1. In an Action of Debt in a Borough Court, if Proceſs iſſues to the Serjeant, who returns his Precept ſerved againſt the Defendant, and thereupon a Day is given till the next Court for the Plaintiff to declare againſt the Defendant, and it is not entered, That idem Dies datus eſt Defendenti: This is a Diſcontinuance. P. 3 Car. between Calmady and Vaughan, adjudged in a Writ of Error, and the Judgment given for the Plaintiff upon Nil dicit in the Borough-Court of Okehampton in Devon reverſed accordingly.

2. If a Plaint be entered in an inferior Court that holds Plea by Preſcription, and there the Defendant imparls, and thereupon a Day is given to the Parties till the next Court there to be held, without limiting any Day when the Court ſhall be held; but it is alledged after in the Record, at which Court, ſcilicet, ſuch a Day, held ſecundum Conſuetudinem, &c. This is good, and no Diſcontinuance, becauſe it may be that they have not any certain Day, but may hold a Court when they will, as at the Great Seſſions in Wales; and it ſhall be ſo intended, when it is ſaid, That at the next Court held ſecundum Conſuetudinem, &c. Mich. 7 Car. B. R. between (c) Jeſſon and Laxe, per Curiam, adjudged upon a Writ of Error upon a Judgment given in Coventry-Court, and the Book of 9 Eliz. D. 252. denied, and ſaid, That there were other apparent Errors for which the Judgment was reverſed.

(c) Cro. Car. 254. S. C. adjudged. 1 Rol. Abr. 484. Pl. 7. S. C. Raym. 205 S. C. cited.

3. If a Plaint be entered in an inferior Court, and the Defendant being ſummoned appears, and the Plaintiff declares, and thereupon the Defendant imparls till the next Court, and then pleads in Bar; and thereupon the Plaintiff imparls to the next Court to reply, and there no Day is given to the Defendant, but at the next Court the Plaintiff demurs: This is a Diſcontinuance, for idem Dies ought to have been given to the Defendant. Mich 8 Car. B. R. between Augwin and Lord Roberts, adjudged in a Writ of Error, and the Judgment given in the Hundred-Court of Penwith in Cornwall reverſed. Intratur Mich. 7 Car. Rot. 96.

4. In a Scire facias upon a Recognizance of the Peace againſt J. S. who was bound by it to keep the Peace, the Defendant imparls, and Day is given to him, & idem Dies * is not given to the Plaintiff: Yet this is not any Diſcontinuance, becauſe the King is Party in it; and when the King is Party, no Day is given to him, for he is always preſent in Court. M. 10 Car. B. R. between the King and Griffith, per Curiam.

* Fol. 487.

5. If in an Action upon the Caſe in an inferior Court, the Defendant is eſſoined, and hath a Day *per Eſſoine*, and the Plaintiff *habet eundem Diem*, at which Day the Defendant being demanded, appears not, but makes Default, *& habet Diem per defaltam ſecundum conſuetudinem Villæ*, given by the Court, *&c.* This is a Diſcontinuance, for when the Defendant made Default he was out of Court, and (d) ſo no Day could be given to him, and the Cuſtom alledged cannot help that which is againſt the Common Law. *Mich.* 12 *Jac.* between *Peplow* and *Rowly*. *Cro. Jac.* 357. adjudged.

(d) Cozt and the Biſhop of St. David's. Cro. Car. 341. 1 Jon. 331. and vid. Yelv. 155. Styl. 328, 329.

(D) Diſ-

(D) Diſcontinuance of Proceſs.

In what Caſes it cannot be without the Aſſent of the (a) Defendant.

(a) In the Original 'tis Court, and ſo appears miſprinted.

1. IN an Action after Iſſue joined, and a Verdict found for the Plaintiff, (b) the Plaintiff cannot diſcontinue the Action without the Conſent of the Defendant; and if he will not enter the Judgment, the Defendant himſelf may enter it. Mich. 17 Car. and Hill. 17 Car. Banco, between Thorp and Davenant, in an Action upon the Caſe upon a Promiſe, adjudged for the Plaintiff upon Requeſt of the Defendant, tho' the Plaintiff would have diſcontinued the Suit, and have brought a new Action to have had more Damages.

(b) Styl. 346. S.P. per Holl. Ellis and Barrow. S.P. 1 Sid. 60. per Curiam. 1 Lev. 48. per Curiam. 1 Mod. 13. S. P. per Curiam: Et vid. Latch 216. But vide Hetl. 3. Cro. Car. 575. after a ſpecial Verdict. — Where by the Courſe of the Court the Plaintiff may diſcontinue without Motion, paying Coſt. Styl. 366. and vide 1 Leon. 105.

(E) In what Caſes the (a) Court ought to have given Conſent to a Diſcontinuance.

(a) Where after Demurrer. Cro Jac. 317. Cro. Car. 195. March 24. Styl 120, 134. 306, 309, 310, 382. All. 20. 1 Saund. 23. 2 Saund. 74. 1 Sid. 84, 306. 1 Lev. 227, 298. 2 Lev. 118, 124. and vid. 1 Mod. 41. 1 Bulſ. 217.

1. IF the Parties demur in Law, and after the Plea is not continued in the Roll (b) for a Year, and one Party prays a Diſcontinuance, if the other does not pray the contrary, the Uſe is for the Court to grant the Diſcontinuance. H. 37 Eliz. Banco, between Fullwood and Ward, by the Clerks.

(b) Gouldſ. 53.

2. But if the other Party prays a Continuance of the Plea, the Court in Diſcretion hath uſed to continue it. H. 37 Eliz. B. between Fullwood and Ward adjudged.

(c) Godb. 219. like Point, per Curiam. (d) Cro. Jac. 35, 316, 317.

3. (c) If the Plaintiff be Nonſuit, by which the Defendant is to recover Coſts; if the Plaintiff will not enter his Continuances on purpoſe to ſave the Coſts, (d) the Defendant ſhall be ſuffered to enter them, and ſo recover his Coſts. P. 8 Jac. B. Yeo's Caſe, per Curiam.

4. If the Demandant in his Demand leaves out Parcel of his Demand comprized in the Original in his Proceſs, all is diſcontinued. 18 E. 3. 42. b.

5. If a Man vouches for Parcel, and as to the reſt makes no Anſwer, and the Demandant does not take Advantage thereof by Prayer of Seiſin, but ſuffers the Proceſs to be continued againſt the Vouchee in Right of the Parcel, all is diſcontinued. 18 E. 3. 40. b.

6. If the Tenant vouches for all the Demand, and the Proceſs upon the Voucher is made for leſs than it is, all is diſcontinued. 18 E. 3. 40. b.

(e) Br. Diſcontinuance de Proceſs 20. S. C.

7. In an Action of Treſpaſs, a Diſcontinuance in Parcel is a Diſcontinuance in the Whole. (e) 7 H. 6. 27.

8. In Treſpaſs, if the Diſcontinuance be after Iſſue; This ſhall be a Diſcontinuance of the Original and Whole. Contra,

(f) 30. Aſſ.

(f) Aſſ. 36. adjudged for the Repleader where the Diſcontinuance began. (f) Br. Diſcontinuance de Proceſs 30. S. C. Br. Repleader 28. S. C.

9. If an Aſſize be adjourned before themſelves at Weſtminſter, and after in Banco for Difficulty, and at the Day the Record is not ſent, nor the Parties demanded, all is diſcontinued. (g) 22 E. 3. 3. b. (g) Fitz. Diſcontinuance 9 S C.

10. In Treſpaſs for ſeveral Things, the Defendant pleads a Plea in Bar for part, and (h) does not anſwer to the reſt, and the Plaintiff demurs generally; the Plaintiff ſhall not have Judgment againſt the Defendant, * for the Demurrer was by Intendment upon the Bar, and not for want of Pleading to the Reſidue, for he ought to have prayed Judgment upon Nil dicit for it, ſo all is diſcontinued. Co. 4. Herlakenden's Caſe 62. adjudged. My Reports, 13 Jac. (i) Wilſon and Dod, adjudged Mich. 15 Jac B. R. between Cleer and Abie, adjudged. Contra, My Reports, 13 Jac. and 14 Jac. (h) Where for want of anſwering to Part, all is diſcontinued. 1 Brownl. 228 Cart. 51. 2 Mod. 259. 3 Lev. 324.

* Fol. 488.

Yelv. 65. 1 Sid. 223. (i) 1 Rol. Rep. 135. 176. S. C. adjudged. 2 Bulſ. 335, 336. S. C. adjudged

11. If in a *Quo Warranto* againſt a Corporation for uſing a Fair and Market, and taking Toll, *&c.* Iſſue is taken, whether they have Toll by Preſcription or not, and it is found for the Defendants; the Attorney-General may yet proceed to take Iſſue upon the reſt, for in the Caſe of the King there is no Diſcontinuance before Judgment. *Paſch.* 21 *Car.* 2. Attorney-General and Town of *Farnham. Hard.* 504. adjudged.

(* T) Diſcontinuance of Proceſs.

* This, by the Courſe of the Letters, ſhould have been F, but 'tis T in the Original.

In what Actions a Diſcontinuance againſt One ſhall be a Diſcontinuance againſt others.

1. IN Treſpaſs againſt Three, a Diſcontinuance of Proceſs againſt One, is a Diſcontinuance againſt all. 39 Ed. 3. 3. (a) 30 Aſſ. 36. (a) Br. Diſcontinuance de Proceſs 30. S. C. Br. Repleader 28. S. C.

2. If a Man brings a Writ of Error upon an Outlawry of Felony, and aſſigns for Error, That he was in Priſon at the Time; and the King maintains that he was at Large upon a Venire facias iſſued, and Proceſs againſt the Lords, mediate and immediate, the Lords come and alledge, That his Impriſonment was by his own Covin, upon which a Venire facias iſſues; and after, for Default of Jurors, a Continuance is made between the King and the Party, and no Continuance between the Lords and the Party, by which the Proceſs is diſcontinued againſt the Lords: This ſhall be a Diſcontinuance of all. (b) 38 Aſſ. 17. adjudged. (b) Br. Diſcontinuance de Proceſs 31. S. C.

3. If a Writ be brought againſt ſeveral Tenants by ſeveral Precipe's, tho' the Proceſs is diſcontinued againſt One in a Precipe, yet it is not any Diſcontinuance againſt the other Tenants. 27 E. 3. 87. b.

4. If a Man brings Debt againſt Two by ſeveral Precipe's, if the Proceſs be diſcontinued againſt One, it ſhall not be a Diſcontinuance againſt the other alſo. (c) 7 H. 6. 27. per Curiam. (c) Br. Diſcontinuance de Proceſs 20. S. C.

Diſcontinuance.

By the Death of the King.

1. AT the Common Law, by the Death of the King, the Plea (a) was diſcontinued, and the Proceſs awarded, (b) and not return'd before his Death, loſt; for by the Writ of the Predeceſſor, nothing could be done in the Time of the Succeſſor, unleſs in ſpecial Caſes. 7 *Co.* 30. *a.*

(a) But how the ſame was to have been revived by a general or ſpecial Writ of Re-ſummons, Vid. 7 Co. 29. b. 30. a. —— And therefore could not properly be ſaid to be diſcontinued, but put without Day. Br. Diſcontinuance de Proceſs 2. (b) If upon a Capias ad Reſpondendum the Sheriff had arreſted the Party, and after the Plea had been diſcontinued by the Death of the King, or otherways, he might have ſuffered him to go at large; otherways in caſe of an Arreſt upon a Capias ad Satisfaciendum, for there the Record continued. Kelw. 2.

2. At the Common Law, if a Verdict had been given for the Defendant, and before the Day in Bank the King had died, the Plea had been diſcontinued; but the Defendant by *Certiorari* might have removed the Record, and thereupon ſued a *Scire facias*, and had his Judgment. 7 *Co.* 30. *a.*

3. If a Writ of Appeal be delivered to the Sheriff within the Year, but before the Return thereof, or the Sheriff hath done any Thing, the King dies: If the Year be expired, the Plaintiff may have a *Certiorari* to the Sheriff returnable in *B. R* and thereupon a Re-attachment, tho' the Writ does not come in by Return of the Sheriff, but by *Certiorari*, for otherways he ſhould loſe his Appeal without any Default in him. 7 *Co.* 30. *a.*

4. So if a Man purchaſes a Formedon againſt the Pernor of the Profits within one Year after his Title accrued, and before the Return thereof, the King dies, *&c.* 7 *Co.* 30. *b.*

(c) Cro. Jac. 14. S. P. Reſolved upon a Conference among all the Juſtices. Moor 748. Pl. 1027. S. P. Reſolved upon a Conference amongſt all the Juſtices. 1 Lev. 207 S. P.

5. (c) If an Information of Intruſion, or other (d) Information, meerly for the King, or *tam pro Domino Rege quam pro ſeipſo*, be preferred, and the Defendant pleads to Iſſue, or a Demurrer is joined, and after the King dies, (e) all but the Information is loſt; and thereupon Proceſs ſhall be awarded to compel the Defendant to appear and plead *de novo*. 7 *Co.* 30. *b.* 31. *a.* and ſeveral Precedents cited accordingly.

(d) Upon an Outlawry, Plea, Replication and Demurrer to it after Extent, the Protector died. Hard 136. per Curiam. All but the Outlawry and Extent upon it are gone by the Death of the Protector. (e) But Informations in Engliſh Courts are not diſcontinued by the Death of the King, becauſe there are not any Continuances of them. Moor 748. Pl. 1027. Reſolved upon a Conference among all the Juſtices.

(f) Or an Arraignment at the Suit of the King, after a Nonſuit in an Appeal. 7 Co. 31. a. (g) Cro. Jac. 14. S. P. Reſolved by all the Juſtices.

6. So in caſe of an (f) Indictment. 7 *Co.* 31. *a.* And upon many Penal Statutes, the Suit is to be commenced within a certain Time; and therefore if the Information or Indictment ſhould not continue in Force, the Offence would be diſpuniſhable by the Death of the King, which is the Act of God.

7. So in a popular Action, where the King died after Demurrer upon Evidence, the Defendant pleaded *de novo*. 7 *Co.* 31. *a.* (g) But if the King brings an Original, as a *Quare impedit*, *&c.* and dies, the Writ ſhall abate, becauſe the King, for whom the Judgment ſhould be given, is dead; and after the Death of the King, who is Party, no Proceſs can be awarded upon the Original. 7 *Co.* 31. *a.*

8. At Common Law, if a Man had been indicted and convicted, by Verdict or Confeſſion before any Commiſſioners, and before Judgment the King had died, no Judgment could have been given, becauſe the King, for whom the Judgment ſhould have been given, was dead,

dead, and the (h) Authority of the Judges, who ſhould have given the Judgment, was determined. 7 *Co.* 31. *b.*

(h) But per 1 E 6. cap. 7. new Juſtices of Gaol-Delivery may give Judgment of a Priſoner found guilty of Treaſon, Murder, Manſlaughter, Rape, or other Felony, and reprieved, &c. Cro. Car. 14.

9. *Per* 1 *Ed* 6. *cap.* 7. reciting, That where the King's (i) Subjects, to their great Charge and Expence, had proſecuted divers Actions in the (k) King's Courts, and other Courts of Record, not only by Writ, but alſo by Plaint or Bill; which Actions, Suits, Bills and Plaints, by the Death of the Kings of this Realm, have been diſcontinued, and the Parties put without Day, *&c.* it is enacted, That by the Death of any King, any Action, (l) Suit, Bill or Plaint, that ſhall (m) depend between (n) Party and Party, in any of the Courts aforeſaid, ſhall not in any wiſe be diſcontinued, or put without Day, but that the (o) Proceſs, Pleas, Demurrers, and Continuances in every Action, *&c.* depening, ſhall ſtand (p) good and effectual, and be proſecuted and ſued forth in ſuch Manner and Form, and in the ſame Eſtate, Condition, and Order, as if the ſame King had been living; and that all judicial Proceſs to be ſued out in the Reign of another King, than reigned at the Time of the purſuit of the Original, or other former Proceſs, ſhall be made in the (q) Name of the King for the Time being, and that the Variance in reſpect of the King's Name ſhall not be material.

(i) Therefore it extends not to ſuch Caſes where the King is Party. 7 Co. 30 b.

(k) It extends not to County-Courts, and other Courts not of Record. 7 Rep. 30. b.

(l) A Writ of Error is a Suit within theſe Words, and being returned, is not diſcontinued by the Death of the King. Lat. 110. (m) Therefore it extends not to an Original before it is returned. 7 Co. 30. a. b. 1 And. 44, 45. Benl. 79. Pl. 121. But it extends to a Latitat, becauſe founded upon a Bill of Middleſex precedent. Yelv. 52. — It extends to a Prohibition granted in Banco, becauſe not granted without a Suggeſtion firſt entred upon Record. Secus, Of a Prohibition granted in B. R. unleſs ſome other Proceſs hath been iſſued, or an Appearance entered. Dixy and Brown. Palm. 422. Lat. 114. 3. Bulſ. 314. Noy 77. (n) Therefore it extends not to any Suit where the King is Party. 7 Co. 30. b. 31 b. = But it extends to an Action of Scandalum Magnatum, tho' tam pro Domino Rege quam pro ſeipſo, for the Contempt to the King is collateral: Secus, where the King is to recover Part. Palm. 422. cited to have been adjudged. Lat. 115. cited to have been adjudged. But yet Cro. Car. 10. Hut. 82. in Faringdon's Caſe it was adjudged to extend to an Action upon the Statute of Recuſancy. 3 Lev. 207. (o) This extends to a Scire facias upon a Judgment in a Quare Impedit. Palm. 404. (p) A Proceſs taken out in time of the Predeceſſor, may be executed in the time of the Succeſſor, and returned at the Day. 7 Co. 30. b. 1 And. 45. (q) 1 And. 45.

10. *Per* 4 *&* 5. *Will. & Mar. cap.* 18. Upon the Death of any King, *&c.* all Pleas to Informations in *B. R.* ſhall ſtand and be good in Law without calling the Defendants to plead again, unleſs the Defendants deſire ſo to do, and requeſt the Court for that Purpoſe within Five Months after ſuch Death.

11. By 1 *Ann. cap.* 8. No Writ, Plea, or Proceſs, or other Proceeding upon any Indictment or Information for any Offence, or any Writ, Proceſs, or Proceeding, for any Debt or Account that ſhall be due to the Queen, her Heirs or Succeſſors, ſhall be put without Day by the Death of the Queen, her Heirs or Succeſſors, but may be proceeded upon notwithſtanding ſuch Death.

12. And by the ſame Act, no Original Writ, Writ of *Niſi prius*, Commiſſion, Proceſs, or Proceeding whatſoever, in, or iſſuing out of any Cout of Equity; nor any Proceſs or Proceeding upon any Office or Inquiſition; nor any Writ of *Certiorari* or *Habeas Corpus*, in any Matter or Cauſe, Criminal or Civil; nor any Attachment or Proceſs, for Contempt, Commiſſion of Delegacy, or Review, or any Proceſs thereupon, ſhall be diſcontinued by the Death of the Queen, or any King or Queen of this Realm. Note, *This Act by a ſpecial Clauſe extends to* Ireland, Jerſey, Guernſey, *and the Plantations in* America.

Diſ-

Diſcontinuance.

By the Alteration, (a) not (b) coming of the Juſtices, &c.

(a) Vide 12 Car. 2. c. 3. and 1 Will. & Mar. cap. 4. to prevent Diſcontinuances by not holding the Term, &c.

1. IF upon a Writ of Error in the *Exchequer*-Chamber, a *Scire facias ad audiendum Errores* is awarded, returnable at a Day, to which there is no Adjournment in the *Exchequer*-Chamber. This is a Diſcontinuance. *Mich.* 19 *Jac.* between *Cave* and *Polewhel.* *Cro. Jac.* 620. *per totam Curiam,* clearly.

(b) Where the Party ſhall not be prejudiced by ſuch Diſcontinuance. Cro. Jac. 135.

2. *Per* 11 *H.* 6. *cap.* 6. Pleas, *&c.* before Juſtices of Peace, ſhall not be diſcontinued by new Commiſſions of the Peace, *&c* But the Juſtices in the new Commiſſion, after they have the Records before them, may continue the ſaid Pleas, *&c.*

3. *Per* 1 *Edw.* 6. *cap.* 7. *Par.* 2. Aſſiſes of *Novel Diſſeiſin*, *Mortdanceſter*, *Juris utrum*, or Attaint, arraigned, commenced or ſued before Juſtices of Aſſiſe, ſhall not be diſcontinued by the Death, new Commiſſion, Aſſociation, or (c) not coming of the ſame Juſtices of Aſſiſe, or any of them.

(c) Cro. Eliz. 12. Vide.

4. And by the ſame Act, *Parag.* 6. No Proceſs or Suit before Juſtices of Aſſiſe, Gaol-Delivery, *Oyer* and *Terminer*, of the Peace, or other the King's Commiſſioners, ſhall be diſcontinued by any new Commiſſion or Aſſociation, or Alteration of any of their Names, but the new Juſtices, *&c.* may proceed as if the old, *&c.* had continued, *&c.*

(A) (a) Conuſance of Pleas.

Fol. 489.

(a) There are Three Sorts of Conuſance; 1. Tenere placita, which does not ouſt another Court of their Juriſdiction, but only creates a concurrent One: 2. Cognitio placitorum, as when the Plea is commenced in one Court, of which the Conuſance belongs to another: 3. A Conuſance, with (b) Tho' not prayed at one Time, yet it may be prayed at another Time, and in another Action. 2 Inſ. 130.

Franchiſe.

(b) At what Time to be demanded.

1. If a Franchiſe be granted to a Vill, that Aſſizes of Land within the Vill, ſhall not be taken out of the Vill: If an Aſſiſe be brought out of the Vill, and the Aſſiſe is awarded for Default of the Tenant, the Bailiff of the Vill ſhall not have the Franchiſe if he demands it after. (c) 20 Aſſ. 13.

an excluſive Juriſdiction, as that no other Court ſhall hold Plea. &c. Hard. 509, 510.
(c) Br. Conuſance 35. S. C.

(B) Of what Actions Conuſance may be granted.

1. (a) The Grant of Conuſance in a Quare impedit is void, for the Franchiſe cannot do Right therein, ſcilicet, ſend a Writ to the Biſhop. (b) 44 E. 3. 29. b. 38. 14 H. 4. 20. b. 50 Aſſ. 9. per Kin. (c) 26 Ed. 3. 73. b.

(a) Dal. 12. S. P. per Curiam. Co. Lit. 134 b. S. P.
(b) Br. Conuſance 12. S. C. (c) Fitz. Conuſance 86. S. C.

2. At Common Law, Conuſance might be granted in a Recordari, or (d) Replevin. 38 Ed. 3. 31.

(d) Conuſance is not grantable, becauſe the original Writ of Replevin is in Nature of a Juſticies, and not returnable; and in a Juſticies no Conuſance can be demanded, becauſe none can demand Conuſance but he that hath a Court of Record, and of a Plea in a Court of Record; but the County-Court, tho' the Plea is holden by Juſticies, is no Court of Record; and if the Sheriff ſhould grant the Conuſance, he could not award a Reſummons. 2 Inſ. 140. Br. Conuſance 4. 23.

3. (e) But otherways it is now after the (f) Statute, which provides, That if the Plaintiff be nonſuit, a ſecond Deliverance ſhall be granted, and the Franchiſe hath not Power to grant it, therefore there would be a Failure of Right if he ſhould have Conuſance. 38 Ed 3. 31. Quere.

(e) Dal. 12. S. P. per Curiam.
(f) viz. 13 Ed. 1. cap. 2.

4. It ſeems that Conuſance * may be granted to levy Fines in a Franchiſe admitted. (g) 44 Ed. 3. 29. 38. If the Grant had been expreſly.

* The King cannot grant Power to hold Plea for

the levying of Fines againſt the Negative Words of the Stat. of 18 Edw. I. De modo levandi Fines, 2 Inſt. 515. but before whom a Fine may be taken, Vid. 2 Rol. Abr. 13. Letter C. with the Additions and Notes there. (g) Fitz. Conuſance 30. S. C. Br. 12. S. C.

5. (h) Co-

(h) Dal. 12. S. P. per Curiam.

5. (h) **Conuſance cannot be granted to a Lord in Ancient Demeaſn of Writs of Waſte and Re-diſſeiſin, for there wants ſuch Judge as ought to be in ſuch Actions, ſcilicet, the Sheriff.** 1 H. 4. 5.

(i) Clovel S. P. Dyer 202. b. Kelw. 210. N. Benl. 99. Pl. 144.

6. (i) No Conuſance can be granted upon any Attaint, becauſe all Attaints, *per* 23 *H.* 8 *cap.* 3. are to be taken before the King in his Bench, or before Juſtices of the *Common Pleas*, and in no other Courts, *&c. Co. Lit.* 224. a.

(B) Againſt what Perſons it ſhall be granted.

(a) So if the Juſtices Clerks, or Attornies of the Common Pleas, ſue or be ſued.

1. **If a (a) Clerk of the King's Bench be ſued by Bill in** Banco Regis **for Land in a Place where another hath Conuſance of Pleas, yet the Conuſance ſhall not be granted; for otherways the Officers of this Court ſhould be drawn to attend in inferior Courts.** Trin. 4 Jac. B. R. (b) But's Caſe, per Popham.

3 Leon. 149. Lit. Rep. 304. But yet vide N. Benl. 233. Pl. 262. — But if one in Cuſtodia Marſchalli, is ſued by Bill, Conuſance may be granted, per Br. Conuſance 50. (b) 2 Rol. Abr. 274. S. C.

(D) Of what Actions Conuſance ſhall be ſaid to be granted upon a general Grant.

1. **If the King grants to a Corporation to hold Plea of all Actions; yet they ſhall not have Conuſance of any Plea out of another Court** (a) **without ſpecial Grant of Conuſance.** (b) 9 H. 6. 27. b.

(a) Palm. 456.

(b) Br. Patents 4. S. C.

2. **But if the Grant be, that they ſhall have Conuſance of all Actions, &c. they ſhall have Conuſance out of other Courts.** (c) 9 H. 6. 27. b.

(c) Br. Patents 4. S. C.

3. **If the King grants Conuſance of all Manner of Pleas; yet the Grantee ſhall not have Conuſance of Appeals of Felony.** (d) 8 H. 6. 21.

(d) Br. Conuſance 27. S. C.

4. **Nor of Appeals of Mayhem.** (e) 8 H. 6. 21.

(e) Br. Conuſance 27. S. C.

5. **If Conuſance be granted of all Pleas,** Motis (f) in quibuſcunque Curiis, &c. **They ſhall have Conuſance of Pleas,** Motis in Banco, **or** Banco Regis, **without naming them ſpecially.** (g) 9 H 6. 27. b.

Fol. 490.

(f) So of a Grant of all Pleas, as well in the Preſence as Abſence of the King, for that cannot otherwiſe be intended than of the King's Bench. Palm. 456. (g) Br. Patents 4. S. C.

6. **If the King grants Conuſance of all Manner of Pleas,** Motis coram quibuſcunque Juſticiariis; **yet he ſhall not have by this Conuſance of Pleas,** Motis in Banco Regis, **without ſpecial naming this.** (h) 8 H. 6. 21. Contra (i) 9 H. 6. 27. b.

(h) Br. Conuſance 27. S. C.

(i) Br. Patents 4. S. C.

7. **If** (k) **Conuſance be by Preſcription to hold Plea by Writ of Right Patent in Nature of any Action, they cannot hold Plea of a Writ of Covenant, for they cannot have a real Writ in Nature of a perſonal Writ.** 44 E. 3. 37. (l) 50 Aſſ. 9.

(k) Conuſance cannot be claimed by Preſcription, but to hold Pleas may. Co Lit. 114. a b. But for this, vide 2 Rol. Abr. 270. Pl. 5. (l) Br. Conuſance 61. S. C. Br. Fines levied 104. S. C

8. * If Conuſance be granted of all Pleas, yet a Fine cannot be levied there; for this is no Plea, but a Record. 3 H. 4. 6. dubitatur. * 2 Inſt. 515. S. P.

9. If Conuſance of Pleas be granted, and no Mention of Aſſiſes, he ſhall not have Conuſance of Aſſiſes. (m) 12 H. 4. 12 b. (n) 26 Aſſ. 24 adjudged, becauſe it is not placitum ſed querela. 9 H. 6. 27. b. (o) 14 H. 6. 12. 38 Aſſ. 25. (p) 30 Aſſ. 31. (q) 34 Aſſ. 14. (r) 26 Aſſ. 24. adjudged. 22 Aſſ. 49. per Thorp. (m) Br. Conuſance 20. S. C. Fitz. 21 S. C. (n) Br. Conuſance 40. S. C. Fitz. 57. S. C.

(o) Br. Patents 27. S. C. (p) Br. Conuſance 46. S. C. Fitz. 63 S. C. Br. Patents 105. S. C. (q) Br. Conuſance 34. S. C. (r) Br. Conuſance 40. S. C. Fitz. 57. S. C.

10. But upon an ancient Grant by ſuch Words, if Conuſance had been allowed in an Aſſiſe after Memory, (as it ſeems the Book is to be intended) he ſhall have Conuſance of Aſſiſes. (s) 12 H. 4. 13. (t) 14 H. 6. 12. (u) 30 Aſſ. 31. admit. (x) 34 Aſſ. 14. adjudged. (s) Br. Conuſance 20 S. C. Fitz. 21. S. C.

(t) Br. Patents 27. S. C. (u) Fitz. Conuſance 63. S. C. (x) Br. Conuſance 34. S. C.

11. So if upon an ancient Grant to an Abbot, &c. Quod habeat Curiam ſuam regalem, &c. If Conuſance hath been allowed in Aſſiſes, he ſhall have Conuſance of Aſſiſes. (y) 30 Aſſ. 31. adjudged. (y) Br. Conuſance 46. S. C. Br. Patents 105. Fitz. Conuſance 62. S. C.

12. But upon an ancient Grant, if Conuſance hath not been allowed in an Aſſiſe, tho' there hath been a general Allowance of Liberties, he ſhall not have Conuſance of Aſſiſes. Contra, (z) 37 Aſſ. 6. adjudged. (z) Br. Conuſance 49. S. C. Fitz. 64. S. C.

13. If Conuſance of all Pleas be granted, they ſhall not have Conuſance of ſuch Actions which were not in eſſe at the Time, but created after by Statute. (a) 14 H. 4. 2. (a) Br. Conuſance 21. S C. Fitz. 22. S. C.

14. As they ſhall not have Conuſance of a Writ of Maintenance, * which was by a Statute after the Grant made of all Actions. (b) 14 H. 4. 20. * 2 Inſt. 208. (b) Br. Conuſance 21. S. C.

Fitz. 22. S. C. Hob. 48. S. C. cited; and vid. Kelw. 210. b. N. Benl. 99. Pl. 144.

15. The ſame Law is of a Decies tantum. (c) 14 H. 4. 20. b. (c) Br. Conuſance 21. S. C. Fitz. 22. S. C.

16. The ſame Law is of a Conſpiracy. (d) 14 H. 4. 20. b. (d) Br Conuſance 21. S. C. Fitz. 22. S. C.

17. But where the Action was at Common Law, and is given againſt a Perſon by another Name than was before the Grant of Conuſance, as an Action of Debt againſt an Adminiſtrator; there they ſhall have Conuſance. (e) 14 H. 4. 20. b. (f) 22 E. 4. 23. (e) Br. Conuſance 21. S. C. Fitz. 22. S. C.

Hob. 48. S. C. cited. (f) Br. Conuſance 56. S. C.

18. If the King grants, *Majori, Ballivis & Juratis quinque Portuum,* that they ſhall not be impleaded for Land, or other Cauſe, elſewhere than within the ſaid Ports; yet in a *Quo Warranto, &c.* where the King is directly a Party, they ſhall not be impleaded there. 22 *H.* 7. *Kelw.* 88 b. 89. a 90. a b.

19. If by Charter confirmed by Act of Parliament, Conuſance be granted (g) to the Univerſity of *Oxford*, of all Suits ariſing any where againſt any Scholar, Servant, or Miniſter of the Univerſity, depending before the Juſtices of the *King's Bench, Common Pleas,* and others therein (g) Cro. Car. 73. Lit. Rep. 40. Hetl. 25.

(h) Hard. 506, 509. ſaid, That theſe Words had been allowed to extend to the Chancery; but, 2 Vent. 362. where a Man ſued a Scholar in Chancery, to have a ſpecifick Performance of a Contract to make a Leaſe of Lands in Middleſex, this Charter was pleaded, &c. and the Plea was over-ruled, becauſe the Charter ought properly to be extended to Matters at Common Law only, or to Proceedings in Equity ariſing in ſuch Caſes, and not to meer Matters of Equity, which are originally ſuch as to execute Agreements in Specie; and Conuſance is never to be allowed, unleſs the inferior Jurisdiction can give Remedy, and they can only excommunicate or impriſon, but not proceed to a Sequeſtration of the Land in Middleſex; but ſaid, That if the Matter lay in Damages only, their Jurisdiction might be allowed. Vid. 1 Caſes in Chancery 237. (i) But if an Attorney ſues a Scholar by Writ of Privilege, they ſhall not have Conuſance; for this general Grant ſhall not take away the ſpecial Privilege of any Court. Lit. Rep. 304. — So if one, as Debtor and Accountant to the King, ſues a Scholar by Bill in Equity in the Exchequer. Wilkins and Shalcrofr. Hard. 189.

therein mentioned, and (h) before any other Judge, tho' the Matter concern the King: If an *Indebitatus Aſſumpſit* be brought by (i) *Quo minus* in the *Exchequer*, againſt a Scholar, &c. they ſhall have Conuſance, for the Court of *Exchequer* is included in the general Words. *Paſch.* 21 *Car.* 2. between *Caſtle* and *Litchfield*. *Hard.* 505. allowed accordingly.

(E) Of what Actions, Suits and Pleas, Conuſance ſhall be ſaid to be granted, as Conſequents, and incident to the Thing granted.

1. WHen Conuſance is granted, tho' no Proceſs is limited, as that he ſhall have a Petit Cape, or Proceſs upon Voucher or other Proceſs, touching the Pleas; (a) yet he ſhall (b) have them as incident. (c) 44 E. 3. 29.

(a) So if the King grants a Court, the Power of making a Bailiff to execute Proceſs is incident. 1 Rol. Abr. 526. Pl. 1. (b) Br. Conuſance 38. (c) Br. Conuſance 12. S. C.

2. If Conuſance be granted of Writs of Covenant, a Fine may be levied there upon it; for this is but a Conſequent. (d) 44 E. 3. 29. Quere, Whether this general Grant ſhall extend to ſo high a Conveyance of Land; this alſo will be prejudicial to the King by the Loſs of his Fines for Alienation. And Brook, Conuſance 12. ſeems the better Opinion, that this ſhall not extend to Fines. 3 H. 4. 6.

(d) Br. Conuſance 12. S. C. Fitz. 30. S. C.

(F) How it ought to be granted.

Judge.

1. THe Grant ought to make mention (a) before what Judge the Pleas ought to be held, otherwiſe the Grantee ſhall not have Conuſance by force of it. (b) 44 E. 3. 17. b. 18. 1 H. 4. 5. (c) 6 H. 4. Placito 3. Contra, 8 H. 6. 21. b.

(a) 2 Rol. Rep. 155. (b) Fitz. Conuſance 27, 29. S. C. Br. 11. S. C. (c) Br. Grant 100. S. C.

2. William the Conqueror granted to an Abbot, omnem Regiam poteſtatem & omnem Juſtitiam puniendi & dimittendi; and this had been anciently allowed to be held before his Bailiff: This ſhall not now be diſallowed. (d) 12 H. 4. 13.

(d) Br. Conuſance 21. S. C. Br. 20 S. C.

3. But if a Grant be made without ſuch Allowance, and it is not determined before whom the Plea ſhall be held, it ſhall not be held before his Bailiff. (e) 12 H. 4. 13.

(e) Br. Conuſance 21. S. C. Br. 20. S. C.

4. But if it appears by Implication what Judge is intended, it is good; as if the Grant be, that the Grantee ſhall have Conuſance in his Court: This implies, That it ſhall be before the Judges and Miniſters of the Grantee, and therefore it is good. (f) 44 E. 3. 17. b.

(f) Fitz. Conuſance 28. S. C. Br. 11. S. C.

5. But a Grant of Conuſance of Pleas to another within the Precinct of his Manor, is not good without more. 6 H. 4. Placito 3.

6. But if in ſuch Caſe it be further to be held before his Steward, it is good. 6 H. 4. Placito 3.

7. If the King grants Conuſance of Pleas to another, to be held before his Bailiffs, Stewards or Juſtices: If he had not ſuch Officers before the Grant, he cannot make them by this; ſo the Grant is void. 7 H. 4. 5. b.

8. If the King hath anciently granted to another, Curiam ſuam of ſuch a Town, without appointing who ſhall be Judge; yet if, by this, Conuſance hath been allowed to the Bailiff of the Grantee, it ſhall be good. (g) 37 Aſſ. 6. adjudged.

(g) Br. Conuſance 49. S. C. Fitz. 64. S. C.

(G) How it may be granted.

1. If the King grants Conuſance, he ſhall not change the Day by his Grant, for he cannot change the common Day in a Plea of Land; for there is (a) a Statute called Dies Communes, &c. and this Statute limits the Day in a Plea of Land, and therefore the King cannot grant a ſhorter Day, for this would be againſt the Statute. 8 H. 6. 21.

(a) 51 H. 3. Stat. 2. 3.

2. The King cannot grant Conuſance of Pleas to another, to have (b) the Original out of any Court, &c. for if he ſhould have the Original, there could be no Reſummons, and ſo there would be a Failure of Juſtice. (c) 26 Aſſ. 24. adjudged by all the Council.

(b) But he ſhall have the Tranſcript only; ſo that if there be a Failure of the Original.

Right in the Franchiſe, the King's Court, after a Reſummons, ſhall proceed upon Br. Conuſance 32. (c) Fitz. Conuſance 57. S. C. Br. 40. S. C.

3. A Preſcription and Confirmation of this to have the Original, &c. with Conuſance of Pleas, is not good, for the Cauſe aforeſaid, tho' it hath been ſeveral Times allowed in Eyre. (d) 26 Aſſ. 24. adjudged by all the Council.

(d) Fitz. Conuſance 57. S. C. Br. 40. S. C.

(H) Upon what Grant.

Upon a General Grant.

1. A Man upon a general Grant ſhall not have Conuſance of Pleas where he himſelf is Party, and where the Plea is to be held before himſelf. (a) 40 E. 3. 10. b. adjudged. (b) 8 H. 6. 21. b. Curia

(a) Fitz. Conuſance 26. S. C. Br. 9. S. C.

(b) Br. Conuſance 27. S. C.

2. In Treſpaſs againſt a Mayor, and ſeveral of the Commonalty, the Mayor and * Commonalty ſhall not have Conuſance upon a general Grant of Conuſance, becauſe they cannot be Judges in their own Cauſe. 38 E. 3. 15. b. Curia.

* Fol. 492.

3. But where the Plea is to be held before the Steward or Bailiff, there Conuſance ſhall be granted upon a General Grant, without the Words licet ipſemet ſit pars, where the Lord of the Bailiff is a Party. D. 4, 5 Ma. 157. 27. Dubitatur. (c) 9 H. 7. 11. Contra (d) 12 H. 4. 13. 10 H. 6. 7. b.

(c) Fitz. Conuſance 16 S. C. (d) Br. Conuſance 20. S. C. Fitz. 21. S. C.

4 Upon a general Grant anciently made and allowed, in caſe where the Lord is Party, and this had uſed to be held before his Bailiff: He ſhall have Conuſance at this Day alſo where he himſelf is Party. (e) 12 H. 4. 13. (f) 34 Aſſ. 14. adjudged; but it is not there mentioned whether it was to be held before his Bailiff, but it ſeems it is to be ſo intended.

(e) Br. Conuſance 20. S. C. Fitz. 21. S. C. (f) Br. Conuſance 48. S. C.

5. Where Conuſance is granted to be held before the Bailiff; if an Action is brought againſt one of the Bailiffs, they ſhall not have Conuſance thereof, for then the Bailiff ſhould be his own Judge. (g) 10 H. 4. 9.

(g) Fitz. Conuſance 90. S. C.

6. So in this Caſe, if after the Writ brought, new Bailiffs are elected, yet they ſhall not have Conuſance, becauſe the Writ was well brought at firſt. (h) 10 H. 4. 9.

(h) Fitz. Conuſance 90. S. C.

7. If a Borough have an ancient Charter, by which it was granted to them, *quod nullus Burgenſis inhabitans infra Burgum præd' placit' vel implacitetur de Terris, Tenementis, Contractibus,* &c. within the Borough, elſewhere out of, *&c.* And the Mayor and Burgeſſes of the ſaid Borough are impleaded *in Banco* for Lands within their Borough, they ſhall not have Conuſance; for in this Action (i) the whole Body is impleaded. *Paſch.* 3 *Eliz. N. Benl.* 88. *Pl.* 134.

(i) So where Conuſance is granted to the Chancellor of the Univerſity, to hold Plea where Scholars or privileged Perſons are concerned, this ſhall not extend to an Action againſt the Preſident and Scholars of a College. 1 Mod. 163.

(I) Special

(I) Special Grant.

1 IF Conuſance of Pleas be granted, licet ipſemet ſit pars, * he ſhall not have Conuſance in an Action, in which he himſelf is Party, becauſe he ſhall not be his own Judge, unleſs it be granted further, that if he be Party, that he may make another Judge. (a) 8 H. 6 19 b.

* Vide Hob. 87 Vent. 3.

(a) Br. Conuſance 27. S.C.

2. But upon ſuch Grant, licet ipſemet ſit pars, if it be granted, that if he be Party, that the Plea ſhall be held before his Steward, he ſhall have Conuſance, for there the Steward ſhall be Judge. (b) 8 H. 6. 20. b

(b) Br. Conuſance 27. S.C.

3. If the Grant be, That if any Clerk of Oxford be impleaded, that the Chancellor ſhall have Conuſance to be held before him: If the Chancellor be ſued, he ſhall not have Conuſance, tho' he himſelf be a Clerk; for the Words are not expreſs, licet ipſemet ſit pars. (c) 8 H. 6. 20. b.

(c) Br. Conuſance 27. S.C.

(K) Where they have Conuſance of the Action, yet for a collateral Cauſe the Conuſance ſhall not be granted.

(a) Failure of Right.

1. IF a Fine be removed out of a Franchiſe by Writ of Error, and comes in Banco Regis by Mittimus, and after a Scire facias is ſued to have Execution of it, the Franchiſe ſhall not have Conuſance of it, becauſe the Record ſhall not be remanded de Banco Regis, and without it they cannot do Right to the Party. (b) 50 Aſſ. 9. adjudged. (c) 44 E. 3. 37. adjudged.

(a) If a Scholar of Oxford be ſued in Chancery for a ſpecifick Performance of a Contract to leaſe Lands in Middleſex, the Juriſdiction of the Univerſity is not allowed, for they can only excommunicate or impriſon, but not proceed to a Sequeſtration of the Lands in Middleſex. 2 Vent. 363. (b) Br. Conuſance 61. S. C. (c) Br. Conuſance 13. S. C. and abridged, as if in B. but this I ſuppoſe a Miſtake, for it appears by the Year-Book, that it was in B. R. and ſo it appears, by Br. Cauſe de Remover, Plea 46.

2. At the Return of the Exigent, Conuſance ſhall not be granted for Failure of Right; for he cannot be reſtrained in the Franchiſe to appear by Attorney, and it is againſt Law to appear by Attorney at the Exigent. 3 H. 6. 10. b.

3. If a Man comes by Exigent in a Writ of Debt, Conuſance ſhall not be granted, becauſe the Defendant ought to remain in Priſon till he has agreed with the Plaintiff, and the Body cannot be delivered to the Franchiſe. (d) 40 E 3. 1. adjudged: So Failure of Right. Contra, (e) 11 H. 4. 41. b. 43. b.

(d) Fitz. Conuſance 25. S.C. Br. 8. S. C.

(e) Fitz. Conuſance 20. S C. Br. 18. S. C.

4. So if in a Plea of Land, the Tenant makes Default after Default at the Summons, Conuſance ſhall not be granted, becauſe they cannot give Judgment upon the Default of Record here. (f) 40 E. 3. 1.

(f) Fitz. Conuſance 25. S. C. Br. 8. S. C.

5. Nor

Fol. 493.

5. Not at the Grand Cape returned. 11 H. 4 43. b. 14 H. 4. 20. b

6. But vide 11 H. 4. 43 b. In an Action upon the Statute of Labourers, if the Defendant comes in Ward at the firſt Day, and Conuſance is demanded, it ſhall be granted; yet he ſhall not find Mainprize to keep his Day in the Franchiſe. (g) 11 H 4. 43. b.

(g) Br. Conuſance 18. S C. Fitz. 20 S. C.

7. At the Grand Cape returned, Conuſance ſhall not be granted upon Demand, tho' the Tenant be an Infant, for the Failure of Right; for tho' the Infancy be a good Cauſe to ſave the Default, yet this is a Default in Law, and ſo the Court once ſeiſed. (h) 3 H. 6. 10. b.

(h) Fitz Conuſance 1 S. C. Br 1. S. C.

8 So if at the Grand Cape returned, the Demandant releaſes the Default, yet Conuſance ſhall not be granted, for this affirms the Default. (i) 3 H. 6. 10. b.

(i) Fitz. Conuſance 1. S. C. Br. 1. S C.

9 If Conuſance be demanded at the grand Diſtreſs returned in a Writ of Debt, it ſhall be granted. 2 E. 3. 62. b. adjudged.

10. After Battail joined in a Franchiſe in a Writ of Right, upon a Grant of Conuſance, it ſhall be returned in Banco, becauſe the Iſſue cannot be tried there. (k) 44 H. 3. 29. b.

(k) Br. Conuſance 12. S.C.

11. If one brings Detinue, and counts of a Bailment in a Franchiſe, and another brings Detinue for the ſame Thing, and counts of a Bailment in another Place out of the Franchiſe, and the Defendant prays that they may interplead, and the Franchiſe demands Conuſance of the Detinue, who counts of a Bailment within the Franchiſe, yet it ſhall not be granted, becauſe then the Defendant ſhould be at a Miſchief, for he cannot have Conuſance of both, and ſo no Interpleader could be there, and therefore if it ſhould be granted, the Defendant ſhould be twice charged. (l) 8 H. 6 31. adjudged.

(l) Fitz. Conuſance 6. S. C. Br. 28. S. C.

12. If a Plea be removed out of a Franchiſe becauſe of a foreign Voucher, if in Banco the Tenant waives the Voucher, and pleads in Bar, or the Voucher is determined; yet the Franchiſe ſhall not have Conuſance of this again, becauſe there was once a Failure of Right there, tho' not by their Negligence. (m) 11 H. 4. 28. 87. b. (n) 14 H. 4. 25. b.

(m) Br. Conuſance 16. S.C.

(n) Br. Reſummous 13. S. C.

13. If Conuſance of Pleas be granted to a Franchiſe, and after an Aſſiſe is there brought (admitting this to be a Plea within their Grant) and the Tenant pleads, That by this Grant they cannot hold Plea originally, but ſhall have Conuſance out of other Courts, which Plea they there over-rule, and award the Aſſiſe, by which the Diſſeiſin is found, and the Tenant ouſted of the Poſſeſſion: If the Tenant that is ouſted brings an Aſſiſe after upon this Ouſter, the Franchiſe ſhall not have Conuſance, becauſe they have once failed of their Right. 38 Aſſ. 25. This is pleaded.

14. In Treſpaſs, if the Defendant pleads Villeinage in the Plaintiff, and after Conuſance is demanded, it ſhall be granted, tho' the Villeinage cannot be tried in the Franchiſe, becauſe it may (o) be that he will plead another Plea, and not this, when he comes there. 26 Ed. 3. 73. b.

(o) But Hard. 508. arguendo, 'tis ſaid, That the inferior Court muſt proceed upon the ſame Declaration and Plea, and cannot try a Cauſe laid out of their Juriſdiction. (p) Br. Conuſance 86. S. C.

15. A Treſpaſs lies not in a Franchiſe for a Treſpaſs done in a Place out of the Franchiſe, becauſe they cannot try it there, for they cannot compel a (q) Jury to come from the Place. 1 E. 3. 24. adjudged.

(q) In the Original it is Le pais de lieu.

16. If a Treſpaſs be brought of a Treſpaſs within a Franchiſe, againſt a Foreigner that hath nothing within the Franchiſe, Conuſance ſhall not be granted, becauſe they cannot do Right to the Party; for they have not Power to amerſi a Stranger who hath nothing within the Franchiſe to anſwer. 22 Aſſ. 3.

17. So it is of an Action of Debt brought againſt ſuch Foreigner, upon a Contract within a Franchiſe. 22 Aſſ. 83. for the Cauſe aforeſaid.

18. In a Conſpiracy againſt Two, for a Conſpiracy within a Franchiſe, of which one is a Foreigner, and the other within the Franchiſe, Conuſance ſhall not be granted, becauſe the Action is entire, and they cannot do Right there againſt the Foreigner. 22 Aſſ 8. Fol. 494.

19. But if a Treſpaſs be brought againſt them for a Treſpaſs within the Franchiſe, Conuſance ſhall be granted, becauſe he might have had ſeveral Actions, and ſo his joint bringing of the Action ſhall not take away the Conuſante. 22 Aſſ 83.

20. In Treſpaſs, *Quare clauſum fregit & domum, &c. intravit in Oxford:* Conuſance was denied to the Univerſity, becauſe the Freehold might come in queſtion. *Paſch.* 5 *Car.* between *Cripps* and *Webb.* *Lit. Rep.* 252. adjudged.

21. (r) So for the ſame Reaſon it ſhall not be granted to them in Ejectment, though nothing but a Term of Years be to be recovered. *Paſch.* 5 *Car. Lit. Rep.* 252. *per Curiam.*

(r) Cro. Car. 87, 88. S. P. adjudged.

(L) What ſhall be ſaid an Action ariſing within the Franchiſe.

1. Where an Action is brought of a Thing done partly within a Franchiſe, and partly out; if it be a Thing that cannot be ſevered, then the Franchiſe ſhall not have Conuſance. (a) 8 H. 6. 31. b.

(a) Br. Conuſance 28. S.C.

2. As in Treſpaſs for a Battery in one Place, and continued in another Place; if one of the Places be within a Franchiſe, yet Conuſance ſhall not be granted, becauſe it is an intire Treſpaſs. 8 H. 6. 31. b.

3. If one be ſummoned againſt a Prohibition within a Franchiſe, to appear at a Place within the Franchiſe, but Sentence is given out of the Franchiſe; if an Attachment upon the Prohibition is brought, Conuſance ſhall not be granted, for the principal Grievance is where the Sentence was. (b) 46 Ed. 3. 8. b.

(b) Br. Conuſance 14. S.C. Fitz 34. S.C.

4. If a Leaſe be made in Middleſex of Land in Durham, he cannot have an Action of Debt upon this in Durham. (c) 21 H. 4. 40.

(c) Br. Juriſdiction 25. S.C. Fitz. Debt 112. S.C.

5. If a Retainer of a Servant be out of a Franchiſe, and the Departure within a Franchiſe; yet the Action upon the Statute of Labourers lies not within the Franchiſe. (d) 11 H. 4. 44.

(d) Br. Conuſance 18. S.C.

6. If an Account be brought of a Receipt within the Franchiſe, Conuſance ſhall be granted of it. 29 Ed. 3. 35. b.

7. An Heir cannot be ſued upon the Obligation of his Anceſtor within a Borough, where he hath not Aſſets within the Juriſdiction of the Court, but without. Mich. 16 Jac. B. R. between (e) Bourn and Carington, adjudged in a Writ of Error where

(e) Cro. Jac. 502. S.C. and the Judgment reverſed accordingly. 2 Rol. Rep. 48. S. C. adjudged, and the Judgment reverſed accordingly, tho' the Jury had found Aſſets; but per Dod, it would have been well enough if the Jury had found the Aſſets within the Juriſdiction.

the firſt Judgment was reverſed, becauſe in the Pleading there was no place alledged where the Aſſets were, which might be out of the Juriſdiction of the Court.

8. If an *indebitatus Aſſumpſit* is brought againſt a Scholar, and laid in *London*, yet the Univerſity of *Oxford* may demand Conuſance, for the Cauſe is not to be removed or adjourned thither to be tried, but to be diſmiſs'd here, that they (f) may begin *de novo*; for by their Charter, confirmed by Parliament, they may proceed as they pleaſe, *per Teſtes*, according to the Common or Civil Law. *Paſch.* 21 *Car.* 2. between *Caſtle* and *Litchfield*. *Hard.* 505, 508. adjudged.

(f) But in a tranſitory Action laid in London, the Biſhop of Ely was denied Conuſance. 1 Sid. 103. and Hard 508. 'tis ſaid arguendo, That the inferior Court, upon Conuſance allowed, muſt proceed upon the ſame Plea and Declaration, and cannot try a Cauſe ſaid out of their Juriſdiction, nor compel the Plaintiff to declare de novo; yet vide Hard. 509. 1 Rol. Abr. 493. Pl. 14.

(M) At what Time it may be demanded.

1. CONuſance ought to be demanded the firſt Day, otherways it ſhall not be allowed. (a) 20 H. 6. 32. b.

(a) Br. Priviledge 7. S. C.

2. When the Place appears in the Writ where the Action aroſe, there Conuſance ought to be demanded the firſt Day, becauſe it appears whether Conuſance belongs to them; but otherways it is econtra. (b) 11 H. 4. 41. b. (c) 14 H. 4. 20. b. (d) 3 H. 6. 30. b. 2 Ed. 3. 62. b.

(b) Fitz. Conuſance 19. S. C.

(c) Fitz. Conuſance 22. S. C. Br. 21. S. C. (d) Fitz. Conuſance 3. S. C. Br. 3. S. C.

3. As in Treſpaſs, Conuſance ought to be demanded the firſt Day before the Count, if the Party makes Default, becauſe the Place of the Treſpaſs appears in the Writ. (e) 11 H. 4. 41. b. 43. b. (f) 14 H. 4. 20. b. (g) 3 H. 6. 30. b.

(e) Fitz. Conuſance 19. S C. Br. 17. S. C.

(f) Fitz. Conuſance 22. S.C. (g) Fitz. Couuſance 3. S. C. Br. 3. S.C.

4. But otherways it is in a Writ of Debt. (h) 11 H. 4. 41. b. 43. b. becauſe the Place of Contract does not appear in the Writ. (i) 14 H. 4. 20. b. (k) 3 H. 6. 30. b. 2 E. 3. 62. b.

(h) Fitz. Connſance 19. S C. Br. 17. S C.

(i) Fitz. Conuſance 22. S.C. (k) Fitz. Conuſance 3. S.C. Br. 3. S.C.

5. The ſame Law in Detinue. (l) 3 H. 6. 30. b.

Fol. 495.

6. But theſe Caſes are to be intended when the Writ is brought in a County within which the Franchiſe is; for there it may be, that the Contract was within the Franchiſe, or without in the County; for this ſtands indifferently by the Suppoſal of the Writ, and ſo the Truth cannot be known by the Writ before the Count. (m) 3 H. 6. 31.

(l) Fitz. Conuſance 3. S. C.

(m) Br. Conuſance 3. S. C. Fitz. 3. S. C.

7. But if all the Town be one County by it ſelf, and no Franchiſe within it, as Briſtol; there, becauſe they are aſcertained by the Writ, they ought to demand Connſance at the firſt (n) Day. ( ) 3 H. 6. 31. adjudged.

(n) This is miſprinted in the Original, for there 'tis Brief.

(o) Fitz. Conuſance 3. S. C. Br. 3. S. C.

8. In a Writ, if Conuſance be not demanded at the Return of the Original, they ſhall not have Conuſance after at the Return of the Capias; for tho' upon the Return of the Original, the Defendant made Default, and ſo the Conuſance cannot then be granted,

granted, yet the Demand ought to be at the firſt Day, and this ſhall be entered. (p) 14 H. 4. 20. Curia. (p) Fitz. Conuſance 22 S. C. Br. 21. S. C.

9. In an Aſſiſe againſt two, if the Aſſiſe be awarded againſt one by Default, if Conuſance be after demanded for the other that appears, it ſhall not be granted; for the Court is ſeiſed by the Default of one, and the Original is intire. (q) 3 H. 6. 10. 14. b. (q) Br. Conuſance 1. S. C.

10. But if a Man brings ſeveral Aſſiſes, and one is awarded by Default, yet for the other Conuſance ſhall be granted upon Demand at the ſame Day; for he hath Election to have Conuſance of any which he pleaſes. 3 H. 6. 14. b.

11. In an Aſſiſe, if the Tenant makes Default, by which the Aſſiſe is to be awarded by Default; if Conuſance is demanded before the Aſſiſe is awarded, yet it ſhall not be granted. (r) 8 H. 6. 7. b. adjudged. (r) Br. Conuſance 26. S. C. Fitz. 7. S. C.

12. In Treſpaſs againſt two, if one makes Default, and the other comes and pleads Not guilty, Conuſance may be demanded now, tho' it ſhall not be granted till the other comes; yet this Demand ſhall be enter'd, and he ſhall have it when the other appears. (s) 22 Aſſ. 50. (s) Fitz Conuſance 71. S. C. Br. 7. S. C.

13. In Treſpaſs againſt two, if Conuſance be not demanded every Day of the Proceſs continued, it ſhall not be granted; for it ought to be demanded at every Day of the Proceſs continued. 22 Aſſ. 83.

14. Conuſance cannot be demanded (t) after Imparlance. *Hill.* 14 & 15 *Car.* (u) The Biſhop of *Ely*'s Caſe. 1 *Sid.* 103. reſolved *per Curiam.* (t) Not at a Day after an Eſſoign caſt. Br. Conuſance 6. (u) 1 Lev. 89. S. C. adjornatur.

(N) At what Time it is to be granted.

1. CONuſance ſhall not be granted before the Writ is ſerved, as if the Defendant ſays in an Aſſiſe, that he was not attached by Fifteen Days; Conuſance ſhall not be granted. 13 H. 4. 11.

2. Conuſance ſhall not be granted till the Defendant has made Defence; for if he will not make Defence, the Plaintiff ſhall take advantage againſt him for his want of Defence. (a) 14 H. 4. 20. (a) Br. Conuſance 21 S. C. Br. 22. S. C.

3. In Treſpaſs againſt two, if one makes Default, and the other appears and pleads, and Conuſance is demanded, yet it ſhall be granted for none of them till the other appears; for upon a Bill or Writ, the Court cannot grant Conuſance in part. (b) 22 Aſſ. 50. adjudged. (b) Br Conuſance 26 S. C. Fitz. 7. S. C.

4. When a Court holds Plea upon Conuſance of a Plea granted, the Proceſs againſt the Party ſhall be by Capias, as other Juſtices do. (c) 22 Aſſ. 61. (c) Br. Conuſance 38. S. C. Fitz. Proceſs 177. S. C.

5. And they ſhall award the grand Diſtreſs, if the Cauſe requires it. (d) 22 Aſſ. 61. (d) Br. Conuſance 38. S. C. Fitz. Proceſs 177. S. C.

6. And if he comes not, he ſhall loſe his Iſſues. (e) 22 Aſſ. 21. (e) Br. Conuſance 38. S. C. Fitz. Proceſs 177. S. C.

7. And

* Fol. 495.

7. And if the Party is (f) convicted, he ſhall be fined or imprifoned, or ſhall be in * miſericordia of him to whom Conuſance is granted, if the Caſe requires it; for without theſe, Conuſance would be of no Effect. (g) 22 Aſſ. 61.

(f) In the Original it is, Convince, and ſo appears miſprinted.

(g) Br. Conuſance 38. S. C. Fitz. Proceſs 17. S. C.

(O) Conuſance of Pleas.

Remover.

What will be a ſufficient Cauſe to remove.

1. The Return of Iſſues againſt a Party of 2d, or no Iſſues, by the Bailiff of a Franchiſe, where he might have returned Iſſues to 20 l. is no Cauſe to remove the Plea; for the other Party might aver in the Franchiſe, that more Iſſues might have been returned. (a) 45 Ed. 3. 7.

(a) Fitz. Cauſe de Remover, Plea 9. S. C.

2. But if the Under-Bailiff returns two ſmall Iſſues by Covin and Procurement of the Bailiff, who is Judge: This is a good Cauſe to remove the Plea. (b) 45 Ed. 3. 7.

(b) Br. Cauſe de Remover, Plea 9 S. C. Fitz 9 S. C.

3. In an Aſſiſe, if the Bailiff of the Franchiſe does not ſue the Record at the Day that the Plaintiff hath in the Franchiſe, this is not any Cauſe to remove the Plea; for the Record is at all times to be ſued by the Plaintiff or Demandant. (c) 27 Aſſ. 72. by all the Juſtices.

(c) Br. Conuſance 42 S.C. Fitz. 58. S. C.

4. It is a good Cauſe to remove a Plea, that the Bailiff, who is the Judge, is of the Robes of the Plaintiff. (d) 12 H. 4. 13.

(d) Br. Cauſe de Remover, Plea 13. S. C.

5. If Conuſance be granted to be held before the Mayor and Bailiffs; if one of the Bailiffs brings an Action within the Franchiſe, it is no Cauſe to remove the Plea, quia favet, becauſe he himſelf is Judge; for if the Defendant takes this Exception there, the Plaintiff ought to ſtay his Action till he be out of his Office, otherways it is Error. (e) 2 H. 4. 4. b.

(e) Br. Cauſe de Remover. Plea 11. S. C. Fitz. 6. S. C.

6. If Conuſance be granted to be held before the Bailiff, if an Action be brought againſt the Bailiff: This is good Cauſe to remove the Plea, becauſe he cannot be his own Judge. (f) 8 H. (g) 9. 19. b.

(f) Br. Conuſance 27. S.C.

(g) This is miſprinted in the Original, as here, and ſhould be 6.

7 (h) Failure of Right in a Franchiſe is good Cauſe to remove. (i) 11 H. 4. 27. b. (k) 8 H. 6. 20.

(h) Hard. 507. S.P. per Chief Baron.

(i) Br. Conuſance 16 S. C. Br. Voucher 161. S. C. Fitz. Reſummons 12. S. C. Br. 6. S. C.

(k) Br. Conuſance 27. S. C.

8. If a Foreigner be vouched in a Franchiſe: This is a good Cauſe to remove it for Failure there. (l) 11 H. 4. 27. b. 8 H. 6. 20.

(l) Br. Conuſance 16. S.C. Br. Voucher 161. S. C. Fitz. Reſummons 12. S. C. Br. 9. S. C.

9. So if a Plea be pleaded that beats Date out of the Juriſdiction. 8 H. 6. 20.

10. If

10. If Conuſance be to be held before the Bailiff of an Abbot, (as it ſeems to be intended) and a real Action is brought againſt the Abbot, and the Abbot ſaith, That he hath the Land of the Gift of the King, and prays Aid of the King: This ſhall not be any Cauſe to remove the Plea, for he hath not failed of Right there; for he may have Aid of the King, and the King may ſend to the Juſtices to proceed to Judgment, as well as in Banco. 21 Ed. 3. 38. b.

11. If they will err voluntarily in a Thing of which a Writ of Error lies, and this can be reformed by it: This ſhall not be Cauſe to remove the Plea. Contra, (m) 8 H. 6. 20. (m) Br. Conuſance 27. S.C.

12. As if they will not grant the View where the View lies: This is no Cauſe. (n) 8 H. 6. 20. (n) Br. Conuſance 27. S.C.

13. But if they err voluntarily in ſuch a Thing, of which a Writ of Error lies not, nor can be reformed by it: This ſhall be good Cauſe to remove it. (o) 8 H. 6. 20. (o) Br. Conuſance 27. S.C.

14. As if they will not record a Default as they ought, or will not give Judgment: This is good Cauſe to remove it, becauſe no Writ of Error lies without Judgment, nor the Error of the Default will not appear of Record to be reformed. (p) 8 H. 6. 20. (p) Br. Conuſance 27. S.C.

15. If Wrong be done to a Tenant or Defendant that goes but in Delay, as it ſeems to be intended: This is no Cauſe of Removal, for he is not at Prejudice, becauſe he hath the Poſſeſſion of the Land. (q) H. 6. 20. (q) Br. Conuſance 27. S.C.

Fol. 497.

16. If Conuſance be granted, and the Bailiff will not read the Writ there, it is good Cauſe of Reſummons. 18. E. 3. 31. b.

17. In an Action, if the Franchiſe hath Conuſance granted, and in the Franchiſe the Defendant pleads Villeinage in the Plaintiff: This is good Cauſe of a Reſummons, becauſe this cannot be tried there. (r) 26 Ed. 3. 73. b. (r) Fitz. Conuſance 86. S.C.

(P) Pleading after Removal.

1. If a Plea be removed out of the Lord's Court for Cauſe; the Cauſe is traverſable. (a) 12 H. 4. 13. b. (a) Br. Cauſe de Remover, Plea. 13. S.C. Fitz. 7. S. C. —If Conuſance be granted, and a Reſummons ſued for Failure of Right, the Lord may demand Conuſance again, and then the Demandant ſhall ſhew how he failed, &c. and the Lord may traverſe the Cauſe, and thereupon the Tenant ought to joyn in this Iſſue with the Demandant or Lord; and if he joyns with the Lord, and it is found with the Demandant, it is peremptory to the Tenant; otherwiſe if he joyns with the Demandant, for there the Demandant cannot have Judgment againſt him where the Verdict is found with him, or for the Demandant againſt a Stranger, and not againſt the Tenant; ſo that Conuſance may be demanded, as well upon the Reſummons as the Original, and the Cauſe may be traverſed as well upon the one as the other. Br. Conuſance 5, 6. —Where ſeveral Cauſes may be alledged, and all traverſed. Br. Conuaſnce 10.

(Q) Conuſance.

Reſummons.

In what Caſes it lies.

1. After Conuſance is granted, if there be good Cauſe after to remove the Plea, a Reſummons ſhall be ſued in the Court where the Original was commenced. 8 H. 6. 20. 18 E. 3. 31. b. 1 Ed. 3. 21. b.

2. But when it comes there, if no Cauſe appears, it ſhall be remanded. 1 Ed. 3. 21. b.

(R) Conuſance.

Remover.

Reſummons.

1. When Conuſance is granted to a Franchiſe out de Banco, and there is a Foreign Voucher; and thereupon the Demandant ſues a Reſummons in Banco for Failure of Right there, nothing ſhall come of the Record in Banco but the Original, and the Party ſhall be at large to plead any Plea. (a) 11 H. 4. 87. b.

(a) Br. Conuſance 19 S. C. And that nothing that is done in the Franchiſe ſhall be of Record in B. but the Original.

Conuſance.

(a) How to be (b) Demanded, and (c) Entered.

(a) N. Benl. 233. Pl. 262.

(b) It muſt be demanded by the Lord of the Franchiſe, and not pleaded to the Juriſdiction by the Party. 1 Lev. 89. but vid. Moor 249. Pl. 396. 276. Pl. 429. —There is a Diverſity between a Franchiſe to demand Conuſance, and a Franchiſe ubi breve Domini Regis non currit; for in the firſt Caſe, the Tenant or Defendant ſhall not plead it, but the Lord of the Franchiſe muſt demand Conuſance; but in the other Caſe the Defendant may plead it to the Writ. 4 Inſt. 244. (c) Where the Parties ought to have a Day given to them in the Franchiſe. Lane 81, 87. —Where the Time and Place of Tryal ought to be entered upon the Roll. 1 Sid. 283. (d) 1 Lev. 87. S. C. And ſaid the Warrant of Attorney muſt be filed in Court: And vid. Palm. 456.

1. IT is not demandable by Attorney, unleſs he hath a Warrant of Attorney in *Latin* preſent in Court. *Hill.* 14 & 15 *Car.* 2. (d) The Biſhop of *Ely*'s Caſe. 1 *Sid.* 103. *per Curiam.*

2. If by Charter, confirmed by Act of Parliament, Conuſance of Pleas, &c. is granted to the Chancellor of *Oxford*, or his Commiſſary, the Vice-Chancellor by his Deputy may demand it, tho' the Vice-Chancellor is but a Deputy himſelf; for a (e) Bailiff may properly demand Conuſance, and upon Notice of the Patent the Court ought to ſuperſede. *Paſch.* 21 *Car.* 2. *Caſtle* and *Litchfield*. *Hard.* 505, &c. adjudged.

(e) Br. Conuſance 36, 50.

FH
MVSEVM
BRITANNICVM

Copy-

(a) (b) Copyhold.

Fol. 498.

(a) As to the Name and Origin of Copyholds, vide 9 Co. 76. b. Co. Lit. 58. a. 2 Rol. Rep. 236 — They are now eſtabliſhed by Cuſtom; and ſuch Tenant, ſo long as he doth his Services, and does not break the Cuſtom of the Manor, is not to be ejected by his Lord. 4 Co. 21. b. 22. a.

(A) Of what Things it may be.

1. (c) **Tithes may be demiſable by Copy of Court-Roll, according to the Cuſtom of the Manor, for they may be Parcel of a Manor, (as it ſeems) as well as a Rent-Charge.** Contra, P. 43 Eliz. B. R. between (d) Sands and Drury.

(b) The Cuſtom having created ſuch Inheritances, the Law will direct the Diſcent thereof, according to the Rules and Maxims of the Common Law, as incident to every Eſtate diſcendible; but ſuch cuſtomary Inheritances ſhall not have any collateral Qualities which concern not the Diſcent, and therefore they ſhall not be Aſſets, &c. 4 Co. 22. a. 22. b. 30. b. Hob. 215. (c) Cro. Eliz. 413. S. P. cited to have been adjudged. (d) Cro. Eliz. 814. S. C. and S. P. dubitatur, becauſe not Parcel of the Manor, and therefore not grantable, Secundum Conſuetudinem Manerii. 4 Co. 24. b.

2. Tonſura prati **may be demiſable by Copy of Court-Roll, according to the Cuſtom of a Manor by Preſcription.** P. 43 Eliz. B. R. per Gawdy.

3. (e) **Underwood, without the Soil, may be demiſable by Copy.** Co. Lit. 58. b.

(e) Poe and Taylor, S. P. 4 Co. 30, 31. adjudged and affirmed upon Error, becauſe it is a Thing of Perpetuity, to which the Cuſtom may extend. Cro. Eliz. 413. adjudged and affirmed upon Error. Moor 315. Pl. 480. adjudged and affirmed upon Error.

4. (f) **The Herbage or Veſture of Land may be demiſable by Copy.** Co. Lit. 58. b.

(f) Poe and Taylor, S. P. 4 Co. 31. a. reſolved.

5. (g) **A Manor may be demiſable by Copy.** Co. Lit. 58. b.

(g) Sir Henry Nevil's Caſe. S. P. 11 Co. 17. adjudged; and that ſuch cuſtomary Lord may keep Courts, and grant Copies. Cro. Jac. 327. adjudged. 1 Bulſ. 57. cited. But Cro. Jac. 260. dubitatur. —But he cannot hold a Court Baron, for he can have no Freeholders, for a Copyhold-Manor is not capable of an Eſcheat of a Freehold, for if it were, the Freehold after the Eſcheat muſt become Copyhold, which is repugnant and impoſſible. The King and Staverton. Yelv. 190. Cro. Jac. 259. 1 Bulſ. 54, 55, &c.

6. (h) **Any thing that concerns Land may be granted by Copy.** Co. Lit. 58. b.

(h) A Mill may be. 4 Leon. 141. cited to have been adjudged.

7. (i) So a Fair appendant to a Manor may be granted by Copy. Co. *Lit.* 58. b.

(f) 4 Co. 31. a. S. P.

(B) What

(B) What (a) Act or Thing will deſtroy the Power to grant by Copy.

(a) It is one of the Pillars of a Copyhold Eſtate, That it hath been demiſed or demiſable Time out of Mind. 4 Co. 24. b. Co. Lit. 58. b. and vid. 1 Leon. 56. 3 Leon. 107, 108.

1. If the King be ſeized of a Manor, of which Black-Acre is Parcel, and demiſable by Copy in Fee, and this comes to the King either by Eſcheat or Surrender; and after the King leaſes the ſaid Black-Acre to J. S. for Life, not taking Notice that it was demiſable by Copy: This is a good Grant, tho' the King did not know that it was demiſable by Copy, and by conſequence it will deſtroy the Power to grant it by Copy at any time after; ſo that the King, or any other Lord of the Manor, cannot grant it by Copy after. M. 15 Car. B. R. between (b) Downcliffe and Minors, per Curiam, reſolved upon Evidence at the Bar; but they directed the Jury to find a ſpecial Verdict, and the Jury gave a general Verdict againſt their Direction.

(b) Lee and Boothby ſeems to be the ſame Caſe. 1 Jon. 449 agreed accordingly; but the Jury found a general Verdict contrary to the Direction of the Court. Cro. Car. 521. —But in the Caſe of Field and Boothy, 2 Sid. 17, 35, 81, 137. &c. the S. P. being in Queſtion, it was adjudged otherways by Glyn and Warburton contra Newdigate; and for that the King's Grant ſhould not enure to a double Intent. Styl. 266. &c. adjudged con. And vid. March 206.

(c) So if he keeps it for a long time in his Hand.

2. If a Copyhold in Fee comes to the Lord by Eſcheat or Surrender, (c) yet there is no Impediment, but the Lord may after grant it again by Copy. M. 15 Car. B. R. between Downcliffe and Minors, per Curiam, upon Evidence at the Bar.

4 Co. 31. a. Co. Lit. 58. b. Cro. Eliz. 699.

(d) 4 Co. 31. S. P. adjudg'd, becauſe during ſuch Eſtate it was not demiſed nor demiſable by Copy.

3. (d) If a Copyhold comes into the Hands of the Lord (e) in Fee by Eſcheat or Surrender, and the Lord leaſes it by Parol for One Year, or half an Year, or for any (f) certain Time, it can never be granted by Copy after; but this Power to grant by Copy is wholly deſtroyed. M. 15 Car. B. R. between Downcliffe and Minors, per Curiam, upon Evidence at the Bar reſolved.

(e) But if Tenant in Tail for Life, &c. makes ſuch Leaſe, &c. this ſhall not deſtroy the Power of him in Reverſion. 2 Rol. Abr. 271. Pl. 1, 2, &c. 2 Sid. 35, 37. Yet vid. Cro. Car. 521. per Curiam, arguend' con. (f) Secus, if he leaſes it at Will. 1 Co. 31. a. 3 Leon. 108.

4. So if the Lord makes a Feoffment thereof in Fee upon Condition, and after enters for the Condition broke; yet it cannot be regranted again by Copy. *Mich.* 18 & 19 *Eliz.* in *Frenche's* Caſe. 4 *Co.* 31. a. reſolved.

5. But if the Lord be diſſeiſed thereof, and the Diſſeiſor dies ſeiſed, or if the Land be recovered againſt the Lord by a falſe Verdict or erroneous Judgment; tho' 'tis not demiſed or demiſable by Copy till it is recovered by the Lord, or the Judgment reverſed, yet after it is recontinued, it is grantable again by Copy, becauſe the Interruption was Tortious. *Mich.* 18 & 19 *Eliz.* in *Frenche's* Caſe. 4 *Co.* 31. a. reſolved.

6. If the Land ſo eſcheated, *&c.* is extended upon a Statute or Recognizance made by the Lord, or the Wife of the Lord in a Writ of Dower hath it aſſigned to her, tho' theſe Interruptions are by Act of Law, yet it cannot again be granted by Copy. *Mich.* 18 & 19 *Eliz.* in *Frenche's* Caſe. 4 *Co.* 31. a.

7. If a Copyholder takes a Leaſe for Years of the Manor, by which his Copyhold is extinct, yet he may regrant it again if he will, for it was always demiſed or demiſable. *Mich.* 18 & 19 *Eliz.* 4 *Co.* 31. b. reſolved.

8. So

8. So if a Copyhold eſcheats, &c. and the Lord aliens the (g) Manor, his Alienee may regrant the Land by Copy. *Mich.* 18 & 19 *El.* 4 *Co.* 31. b. reſolved.

(g) So if he leaſes the Manor and the ſaid Copyhold Land, by the Name of his Tenement called H. for the Manor being demiſed, the Copyhold is included as Parcel thereof, and the naming the Copyhold is but Surpluſage. Cro. Car. 521.

(C) Copyhold.

Fol. 499.

Grant.

By whom it may be made.

1. (a) THE Lord that hath a lawful Eſtate in the Manor, (b) be he Tenant for Life or Years, Tenant by Statute Merchant, Staple, Elegit, Tenant at Will, or Guardian in Chivalry, (c) may grant Copies (d) according to Cuſtom. Co. Lit. 58. b.

(a) Moor 147. Pl. 292. 236. Pl. 369. S. P. agreed, per Curiam. 4 Co. 23. b. S.P. reſolved,

and that ſuch Grants ſhould bind thoſe in Remainder. (b) For the Copyholder is in by the Cuſtom, without Regard to the Eſtate or Perſon of the Grantor, and therefore ſuch Grant by an Infant, Non compos, &c. ſhall bind. 4 Co. 23. b. 8 Co. 63 b. Noy 41. (c) And ſuch Rents and Services as they reſerve, will be annexed to the Manor, and attend the Owner thereof after their particular Eſtates determined, 11 Co. 18. a. (d) But he that hath but a particular Eſtate only in the Manor, cannot grant a Copyhold by Parcels, or demiſe Part, and retain the Reſidue himſelf. Cro. Eliz. 662. per Poph. —He muſt reſerve the ancient Rent or more. Br. Tenant by Copy 27.

2. (e) But Diſſeiſors, Abators, Intrudors, or Tenants at Sufferance, cannot grant Copies to bind thoſe that have Right. Co. Lit. 58. b. Co. 4. between (f) Rouſe and Arters, B. R. 24. adjudged in the Caſe of a Tenant at Sufferance.

(e) Chudleigh's Caſe, S.P. 1 Co. 140. b. Poph. 71. Moor 112. S.P. per Cur.

(f) Moor 236. Pl. 369. S.C. adjudged. 2 Leon. 45. adjudged niſi. Ow. 27, 28. adjudged niſi. Cro. Eliz. 699.

3. (g) If Tenant in Dower of a Copyhold Manor grants a Copyhold in Reverſion to another, (h) where by the Cuſtom it may be granted in Reverſion: This Grant ſhall bind the Heir after the Death of the Feme, tho' the Reverſion be not executed in the Life of Tenant in Dower: For this is all one with a Grant in Poſſeſſion, the Cuſtom warranting an Eſtate in Reverſion. P. 41 Eliz. B. R. between (i) Gaye and Reye.

(g) Otherways where pleaded, that ſhe recovered the third Part of the Manor by the Name of certain Meſſuages,

Acres and Rents, for by ſuch Names no Part of the Manor could be recovered, and therefore, &c. Godb. 135. Ow. 4. (h) There ought to be a Cuſtom to enable a Lord of a Manor to grant a Copyhold in Reverſion. March. 6. —And where the Cuſtom may be to grant with the Conſent of the Copyholder in Poſſeſſion. Mid. Goulſ. 102, 103. 3 Leon. 226. Godb. 140. (i) Cro. Eliz. 661. S.C. adjudged.

4. If Guardian in Soccage grants a Copyhold in Reverſion, according to the Cuſtom of the Manor, this ſhall be a good Grant, and bind the Ward, tho' it comes not in Poſſeſſion during the Nonage of the Ward, for he is Dominus pro Tempore. H. 12 Jac. B. and M. 3 Jac. B. between (k) Shapland and Ridler. adjudged.

(k) 2 Rol. Abr. 41. S.C. Cro. Jac. 55. 98.

S.C. adjudged. Godb. 143. S.C. adjudged; and I ſuppoſe the Admittance there mentioned muſt be intended of a Grant. Ow. 115. S.C. adjudged, and by ſome of theſe Books the Court ought to be kept in the Name of the Guardian.

5. If a Lord of a Manor devises by his Will in Writing, that his Executor shall grant Copies according to the Custom, for Payment of Debts, and dies; the Executor, tho he hath no Estate in the Manor, may make Grants according to the Custom of the Manor. M. 7. 8 Eliz. D. Manuscript cited. Co. Lit. 58. b.

6. If *A.* and *B.* under the Seal of the *Exchequer*, are appointed Joint-Stewards of all the Lands of a Fugitive, and the Lord Treasurer makes to them a Warrant to keep Courts, grants Copies, *&c.* and *A.* only keeps a Court and grants Copies; tho' in Strictness he had no Power without *B.* yet these Grants are good, being made by one (k) that had a Colour to keep Courts, *&c. Pasch.* 22 *Eliz.* between *Knowles* and *Luce. Moor.* 109. Pl. 252. adjudged.

(k) So where made by the Servant of the Deputy-Steward. 1 Leon. 218. but Quere, if not intended of an Admittance; and vid. Br. Tenure by Copy 26.

7. (l) If Baron and Feme being seised of a Copyhold Manor in the Right of the Feme, * grant a Copyhold: This shall bind the Feme, notwithstanding her Coverture, for the Copyholder is in by Custom without regard to the Estate or Person of the Grantor. 4 *Co.* 23. b.

(l) 8 Co. 63. S. P. per Curiam, arguendo.

* The Grant must be in the Name of both. Cro. Jac. 99.

8. (m) So the Grant of a Copyhold by a *Non compos*, (n) Infant, Bishop, Prebend, Parson, *&c.* shall bind for ever. 4 *Co.* 23. b.

(m) 8 Co. 63. S. P. per Curiam, arguendo.

(n) Noy 41. S. P. adjudged.

9. If the Queen be Tenant for Life of a Copyhold Manor, and a Copyhold of Inheritance escheats to her, she may grant it again; for the King, his Heirs and Successors, shall be bound by the Custom of the Manor. *Trin.* 26 *Eliz.* between *Clark* and *Pennyfather.* 4 *Co.* 23. b. adjudged.

10. If the Feoffee of the Manor, upon Condition, grants a Copyhold, and after the Condition is broke, and the Feoffor re-enters, yet he shall not avoid the Grant by Copy. 4 *Co.* 24. a.

11. If the King by Letters Patents grants the Stewardship of a Copyhold Manor, and after a Copyhold escheats, (o) the Steward, *ex Officio*, without any special Warrant, may grant it again, and the King shall be bound by the Custom of the Manor. *Trin.* 41 *Eliz.* between *Harris* and *Jays.* 4 *Co.* 30. a. adjudged; but it was said, tho by Law he might do it, yet it was his Duty before he made any Grant, to inform the Treasurer, Chancellor, and Barons of the *Exchequer*, or some of them, for their Direction.

(o) For the Steward is in Place of the Lord, and without a Command to the contrary may grant Lands by Copy. Cro. Eliz. 699.

12. But a Steward retained only by the King's (p) Auditor or Receiver cannot make such a voluntary Grant of a Copyhold. *Trin.* 4 *Eliz.* between (q) *Harris* and *Jays.* 4 *Co.* 30. a. adjudged.

(p) For they have not any Authority to appoint Stewards, the Business of the one being to take the Accounts, and of the other to survey the Land. Cro. Eliz. 699. (q) Cro. Eliz. 699. S. C. adjudged; for tho' he was an Officer de facto, and might do Things of Necessity, as to take Presentments from the Jury, make Admittances, &c. yet he could not do voluntary Acts, as to grant Copyholds, &c.

13. If *A.* being Tenant for Life of a Manor within which are several Copyhold Tenements grantable for one Life in Possession, and another in Reversion, grants the Stewardship thereof by Deed under his Hand and Seal to *B.* for Life, with the Fee of 10 *s. per Annum* for the executing thereof; and after *A.* becomes a Lunatick, and being found so by Inquisition, is committed to, *&c.* yet *A.* by his Steward may grant Copies. 9 *Jac. Blewit's* Case. *Ley* 47, 48. resolved by *Hobert* and *Tanfield*; but it was ordered the Steward should grant none but with the Privity of the Committees, and Warrant from the Court; but there is a Note that this was in Discretion, and the Grant of the Steward good.

14. But the Committees cannot grant Copies, for that they themſeves by Law have no Eſtate in the Manor, nor are Lords thereof. 9 *Jac. Ley* 48. reſolved by *Hobert* and *Tanfield.*

(D) At what Place it may be made.

1. The Lord of a Copyhold Manor may himſelf grant a Copyhold at any Place out of the Manor. Co. 4. 26. b. between Melwich and Luter.

2. But the Steward cannot (a) grant a Copyhold at any Court held out of the Manor. Co. 4. 26. b. between *Melwich* and *Luter*, reſolved.

(a) Secus, Of an Admittance.

1 Leon. 289. per Curiam. but vid. 4. Co. 27. a. con. 1 Rol. Abr. 527. Pl. 3. con. and vid. 1 Rol. Abr. 505. Pl. 4.

3. Otherways, where by (b) Cuſtom the Court hath been held out of the Manor, *&c.* 4 Co. 27. a. between *Clifton* and *Molineux*, reſolved.

(b) As if a Lord being ſeiſed of 2 or 3 Manors, hath Time out of Mind, within one of his Manors, kept Courts for all his ſaid Manors, &c. Co. Lit. 58. a. Cro. Car. 367.

4. If there be an Honour conſiſting of ſeveral Manors, and there are ſeveral Copyholders belonging to the ſeveral Manors, tho' there is but one Court held for them, yet they are *quaſi* ſeveral and diſtinct Courts. *Mich.* 8 *Car.* between (c) *Seagood* and *Hone*, *Cro. Car.* 366, 367. *per Curiam*; and that it ſhould be ſo intended where by ſpecial Verdict it was found that by Cuſtom of the Manor of *T.* a Surrender might be into the Hands of Two cuſtomary Tenants of the Manor, and that *J. S.* a Copyholder ſurrendred, *&c.* and it was preſented at next Court, and found the Surrender *in hæc verba T.* in the Margin. At the Court Baron of the Honour of *H. A.* and *B.* Tenants of the Honour preſent, That *J.* 8. did ſurrender, *&c.*

(c) 1 Jon. 342. S. C. and S. P. per Curiam.

(E) Copyhold.

Surrender.

At what Time.

1. If there be Baron and Feme Copyholders to them and the Heirs of the Baron, and the Baron dies, the Heir of the Baron may ſurrender his Reverſion into the Hands of Two Tenants of the Manor out of the Court, (who by the Cuſtom have Power to take Surrenders (a) before Admittance, and (b) during the Life of the Feme; and this is a good Surrender, (c) for

(a) So the Heir, before Admittance, may enter into Copyhold Lands deſcended to him, and ſurrender them to the Uſe of another; but this ſhall not prejudice the Lord of his Fine, by the Cuſtom of the Manor due to him upon the Deſcent. 4 Co. 22. b. Cro. Jac. 36. (b) If there be Tenant for Life of a Copyhold, the Remainder in Fee, he in Remainder may ſurrender his Eſtate, if there be no particular Cuſtom to the contrary. 3 Leon. 239. 4 Leon. 9. (c) Becauſe he is in by Courſe of Law, and the Cuſtom which makes him Heir to his Eſtate, and throws the Poſſeſſion upon him. Yelv. 145. per Curiam. 1 Brownl. 143. per Curiam.

the

the Reversion was cast upon him (d) by Descent before any Admittance. P. 41 Eliz. B. R. between (e) Calchin and Calchin, adjudged.

(d) In the Original, this is by the Surrender, and therefore I supposed it misprinted there.

(e) Cro. Eliz. 662. S. C. adjudged.

2. If a Coppholder in Fee surrenders into the Hands of certain Customary Tenants, to the Use of his Wife in Fee; and after, before any Court, the said Coppholder surrenders the same Lands into the Hands of other * Customary Tenants, to the Use of his Wife for Life, the Remainder to another in Fee; and at the next Court both Surrenders are presented, and the Steward admits the Wife according to the Second Surrender: This is a good Admittance, and the Wife shall have it but for Life, and so it is a good Remainder. (f) H. 8 Jac. Scaccario, adjudged.

* Fol. 500.

(f) Gooche's Case, Lan. 99. S. C. & S. P. admitted.

3. If a Coppholder in Fee surrenders out of Court into the Hands of Tenants, according to Custom, to the Use of B in Fee, upon Condition, That if he pays 10 l. to B. the First of May after, it shall be lawful for him to re-enter, and after and before Payment of the 10 l. surrenders into the Hands of Tenants to the Use of C. in Fee, and after before the said First of May, A. pays the Money to B. and after and before the said Day A. surrenders into the Hands of Tenants to the Use of D. in Fee, and the Custom of the Manor is, That the Surrenders made out of Court into the Hands of Tenants shall be void, if they are not presented at the next Court, and at the next Court the Surrender to B. is not presented, but the Surrender to D. is first presented, and after at the same Court the Surrender to C. is presented: In this Case, upon the whole Matter, C. shall have the Land; for, notwithstanding the Surrender to the Use of B. upon Condition, nothing passed out of the Coppholder, but the Estate remained in him till it is presented at the next Court; so that A. had Power notwithstanding the Surrender to the Use of B. to surrender to the Use of C. but it was subject to be void if the Surrender to B. had been presented; as if a Man acknowledges a Deed of Bargain and Sale, and after bargains and sells to another, if the second Deed be inrolled, and the first not, the second Man shall have the Land; so it is of the Conusance of a Fine: Then in this Case, the second Surrender not being presented, and so void, the first Surrender is to be preferred before the third Surrender, both being presented at the next Court, and the Performance or Non-Performance of the Condition is is not material in the Case; but it is all one as if it had been absolute without any Condition, Mich. 8 Car. B. R. between (g) Burgoign and Spurling, adjudged per Curiam, upon a special Verdict. Intratur, Tr. 7 Car. Rot. 374.

(g) Cro. Car. 273, 283, 284. S. C. adjudg'd. 1 Jon. 306. S. C. adjudged.

4. If a Copyholder in Fee surrenders to the Use of *B.* and his Heirs, *B.* before Admittance cannot surrender to the Use of another; for before Admittance *B* had nothing, and his Copy, upon which he is admitted, is his Evidence by the Custom, and before that he is no Customary Tenant, so he can transfer nothing to another. *Mich.* 6 *Jac.* between (h) *Wilson* and *Weddal.* *Yelv.* 144, 145. adjudged.

(h) 1 Brownl. 143. S. C. adjudged; but seems to be only a Translation of the Report in Yelverton.

(F) Copyhold.

Surrender.

At what Place.

1. A Copyholder may ſurrender into the Hands of the Lord out of Court, without a particular Cuſtom to warrant it. Co. Lit. 59. a. b. Contra Co. 9. 76. b.

2. But he cannot ſurrender to the Lord into the Hands of (a) Tenants, or the Reeve, or others out of Court (b), without a particular Cuſtom. Co. Lit. 59.

(a) Such Tenants, without a ſpecial Cuſtom to warrant it, cannot examine and take a Surrender from a Feme Covert. Cro. Eliz. 717.

(b) Which muſt be ſhewed in Pleading. Styl. 107. Al. 69.

3. The (c) Steward of the Manor may (d) take a Surrender of a Copyhold out of the Manor. Mich. 13. Jac. B. R. between Houſego and Wild, per Curiam.

(c) Tho' retain'd by Parol only. 4 Co. 30. b.

Cro. Jac. 536. Contra Blagrave and Wood. Godb. 142. per totam Curiam. 1 Leon. 227, 228. adjornatur: And vid. 1 Leon. 288.

(d) And examine a Feme Covert, &c. Cro. Jac. 536. adjudged.

(G) (a) (b) How and in what (c) Manner a Surrender may be made.

(a) If one cannot come into Court to ſurrender in Perſon, the Lord may appoint a ſpecial Steward to go to him, and take the Surrender. 1 Leon. 36. by Clinch. —And 4 Leon. 111. it is ſaid, A Copyholder being in Ireland, the Steward of a Manor here made a Commiſſion to One to receive a Surrender from him there, and it was holden a good Surrender. — A Steward may take a Surrender to the Uſe of himſelf, for the Entry is Quod ſurſum reddidit in manus Domini, Cro. Eliz. 717. (b) It may be reſerving a Rent with a Condition of Re-entry for Non-Payment. 4 Co. 21. b. (c) The Surrender to the Lord is always general, without limiting any Eſtate. 4 Co. 29 b. Co. Lit. 59. b. (d) 1 Leon. 36. S. P. con. by Two Judges againſt One.

By Attorney.

1. (d) A Copyholder in Fee may ſurrender in Court by Letter of Attorney without any Cuſtom, becauſe himſelf might there have ſurrendered De communi Jure, by the Common Law, without ſuch Cuſtom. Co. 9. Combe 75. b. reſolved.

2. Hill. 28 Eliz. Chapman's Caſe, cited Co. 9. Combe 76. it was held, That where * by the Cuſtom a Copyholder out of Court might ſurrender into the Hands of the Lord, by the Hands of Two Cuſtomary Tenants, that in Effect are but Attornies, (e) that he cannot Surrender by Attorney to the Lord by two Tenants; for there the Cuſtom that is the Warrant thereof ought to be purſued.

* Fol. 501.

(e) Stil 107. Aleyn 69.

(H) How the Attorney ſhall do it.

1. IF the Letter of Attorney be made to Men to make a Surrender in Court, the Attornies ought to purſue the Form and Manner of the Surrender in all Points, according to the Cuſtom, as the Copyholder himſelf ought to have done, as if it ought to be by the Rod, or other Thing. Co. 9. Combe 76. b. reſolv'd.

2. The Attorney ought to make it in the Name of him that gave him the Authority. Co. 9. Combe 76. b. reſolved.

3. A Letter of Attorney was made to Two to make a Surrender, and they ſhewed their Letter of Attorney, and then they Authoritate eis per prædictam Literam Attornati data, ſurrendred it: This is as much as to ſay, That we, as Attornies of the Copyholder, ſurrender; and both are well done in the Name of him that gives the Authority. Co. 9. Combe 77. Curia.

(I) What ſhall be ſaid a good Preſentment of a Surrender, and at what Time.

1. CO. 4. Kite and Quinton 25. The Cuſtom of the Manor was, That a Surrender out of Court ſhould be preſented in Court: A Copyholder ſurrenders accordingly upon Condition, and this is preſented abſolutely, and reſolved, That the Preſentment is void.

(a) Froſwell and Welſh, S. P. Cro. Jac. 403. adjudg'd. 3 Bulſ 214. &c adjudged. (b) So if Ceſtuy que Uſe dies before it is preſented, his Heir may be admitted. 4 Co. 25. a. 29 b.

2. Co. 4. Bunting 29. B. (a) Copyholder in Fee ſurrenders out of Court, and (b) dies before it is preſented in Court, yet the Surrender being preſented after his Death, according to the Cuſtom, is good, as is reſolved; but if it had not been done according to the Cuſtom, it had not been good; and (c) if the Tenants by whoſe Hands the Surrender was made die, yet if this upon good Proof is preſented, it is well enough. Co. Lit. 62.

(c) Froſwell and Welſh. S. P. Cro. Jac. 403. adjudged. 3 Bulſ. 214. adjudged; the Cuſtom being found generally, that it muſt be preſented at the next Court, without ſaying by whom. 4 Co. 29. b.

3. If there be Two Jointenants in Fee of a Copyhold, and One ſurrenders his Part out of Court into the Hands of the Lord to the Uſe of his laſt Will, and after deviſes it to another in Fee, and dies; and after, at the next Court this is preſented, the Deviſee ſhall have it; for now by Relation the Jointure was ſevered, and the Eſtate of the Land bound by the Surrender. Mich. 2, 3 Ph. Ma. B. Conſtable's Caſe cited. Co. Lit. 59. b.

(K) What

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(K) What Entry of the Surrender and Preſentment ſhall be good.

1. CO. 4 Kite and Quinton 25. A conditional Surrender is preſented, and the Steward in entring thereof omits the Condition, yet it is held, That (a) upon ſufficient Proof thereof, the Surrender ſhall not be avoided, but the Roll ſhall be amended; and the Roll ſhall not conclude the Party to give Evidence againſt it.

(a) So the Miſentry of the Date of the Court ſhall not prejudice the Copyholder, but he may give in Evidence the Truth of the Matter, and ſhall not be bound by the Rolls. 1 Leon. 290.

(L) What Action ſhall be ſaid a Surrender in Law.

1. IF a Copyholder in Fee takes the ſame Land from the Lord by another Copy for Life, this is not any Surrender or Determination of his Copyhold of Inheritance; for a Copyhold cannot be ſurrendred but by actual Surrender in Court, ſurſum reddens into the Hands of the Lord, and not by Surrender in Law. Mich. 37 El. B. between (a) Shephard and Adams; which intratur, Hill. 36 El. Rot. 2640. adjudged: Quod vide, (b) M. 13 Ja. *B R. ſame Caſe; and there it is admitted a Surrender; but there ſaid, the Reverſion is in the Surrenderor, no Diſpoſition being made thereof.

(a) 3 Bulſ. 81. S Cæitedton.

* Fol. 502.

(b) Southcot and Adams, 1 Rol. Rep. 256. S. C. upon a Trial at Bar it appeared, That a Copyholder in Fee accepted by Copy an Eſtate to himſelf for Life, Remainder to his Wife for Life, Remainder to his Son for Life; and it was held to be no more than if the Copyholder had ſurrendred to the Uſe of himſelf for Life, Remainder, &c. and ſo the Reverſion in Fee continued in him; but the Court directed the Jury to find a Special Verdict, but the Jury being ready to give a General Verdict, the Plaintiff was nonſuited: But it was ſaid by Dod, That if the Copyholder had accepted an Eſtate for Life to himſelf only, it might have been ſome Queſtion, Whether it ſhould not have concluded him as to the Inheritance? Belfield and Adams S. C. 3 Bulſ. 80, 81. ruled accordingly upon Evidence; and the Jury being about to give a General Verdict, according to the Opinion of the Court, whereas the Plaintiff expected they would have given a Special Verdict, the Plaintiff was nonſuit. But per Dod, if the Copyholder had accepted an Eſtate for Life to himſelf only, it had been a Doubt. 1 Rol. Abr. 871. Pl. 2.

2. If a Copyholder in Fee comes into Court, and (c) ſays, That he renounces his Copy; this is not any Surrender. M. 37 El. B. in the ſaid Caſe held.

(c) Secus if he ſays he is weary of his Copyhold, and deſires the Lord to take it. Hut 65. per Hobert. —— And 1 Jon. 42. it is ſaid, his Intereſt may be determined by any Act, by which he ſhews his Will to hold no longer by Copy.

3. If *A.* being ſeiſed in Fee of a Copyhold Manor, grants certain Cuſtomary Lands, Parcel thereof to *B. habend.* to *B. C.* and *D.* for their Lives ſucceſſively, as they are named in the Grant, at the Will of the Lord, according to the Cuſtom of the Manor; and *B.* is admitted. And within the Manor there is a Cuſtom, that the Firſt Perſon in ſuch Copy named may ſurrender all the Lands, and thereby determine and deſtroy the Title and Eſtate of the other Perſons therein named; and *A.* and *B.* covenant to levy a Fine of the Manor, and of the Cuſtomary Lands by Name, to the Uſe of a Stranger in Fee; and the Fine is levied accordingly; yet this does not amount to a Surrender within the

Cuſtom, ſo as to bar the Eſtate of *B.* and *C.* for the Cuſtom extends only to the Copyhold Eſtate, and that cannot (d) paſs by the (e) Fine. *Mich.* 32 *Car.* 2. between *Zinzen* and *Tolmage. Raym.* 402. adjudged and affirmed upon a Writ of Error.

(d) But the Right to it may be extinguiſhed by Fine. Cart. 24.

(e) If the Copyholder joins with his Lord in a Feoffment of the Manor, his Copyhold is thereby extinct. Godb. 11.

(M) Copyhold.

Admittance.

In what Caſes the Eſtate ſhall be in the Tenant before Admittance.

1. If the Cuſtom of a Manor be, That the Wife of every Copyholder for Life ſhall have her frée Bench of the Tenement of her Husband dum caſta & ſola vixerit after the Death of the Baron, the Law caſts the Eſtate upon the Wife, ſo that ſhe ſhall have the Eſtate before any Admittance; and may make a Leaſe for an Year as another Copyholder may. Tr. 16 Ja. B R. between Jurdan and Stone, agréed per totam Curiam, upon Evidence at the Bar. Hobert's Reports 244. between (a) Howard and Bartlet, per Curiam; and there cited. P. 16 Ja. B. (b) Rennington's Caſe adjudged.

(a) Hob. Fol. 181 S.C. & S.P. per Curiam. Cro Jac. 573. S. C. & S. P. may be inferred from it. 2 Rol. Rep. 178 S. C. & S. P. may be inferred from it. (b) Noy 29. S. C. adjudged, becauſe her Eſtate is only a Branch of the Eſtate of her Husband, and no Fine is due from her to the Lord.

2. If by the Cuſtom of the Manor, the Copyhold ought to deſcend to the youngeſt Son, and the Copyholder in Fée ſurrenders it (c) to the Uſe of himſelf and his Heirs, and (d) dies before any Admittance upon the Surrender, and the youngeſt Son firſt enters; the eldeſt cannot juſtify his Entry upon him before Admittance. M. 10 Ja. B. R. adjudged.

(c) This Limitation of the Uſe is void, becauſe he had it before, per Godb. 265.

(d) Where Ceſtuy que uſe dies before admittance, if the Lands be of the Nature of Borough-Engliſh, the youngeſt Son ſhall be admitted. 1 Mod. 102. 2 Sid. 61. Styl. 145, 146.

3. If a Copyholder ſurrenders out of Court into the Hands of Tenants, according to Cuſtom, to the Uſe of another, (e) before this Surrender is preſented at the next Court, or (f) any Admittance of him to whoſe Uſe this Surrender is made, the Eſtate continues in the (g) Surrenderor. Mich. 14 Ja. B. R. between (h) Froſwel and Welſh, per Curiam.

(e) So after it is preſented, and entered in the Rolls of the Court, until Admittance.

Robinſon and Gzebes, Bridg. 81. adjudged. Poph. 127, 128. adjudged. 3 Bulſ. 237, &c. adjudged.

(f) But after Admittance, Ceſtuy que uſe ſhall be ſaid in from the Time of the Surrender; and if the Surrenderor dies, and after Ceſtuy que uſe is admitted, the Wife of the Surrenderor ſhall not have her free Bench. 3 Lev. 385, 386.

(g) But if the Steward refuſes to admit, but Ceſtuy que uſe enters and occupies the Land, in an Ejectment brought by the Lord, he may well plead Not guilty. Yelv. 15. agreed per totam Curiam. Quære Rationem; for if it be in Reſpect of the Poſſeſſion, the Title of the Lord ſeems to be the moſt ancient. Et vid. Hob. 181. Noy 29.

(h) Cro. Jac. 403. S C. adjudged. 3 Bulſ. 214. S. C. adjudged. Godb. 268. S. C. adjudged; and that the Surrenderor and his Heirs may take the Profits till Admittance. Bridg. 49, 50. S. C. adjudged. Bridg. 83, 84. S. C. cited; & vid. Dan. 20. 2 Sid. 37, 61. Styl. 146.

4. But in that Case, if the Lord admits Cestuy que use for his Tenant, and accepts the Rent from him as his Tenant, the Estate shall be in him, before any Presentment of the said Surrender at the next Court by the Tenants, because the Lord is not at any Prejudice by this, being satisfied his Duties; which is the Cause that the Estate is not in the Cestuy que use upon a Surrender before Admittance. Mich. 14 Ja. B R. between (i) Froswell and Welsh, per Curiam.

(i) 3 Bulst. 214, 215, &c. S. C. & S. P.

seems to be admitted by the Arguments. Godb. 268. S. C. & S. P. per Curiam. Bridg. 49, 52. S. C. & S. P. seems to be admitted.

(N) What Persons may enter before Admittance, and how they shall be seised of it, and in what Manner it shall descend.

1. CO. 4. Browne 22. b. resolved, That if a Customary Estate of Inheritance descends to the Heir, (a) he may before Admittance enter, and (b) take the Profits.

(a) And if he dies, his Heir may enter, take the Profits, and bring Trespass, &c. 4 Co. 23. b. —Though the Lord had admitted a Stranger. Noy 172. adjudged. (b) And bring Trespass. Lan. 20. 1 And. 192. Cro. El. 148. Moor 597. 1 Leon. 100.

2. (c) Co. 4. (d) Browne 22, adjudged, That there shall be a Possessio Fratris before (e) Admittance.

(c) Moor 272. S. P. cited to have been adjudged: Et vid. 1 Vent. 261. (d) Moor 125. Pl. 272. S. C. adjudged. (e) This Word is misprinted in the Origiual, for there it is entrie.

3. D. 12 El. 291, 69. (f) accordingly by Two Justices; and there also it was held by Two Justices, That where, after the Death of the Father, the Copyhold descends to the Son within Age, and the Custody of the Land is committed to his Mother by the Lord during his Nonage, who enters, and after the Son dies before any Admittance, yet (g) this Possession of the Mother, (h) as Guardian, gives the actual Possession to the Son, and therefore his Sister of the half Blood cannot be Heir to him.

(f) 1 Mod. 102, 120. like Point admitted. (g) 3 Leon. 70. S. P. per Manwood, arguendo, because this Possession of the Mother is a Customary Possession. —So if the Father had made a Lease for Years by Surrender, and died, &c. Secus if the Lease had been made by Deed by Licence. 4 Leon. 38. per Manwood: But yet, 4 Co. 21. a. Moor 225. Pl. 272. where such Lease was made by Licence, the Possession of the Lessee was adjudged the Possession of the Heir. (h) Dal. 110. S. P. agreed: —But said, that if the Lord, by Custom during the Nonage of the Heir, demises it to a Stranger for Years, this will not make a Possessio Fratris. Dal. 110.

4. If the Custom of a Copyhold Manor be, *quod si aliquis Vir habet Uxorem* seised in Fee, *secundum Consuetudinem Manerii*, of Customary Lands, that he shall hold *ad Terminum Vitæ suæ post Mortem Uxoris, per Legem Angliæ*, and a Copyhold Tenement descends to a Feme Covert, and the Husband enters, but before Admittance his Wife dies, yet he shall be Tenant by the Courtesy; for though the Lord before Admittance shall claim no Duty as Fealty, Homage, Relief, Rent, *&c.* yet his Delay shall not prejudice a Third Person. *Hill.* 31 *Eliz.* between (i) *Ever* and *Aston. Moor* 271. Pl. 425. *per Fenner*; To which, by the Book it seems, that the other Justices enclined; *sed adjornatur.*

(i) 1 And. 192. S. C. & S. P. held by the better Opinion of the Court, though they could give no Judgment, by Reason of a Fault in the Pleading.

Fol. 503.

(O) By what Perſons, and to whom it may be ſurrendred.

1. TEnant for Life of a Copyhold, where there is a Remainder over, may ſurrender to the Lord. Co. 9 Marg. Podger 107.

(P) Copyhold.

Admittance upon a Surrender.

By whom it may be.

(a) Rous and Artois S. P. Moor 236. Pl. 369. agreed per Curiam. 2 Leon. 45, 46. agreed per Curiam.

1. (a) ADmittances made by Diſſeiſors, Abators, Intruders, (b) Tenants at Sufferance, or others that have defeaſible Titles, are good againſt thoſe that have Right, becauſe this was a lawful Act, and they were compellable to do it. Co. Lit. 58. b.

Ow. 27, 28. agreed. Chudleigh's Caſe, S. P. 1 Co. 140. b. Poph. 71. Moor 112. S. P. 3 Leon. 239. 4 Leon. 9. 1 Vent. 360. (b) 2 Rol. Rep. 181. 4 Co. 24. a. b.

2. If the Diſſeiſor of a Manor accepts a Surrender of a Copyholder of Inheritance, to the Uſe of another and his Heirs, and he admits Ceſtuy que uſe accordingly; this is good, and ſhall bind the Diſſeiſee. P. 40 El. B. R. between Martin and Rewe, per Popham. Co. 4. 24.

3. If a Copyholder of Inheritance ſurrenders to the Diſſeiſor of the Manor, ut Dominus inde faciat Voluntatem ſuam, and the Diſſeiſor at the ſame Court regrants it to the Copyholder in Tail, with a Remainder in Fee, or in other Manner, according to the Intention of the Surrender, it ſeems this ſhall bind the Diſſeiſee: But (c) quære.

(c) A. was Tenant for Life of a Copyhold, the Remainder to B. for Life, and ſurrendred to the Uſe of the Diſſeiſor of the Manor, ut Dominus inde, &c. Boor and Pit, 2 Mod. 287. dubitatur, Whether the Right of B. was extinct? Becauſe A. continuing always in Poſſeſſion, the Diſſeiſor had gained no Reverſion in this Copyhold Tenement, and by Conſequence was not capable of taking a Surrender thereof to his own Uſe. 1 Vent. 359, 360. upon a Writ of Error upon a Judgment in the Common Pleas, adjornatur.

4. If a Copyholder for Life, or in Tail, ſurrenders to the Diſſeiſor of the Manor, to the Uſe of another for Life or in Tail; this ſhall not bind the Diſſeiſee. P. 40 El. B. R. in Martin's Caſe.

5. But if A. Copyholder for Life, ſurrenders to the Diſſeiſor of the Manor, to the Uſe of another for the Life of A. and the Diſſeiſor admits him accordingly; this ſhall bind the Diſſeiſee. Ibidem.

6. If a Copyholder of Inheritance dies, and this deſcends to his Heirs; a Tenant at Sufferance of the Manor, though he hath no lawful Eſtate, may admit the Heir, and this ſhall bind him that hath Right. Co. 4. 24, 58. b.

(d) Dal. 1 S. P. per Yates.

7. (d) If the Lord pro Tempore of a Copyhold Manor be Leſſee for Life, or for Years, Guardian, or other that hath a particular Intereſt, or Tenant at Will of a Manor, and accepts a Surrender, and after before Admittance, the Leſſee for Life dies, or the Year's Intereſt or Cuſtody is ended or determined,

or the Will determined: Though the next Lord comes in paramount the Lease for Life or Years, Custody, or other particular Interest or Tenancy at Will, yet he shall be compelled to make Admittances according to the Surrender. 17 Ja. in the Lord Arundel's Case held, cited. Co. Lit. 59. b. Tr. 1 Ja. Rot. 854. between (e) Shopland and Ridler, in the Case of a Guardian in Socage, adjudged.

(e) Cro. Jac. 55, 98. S. C. Godb. 143.

S. C. Ow. 115. S. C. but S. P. does not appear in any of these Books.

(Q) What shall be said an Admittance according to a Surrender.

1. THE Lord is but an Instrument to admit Cestuy que use; for (a) no more passes to the Lord than to serve the Limitation of the Use; and (b) Cestuy que use when he is admitted shall be in by him that made the Surrender, and not by the Lord. Co. Lit. 59. b.

(a) And where the Use limited is void, the Surrender is so also, and shall not extinguish the Copyhold for the Benefit of the Lord. Cro. El. 387. Moor 352. Pl. 474.

(b) 4 Co. 27. b. S. P. 28. b. 13 Co. 3. Cro. El. 361. —But there is a Diversity where a Copyholder for Life and where a Copyholder in Fee surrenders to the Use of another for Life. Cro. Car. 205.

2. If a Man surrenders to the Use of J. S. and J. D. for their Lives, the Remainder over to another, and J. S. and J. D. are admitted in Fee, (c) yet this shall not alter their Estate, but they shall be seised according to the Surrender. My Reports, 14 Ja. (d) Lane and Pannel adjudged.

Fol. 504.

(c) 4 Co. 28. b. 4 Co. 29. b.

(d) 1 Rol. C. adjudged.

Rep. 238, 317, 438. S.

(R) Surrender to an Use. Admittance.

1. (a) IF a Copyholder in Fee surrenders to the Use of another for Life, no more passes from him but what will serve the Estate limited in Use. Co. 9. Marg. Podger 107. per Coke.

(a) Cro. El. 442. S. P. per Walmsly. Et vid. 1 Leon. 101, 102.

2. If a Baron seised in the Right of his Feme for Life of a Copyhold, the Reversion being granted to B. the Remainder to C. for their Lives; and the Baron surrenders to the Use of B. for his Life, to whom the Lord grants it for his Life, and so he is admitted Tenant, and after dies: In this Case the Baron shall not have it again during the Life of his Feme, inasmuch as he hath dismissed himself of it; and C. cannot have it during the Life of the Feme without the Surrender of the Feme, and therefore the Lord shall have it as an Occupant during the Life of the Baron. D. 9 El. 264. S. 38.

3. If a Copyholder for Life surrenders into the Hands of the Lord, to the Use of J. S. as after follows, and the Lord grants it after to J. S. to have to him for his Life, and J. S. is admitted accordingly, and after dies: In this Case this shall not revert to the First Copyholder for Life, for he hath wholly dismissed himself by the Surrender, and therefore the Lord shall have it. Mich. 7 Car.

7 Car. in Camera Scaccarii, between (b) King and Loder, adjudged in a Writ of Error; and the Judgment in B. R. which was there given accordingly per Curiam, upon Argument at the Bar, was now affirmed per Curiam, præter Hutton, who inclined econtra, and Vernon, who doubted thereof.

(b) Cro. Car. 304. S. C. adjudged. 1 Jon. 229. S. C. adjudged. 2 Rol. Abr. 462.

Pl. 1. S. C. 1 Mod. 200. S. C. cited, and said, it must be understood of Copyholders in such Manors where the Custom warrants only Customary Estates for Life; and 'tis not applicable to Copyholds granted for Life, the Remainder in Fee.

(S) What Admittance shall be good, and by whom, & *econtra*, & (a) *al.*

What Time.

(a) The Heir not bound to pray Admittance during his Nonage. 1 Leon. 100. 3 Leon. 221. 4 Leon. 31.

1. Co. 4. Kite and Quinton 25. it is put, That if a Conditional Surrender be presented, &c.

2. D. 8 El. 251. 90. A Copyhold is surrendred to the Lord, ad Intentionem that he shall grant it to him for Life, with a Remainder over, (b) if the Party that surrenders dies before Execution thereof had, yet the Grant of the Remainder after by the Lord is good.

(b) This is very much misprinted in the Original, which vide.

3. Co. 4. Kite and Quinton 25. (c) A Copyholder surrenders to the Use of J. S. in Fee; J. S. dies before Admittance; and it is admitted, That his (d) Heir was well admitted after his Death, and the Lord Coke cited the Case, 29. b. That his Heir shall be admitted.

(c) 2 Sid. 38. 61. S. P. admitted.

(d) In this Case, if the Lands be of the Nature of Borough English, the youngest Son shall be admitted. 2 Sid. 61. Sty. 145, 146. 1 Mod. 102. 1 Vent. 261.

(T) What Thing may pass by Admittance.

1. D. 8 El. 251. 92. Barnwell covenants to assure all his Copyhold Lands to A. and after he surrenders out of Court, according to the Custom, divers Parcels by particular Name, the Surrender is enrolled accordingly, with a Conclusion, by the Name of all his Copyhold Lands there. Per Dyer & alios, no more shall pass by it than what was named in the Surrender.

2. Co. 4. Kite and Quinton 25. A Man is admitted upon a void Presentment, yet resolved, That he hath a Customary Estate in Possession, and is in by Title, and capable of a Release from him that hath the Right.

(V) How and at what Place it may be. Fol. 505:

By Attorney.

1. THE Lord may refuse to admit by Attorney Cestuy que use tho' a Surrender of a Copyhold is made, because he ought to do Fealty, which cannot be done by Attorney. Co 9. Com. 76.

2. If the Lord will admit him by Attorney, it is good. Co. 9. Combe 76.

3. The Lord of the Manor may make Admittances (a) out of Court, and out of the Manor also. Co Lit. 60. b.

4. (b) The Steward of a Manor may admit upon a Surrender (c) out of Court as well as in Court. Mich. 14 Ja. B. R. between (d) Froswell and Welsh, per Curiam. Contra, Co 4. 26, 27.

(a) Bridg. 52. S. P. per Curiam.

(b) 3 Bulf. 239. S. P. con. arguendo.

(c) The Admittance of a Copyholder is not a Judicial Act, for there need not be any Suitors there; and a Court for this Purpose may be held out of the Precinct of the Manor. 1 Leon. 289 per Curiam: But vid. 4 Co. 27. a. 1 Rol. Abr. 527. Pl. 3. (d) Cro. Jac. 403. S. C. Godb. 268. S. C. 3 Bulf. 214. S. C. Bridg. 49, 50 S. C. but in none of these Books does the same Point appear.

5. If *A.* surrenders to the Use of *B.* and his Heir, and *B.* die before Admittance; and his Heir being beyond Sea, a Neighbour is admitted in the Name of the Heir, and after the Heir returns, and consents thereto, this is a good Admittance; for a subsequent Assent is equivalent to an Authority precedent. *Hill.* 1657 between *Blunt* and *Clerk* 2 *Sid.* 37, 61. adjudged, the Heir having affirmed the Admittance by bringing an Action.

(X) What shall be said an Admittance.

1. (a) IF a Copyholder in Fee surrenders to the Use of another, and after, at another Court Cestuy a que use the Surrender was, surrenders the Land to the Use of another: This shall enure as an Admittance upon the first Surrender, and after as a Surrender; for by the Acceptance of the Surrender, he is admitted to be Tenant. Dubitatur, 38, 39 Eliz. B. R. between (b) Keping and Bunning, Pasch. 41 Eliz. B. R. in (c) Calchin's Case.

(a) Rawlinson and Greeves S. P. 3 Bulf. 237. &c. dubitatur.

(b) Cro. El. 504. S. C. & S. P. appears.

(c) Cro. El. 662. S. C. but S. P. does not appear.

2. (d) If a Copyholder surrenders to the Use of another, and after the Lord having Notice thereof, accepts the Rent from Cestuy que use out of Court; this is an Admittance in Law. Mich. 14 Ja. B. R. between (e) Froswell and Welch, per Curiam.

(d) 2 Sid. 61. S. P. per Twysden, arguend. admit. Styl. 146. S. P. per Holl Chief Justice.

(e) Cro. Jac. 403. S. C. but S. P. does not appear, nor can necessarily be inferred from it. Godb. 268, 269. S. C. and S. P. per Curiam, where he accepts the Rent as from his Tenant. Secus if he accepts it as a Duty generally, 3 Bulf. 214. &c. 219. S. C. and S. P. per Curiam, where the Rent is accepted by the Lord as of his Copyholder. Bridg. 49, 52 S. C. per Haughton; but the other Judges contra: But as the Case is reported in this Book, it does not appear the Lord had Notice of the Surrender when he accepted the Rent.

3. If a Copyholder in Fee surrenders to the Use of *B.* in Fee, and *B.* surrenders to the Use of *C.* for Life, who is admitted; the Admittance of *C.* shall not by Implication be taken to be an Admittance of *B* for

the Admittance ought to be of a Tenant certainly known by the Steward, and entered in a Roll by it ſelf. *Mich.* 6 *Jac.* between (f) *Wilſon* and *Weddel. Yelv.* 144, 145. adjudged.

(f) 1 Brownl. 143. S. C. and ſeems to be only a Tranſlation of Yelv.

4. If a Copyholder, according to the Cuſtom of the Manor, ſurrenders into the Hands of Two Cuſtomary Tenants, to the Uſe of *J. S.* and his Heirs, and this is preſented at the Court, and by the Steward entered in the Rolls of the Court in theſe Words, *viz. Ad hanc Curiam compertum eſt per Homagium*, That the Copyholder *ſurſum reddidit, &c ad Uſum* J. S *& Hæredum ſuorum*, and the Steward afterwards delivers a Copy hereof to *J. S.* yet this does not amount to an Admittance, for here is no (g) Act done by which it appears the Lord hath (h) conſented that *J. S.* ſhould be admitted, or that he ſhould have the Land according to the Surrender. *Hill.* 12 *Eliz.* (i) between *Robinſon* and *Greaves. Bridg.* 81, 82. adjudged.

(g) So if the Steward had aſſeſſed a Fine upon him. 3 Bulſ. 239. arguendo. — Secus if he had accepted the Fine of him. 3 Bulſ. 239. arguendo. (h) If the Lord ſaith, he agrees to the Surrender, this is an Admittance. 3 Bulſ. 219. per Haughton. (i) Poph. 127. 128. S. C. adjudged. 3 Bulſ. 237 adjornatur, and after ended by Mediation of Friends.

(k) Noy 29. S. P ſeems to be allowed.

5. (k) If a Woman that hath a Right to her Free-Bench comes into Court, and prays to be admitted, and is denied, (ſuppoſing nothing veſts in her before Admittance) the Law will ſupply the Admittance. *Hob.* 181. by *Warburton* and *Hutton.*

(Y) (a) In what Caſes the Admittance of one ſhall be of the other.

(a) If a Copyholder ſurrenders to the Uſe of another for Years, and the Leſſee dies, his Executors ſhall have the Reſidue of the Term without any Admittance. 1 Leon. 4. cited to have been adjudged.

1. (b) If a Copyholder ſurrenders to the Uſe of one (c) for Life, the Remainder to another, the Admittance of the Tenant for Life is an Admittance for him in Remainder alſo, becauſe they are but one Eſtate, and (d) but one Fine is due for both; and if there ought to be an Admittance of him in Remainder alſo, this would be void, becauſe nothing paſſed before Admittance, and ſo the particular Eſtate would be determined before the Remainder could commence. Co. 4. 22 & 23. (e) Fitche's Caſe adjudged. Mich. 38 & 39 Eliz. B. R. between (f) Keping and Bunning dubitatur.

(b) Cro. El. 662. S. P. by Two Judges. 4 Leon. 111. S. P. adjudged. 4 Co. 22. b. S. P. but ſaid it ſhall not bar the Lord of the Duty which he ought to have by the Cuſtom: But for this, vid. Cro. Jac 31. Moor 358. Pl. 488. 2 Brownl. 301. (c) So if the Surrender be to the Uſe of one for Years. 1 Mod. 102, 120. 1 Vent. 260, 261. (d) Unleſs where there is a Cuſtom to the contrary. 3 Lev. 308. 1 Mod. 103, 120. But vid. 1 Vent. 260 (e) Cro. El. 441. S. C. but S. P. does not appear. (f) Cro. El 504. S. C. by Two Judges, but adjornatur. Moor 465. Pl. 658. S. C. adjudged. Goulſ. 95. S. C. argued.

(Z) What Perſons ſhall pay Fines, and to whom

1. A Copyholder in Fee ſurrenders to the Uſe of another for Life, when the Leſſee dies, he ſhall not pay a Fine for a re-admittance to the Reverſion, for it continued always in him. Co. 9. Marg. Podger 107.

2. (a) If a Copyholder in Fee ſurrenders to the Uſe of one for Life, the Remainder to another for Life, the Remainder to another in Fee: By this but one Fine is due, for the Particular Eſtates and the Remainders are but one Eſtate. (b) Mich. 38, 39 El. B. R. by Popham.

(a) Moor 358. Pl. 488. S P. per Curiam, 3 Lev. 308. S P. adjudged, unleſs there be a Special Cuſtom to the contrary: But becauſe, after the Death of the particular Tenant, the Remainder-man had prayed to be, and was admitted, it was at firſt doubted, whether he had not waived the Benefit of the Admittance of the particular Tenant, and whether therefore he ſhould not pay a Fine. 1 Mod. 103, 120. (b) Cro. El. 504 S C. & S. P. per Popham. Moor 465. Pl. 658. S. C. but S. P. contra, per Curiam. Gouldſ. 95. ſeems to be S. C. but S. P. does not appear.

(A) At what Time due.

1. (a) A Fine for an Admittance of a Copyholder is not due before Admittance, (b) but after Admittance. Trin 4. Jac. B. R. between Fiſh and Rogers, agreed.

Fol. 506.

(a) 4 Co. 28. a. S. P. ſaid by Popham to have been adjudged. (b) Therefore if the Heir waives the Poſſeſſion, and refuſes to be admitted, he ſhall pay no Fine. 1 Sid. 58.

(B) Copyhold Dock.

1. If it be admitted that there may be an Eſtate Tail of a Copyhold, (a) by the Cuſtom cooperating with the Statute de Donis, yet this may by the Cuſtom of the Mano; be barred by a (b) Surrender; for as the Cuſtom creates it, ſo the Cuſtom may bar it. Mich. 15 Jac B R. between (c) Lee and Brown, reſolved per Curiam, upon Evidence at the Bar. Et Paſch. 16 Jac. B. R. in the ſame Caſe, reſolved again, upon Evidence at the Bar. Trin. (d) 29 Eliz. between (e) Hill and Upcheir, cited, Co. Lit. (f) 59. b.

(a) As the Cuſtom without the Statute cannot create an Eſtate Tail, ſo cannot the Statute without a Cuſtom: And it is not ſufficient Proof, that Lands have been uſually granted to Men, and the Heirs of their Bodies, for that may be a Fee-Simple Conditional, as it was at Common Law; but if a Remainder hath been limited over upon ſuch Eſtates, and enjoyed, or if the Iſſues in Tail have avoided the Alienation of their Anceſtors, or if they have recovered in Writs of Formedon in Diſcender, theſe are Proofs of an Eſtate Tail. Co Lit. 60. b. But for this, vide 1 Rol. Abr. 838. Pl. 8. 9. and the Notes there. (b) By committing a Forfeiture, and Seiſure of the Lord, &c. by Cuſtom. Styl. 450. But it was ſaid by Rolle, Chief Juſtice, that he conceived there could be no ſuch Cuſtom; for by the Seiſure of the Lord for a Forfeiture, the Copyhold Eſtate is deſtroyed: But 1 Sid. 314, this Cuſtom is allowed to be good. 2 Saund 422. adjudged; and that this Forfeiture by the Cuſtom was but in Nature of a Surrender or Common Recovery (c) Poph. 128. S. C. adjudged; but ſaid, to maintain this Cuſtom, it ought to be ſhewed, that after ſuch a Surrender a Formedon had been brought, and Judgment given that it doth not lie; yet it was agreed, That it was a ſtrong Proof of the Cuſtom, that they to whoſe Uſe ſuch Surrenders had been made, had enjoyed the Lands againſt the Iſſues in Tail (d) I ſuppoſe this is miſprinted, and ſhould be 27 Eliz. Hill and Horſe. Moor 172. Pl. 336. ſeems to be S. C. dubitatur. (e) 2 Brownl. 121, 122. S. C. cited by Coke. (f) This is miſprinted in the Original as here, and ſhould be 60. b.

2. (g) If

2 (g) If it be admitted there may be a Tenant in Tail of a Copyhold, yet this may be (h) barred by a common Recovery; for a Warranty may be annexed upon this (i) by a Surrender to an Use, or by a Confirmation or Release with Warranty; and it may be intended, that he shall have another Copyhold in Value, and also in Favour of Common Recoveries. Dubitatur, 37 Eliz. B. R. between (k) Dell and Higdon. Mich. 42, 44. B. R. Morris's Case, per Curiam, without any Custom to warrant it.

(g) Cro. El. 380. S. P. dubitatur. Moor 753. Pl. 1037. S P. agreed. Et vid. Cro. El. 907. Godb. 358.

(h) A Recovery against Tenant in Tail without any Voucher makes a Discontinuance. Moor 358. Pl. 488. 4 Co. 23. a. Cro. El 380, 391. But for this, vid. Title Discontinuance, What Act or Thing shall be a Discontinuance. — Secus of a Surrender by Tenant in Tail. Moor 358. Pl. 488. Cro Eliz. 148, 717. con. 907. dubitatur. Moor 753. Pl. 1037. adjudged. But for this, vid. 1 Rol. Abr. 632. (i) Moor 352. (k) Cro. El. 372. S. C. dubitatur; it being found, quod numquam antea vidcbatur talis Recuperatio in Curia Manerii pred'. Moor 358. Pl 488 S C adjudged. 4 Co. 23. a. S C. but S. P. does not appear. — But such a Recovery without a Custom to warrant it will not dock a Remainder. Raym. 164. by Two Judges. 1 Lev. 136.

(C) Copyhold. Forfeiture.

(a) What (b) will be a Forfeiture.

Nonfesance.

1. (c) If a Jury or Homage of the Manor, after a Oath made to present the Articles of the Court, refuse to make a Presentment according to their Oath, if they are Copyholders, this is a Forfeiture of their Estates. D. 4 Eliz. 211. 31.

(a) Hetl. 5. &c. Lit. Rep. 264. &c. Hut. 102, &c. Winch. 8. 92. Styl. 387. Refusal to be admitted. 3 Leon. 108. forging a Customary.

(b) 'Tis not necessary it should be found by the Homage. Godb. 47. Palm. 417. Lat. 227. Et vid. Palm 413. 2 Vent 38. — But vid. 4 Leon. 241. the Forfeiture is a Determination of the Will, and the Estate is immediately in the Lord, as in his Reversion, and he may grant it to another before Seisure. 1 Lev 26. adjudged. 1 Jon. 249. (c) Moor 350. S. P. per Gawdy. 3 Leon. 109. S. P. cited to have been adjudged.

2. If a Copyholder be to pay a certain Rent yearly by his Copy to his Lord, and the Lord comes upon the Land, and demands his Rent at the Day, and the Copyholder being present (d) refuses to pay it, this is a Forfeiture. Pasch. 2 Jac. B.

(d) Nonpayment at the Day is no Forfeiture, without a Refusal to pay. Moor 622. Pl. 851. Lit. Rep. 268.

3. If a Copyholder be absent when the Lord demands the Rent at the Day, and no Body is there to pay it, which is a Refusal in Law, yet this is not any Forfeiture, for this does not amount to a voluntary Refusal. Dubitatur, P. 38 Eliz. B. R. between (c) Crisp and Frier. P. 2 Jac. B. Hobert's Reports 183. And (f) Denny and Leman, there ought to be a Demand from the Person of the Copyholder to make a Forfeiture.

(e) Cro. Eliz. 505. S, C. adjornatur. Moor 350. Pl. 468. S. C. & S. P. con. by Two Judges, the Copyholder having for Three Years before neglected to pay his Rent, Noy 58. S. C. & S. P. con. per Two Judges against One. Et vid. Lat. 14. 122. (f) Hob. Fol. 135. S. C.

4 (g) If a Copyholder be present at the Time of the Demand of the Rent, and saith that he hath not his Rent (h) ready, this is no Forfeiture, for the Lord may distrein. P. 2 Ja. B.

(g) Lat. 122. S. P. cited. (h) But if he appoints him to pay it at a Day after at a certain Place within the Manor, and he neglects, this is a Forfeiture. Lat. 122. cited. N. Dyer 211. b. Margine.

5. If

5. If the Copyholder does not pay the Services due to the Lord, this is a Forfeiture. (k) 42 E. 3 25. b.

(i) For the Non-performance of Services, the Lord may either distrain or seize the Land. Noy 135. (k) Br. Tenant per Copy, S C. 4 Co. 21. b. S. C. cited.

6 If a Copyholder makes a (l) voluntary and obstinate Abstraction of his Suit from the Court of the Lord, upon sufficient Warning, this is a Forfeiture. My Reports, 14 Ja. (m) Buttevant and Pickstaff adjudged, M. 13 Ja B. R. between (n) Southcot and Adams, per Curiam.

(l) Continual Default at a Court amounts to a wilful Refusal. 1 Leon. 104. per Egerton, arguendo. (m) 1 Rol. Rep. 429. S. C. adjudged 3 Bulf. 268. S. C. adjudged. (n) 1 Rol. Rep. 256. S. C. per Curiam, Belfield and Adams. 3 Bulf. 80. seems to be S. C.

7. (o) If the Lord gives a particular Summons to every particular Copyholder, that he will hold a Court at a certain Place, at a certain Time; (p) if any of them do not come at the Day, this is a Forfeiture. 23 El. Sir Christopher Hatton's Case adjudged; cited, P. 38 Eliz. B. R. in (q) Crisp and Frie's Case.

Fol. 507.

(o) 3 Bulf. 80. S. P. admitted per Curiam. 1 Bulf. 268. S. P admitted per Curiam. (p) If a Copyholder is present in Court, and being asked, Whether he appeared or not? answers, If it be a Legal Court, I do appear; but if it be not a legal Court, I do not appear. Styl. 241. this is no Forfeiture, if there be a real Controversy whether the Court be well held or not. (q) Cro. El. 505. S. C. & S. C. cited. Moor 350. Pl. 468. S. C & S. C. cited. Noy 58. S. C. cited. Styl. 241. S. C. cited.

8. (r) But otherways 'tis upon a general Summons, for there perhaps the Tenant never had Notice thereof. 22 El. (s) Sir Christopher Hatton's Case, held M. 5 Jac. B. between Farrer and Woodhouse, per Curiam, upon a general Summons in the Church, according to Custom. Coke's Entries 288. between (t) Taverner and Crumwell, adjudged, where a general Summons in the Church, without alledging a Custom to summon a Court in the Church.

(r) 1 Leon. 104. S P. con. per Curiam. Godb. 142. S. P. and cited to have been so adjudged. Et vid. Styl. 241:

(s) Cro. El. 505, 506. S. C. cited. (t) Cro. El. 353. S. C. adjudged.

9. If the Lord assesses a reasonable Fine, and the Day after requires the Copyholder to pay it, and he refuses, yet this is no Forfeiture, for he is not bound always to carry so much Money in his Pocket; but because it is in Point of Forfeiture, the Lord ought to have set a certain Time and Place when the same should be paid. *Mich.* 6 *Jac. Willow*'s Case, 13 *Co.* 1. adjudged.

10. If upon Proclamation, the Heir does not come in to be admitted, the Lord, without any particular Custom, may seize *quousque* the Heir come in to be admitted. *Pasch.* 14 *Car.* 2. the Earl of *Salisbury*'s Case 1 *Levin.* 63. *per Curiam*, upon a Trial at Bar.

11. But without a Custom he cannot seize the Copyhold as forfeited. *Pasch.* 14 *Car.* 2. 1 *Levin.* 63. *per Curiam:* And whether in the Proclamation the Lands ought to be particularly named, *dubitatur*; and was intended to be found specially; but the Parties agreed in Court.

(D) What Act or Thing ſhall be a Forfeiture.

1. IF a Copyholder comes into Court, and ſays, he renounces his Copy; this is not any Forfeiture. M 37 El. B. ſo held.

2 If a Copyholder refuſes to pay his Fine for Admittance after it is due; this is a Forfeiture. Tr. 4 Jac. B. R. between Fiſhe and Rogers, agreed. Hobart's Reports 183. between (a) Denny and Leman; If there be a Demand thereof from the Perſon of the Tenant, otherways not.

(a) Hob Fol. 135. S. C.

(b) 4 Co. 27. S. P. adjudged con.

3. (b) If the Lord aſſeſſes an unreaſonable Fine upon his Tenant, and the Copyholder refuſes to pay it; this is a Forfeiture. P. 36 Eliz. B. between Taverner and the Lord Crumwell, adjudged; cited, Paſch. 38 Eliz. B. R. in Criſp's Caſe; (c) (it ſeems this is not Law:) Et vide this Caſe, Coke's Entries 281. where no ſuch Matter appears to have been in the Caſe. Contra, 1 Jac. B. Rot. 845. between (d) Stallon and Brady, adjudged (as it ſeems) cited. Co. Lit. 60.

(c) In the Original 'tis ſemble.

(d) 13 Co. 1. S. C.

4. But if after the Fine impoſed, the Tenant intreats the Lord to mitigate the Fine, and after he refuſes it; the Refuſal of the Tenant after to pay this unreaſonable Fine is a Forfeiture. Paſch. 36. El. B. in Taverner and the Lord Crumwell's Caſe, agreed; (e) (it ſeems this is not Law) Et vide this Caſe, Coke's Entries 288. where no ſuch Queſtion appears in the Caſe.

(e) In the Original 'tis ſemble.

5. If the Lord aſſeſſes a Fine, where the Fine is not certain, and the Tenant refuſes to pay it; though this be after adjudged to be a reaſonable Fine, yet (f) this is not any Forfeiture, becauſe it was dubious to the Tenant, and Matter of Controverſy between Lord and Tenant, whether it was reaſonable.

(f) So if there be a real Doubt, Whether a Fine certain or uncertain ought to be paid. Raym. 42. 2 Mod. 229, 230. —Or whether any Fine ought to be paid. 3 Lev. 308. Et vid. Cro. Jac. 617. Lat. 14, 15, 122. Styl. 241. (g) If a Fine be reaſonable, a wilful Refuſal to pay it is a Forfeiture. Cro. El. 351. per Curiam. Styl. 387.

(h) Hut. 103. S. P. cited to have been adjudged con. Lit. Rep. 266. S. P. cited to have been adjudged con. 4 Leon. 241. S. P. cited to have been adjudged. Et vid. Lit. Rep. 267, 268. (i) But if he pulls it down again it will be a Forfeiture. 1 Bulſ. 50, 51. adjudged. (k) Setus of a Mill. Lat. 123. per Dod & Cave. N. Dyer 211. b. Margine. (l) In the Original 'tis Meliozation. (m) For this, vid. 2 Rol. Abr. 815. Pl. 22.

6. (h) If a Copyholder (i) erects a (k) a new Houſe upon a Copyhold without Licence; this is no Forfeiture, for this is for the (l) Improvement of the Tenement, though he alters the Nature of the Land by it; and (m) this is not Waſte in the Leſſee for Years. Paſch. 38 Eliz. B. R. between Cecill and Cave.

(n) Whether a Leaſe by Eſtoppel only ſhall be a Forfeiture. Moor 184. Pl. 329. dubitatur. (o) Hetl. 122. S. P. per Hutton. —If a Copyholder makes a Leaſe contrary to the Cuſtom, this is a Forfeiture before the Leſſee enters. Moor 185. per Anderſon. (p) Cro. Eliz. 498. S. C. adjudged. Moor 392. Pl. 508. S. C. adjudged.

7. If a Copyholder (n) leaſes his Copyhold for 4 Years by Parol, (o) to commence at a Day to come; this is a Forfeiture, though it be not in Poſſeſſion, nor by Indenture, nor had been a Diſſeiſin if ſuch Eſtate had been granted by a Tenant at Will, for he hath taken upon himſelf to make a greater Eſtate than his Copyhold will ſupport. Mich. 38, 39 Eliz. B. R. between (p) Eaſt and Harding, per Curiam, & Mich. 40, 41 Eliz. adjudged.

8. If a Copyholder leaſes his Copyhold to another, to have and to hold to him for one Year, and ſo from Year to Year during the Life of the Leſſor, reſerving to the Leſſor in every Year the 25th Day of March; this is a Forfeiture, for (q) this is a Leaſe for Two Years at leaſt, reſerving one Day; ſo that a greater Eſtate than for one Year paſſes in Intereſt, and the reſerving a Day in every Year is but a Shift to avoid the Forfeiture. Mich. 11 Jac. B. R. between (r) Luttrel and Weſtover. Fol. 508.

(q) For this, vid. 1 Rol. Abr. 850. Pl. 1.

(r) Cro. Jac. 308. S. C. adjudged per totam Curiam as a clear Caſe without Argument. 1 Bulſ 215. S. C. adjudged.

9. (s) If a Copyholder that may leaſe for Three Years by the Cuſtom, (t) leaſes for Three Years, and ſo from Three Years to Three Years, till Nine Years; this is a Forfeiture, for this is a Leaſe for Six Years at the leaſt. P. 1 Jac. Wilcock's Caſe adjudged.

(s) Cro. Jac. 301 S P. per Curiam. 1 Bulſ. 190. S P. per Poph.

(t) Otherways if he had leaſed for Three Years, and covenanted that the Leſſee ſhould enjoy from Three Years to, &c. 1 Bulſ. 190. per Poph. for that he hath no lawful Eſtate for more than Three Years; to which the Court agreed. Cro. Jac. 301. dubitatur: But vid. 2 Mod. 80, 81. And for this, vid. under Title Eſtate, What Words will make a Leaſe.

10. If a Copyholder for Life agrees to make Three ſeveral Leaſes by Indenture, one to commence after the other, there being Two Days between the End of the Firſt and the Commencement of the Second, and ſo between the Second and the Third; and after he makes them accordingly, and ſeals them at one Time; this is a Forfeiture; for this is an apparent Fraud, and a greater Eſtate than for One Year paſſes preſently. M. 7 Car. B. R. between (u) Mathews and Wheaton, adjudged upon a Special Verdict, I my ſelf being de Conſilio Querentis. Intratur, Hill. 4 Car. Rot. 496.

(u) Cro. Car. 834. S. C. adjudged.

11. If a Copyholder bargains and ſells the Copyhold to another in Fee, and after the Deed is not enrolled; yet this is a Forfeiture, for it would have determined a Leaſe at Will, being made by a Leſſee at Will. Contra, M. 38, 39 Eliz. B. R.

12. So if a Copyholder makes a Deed of Feoffment, with a Letter of Attorney to make Livery; though Livery be not made accordingly, yet this is a Forfeiture.

13. (w) But otherways it (x) ſeems it is if it be without a Letter of Attorney; for it reſts in him at all Times to perfect it, and ſo his Will is not perfected till it is done. Mich. 38, 59 El. B. R. Co. Lit. 59. as it ſeems to be intended.

(w) 3 Leon. 109. S. P. per Clench.

(x) In the Original 'tis ſemble.

14. If a Copyholder makes a Leaſe for Years, by Licence of the Lord, the Leſſee may aſſign it over, or make an Under-Leaſe, without any new Licence, for the Intereſt of the Lord (y) was diſcharged by the firſt Licence. P. 12. Ja. B. betwæn Johnſon and Smart, per Curiam.

(y) The Licence ſhall be taken as a Confirmation by the Lord; and therefore the Leaſe ſhall be good againſt him if the Copyholder dies without Heirs during the Term. Poph. 188. per Welb. con. Hutton. Hut. 102. — So if he commits a Forfeiture. Hob. 177.

15. If a Copyholder (z) commits Waſte againſt the Cuſtom of the Manor, this is a Forfeiture. Co. 4. 27. Clifton's Caſe, admitted.

(z) Voluntary Waſte is a Forfeiture by the Common Law; but negligent Waſte is not ſo, without a Cuſtom. Noy 51. per Anderſon & Walmſly. —But Ow. 18. it is adjudged, That permiſſive Waſte without any Special Cuſtom is a Forfeiture. —Whether a Copyholder in Fee may dig for Mines. 1 Sid. 152. Quere. Et vid. Winch. 8.

16. If

16. If the Copyholder ſuffers the Houſe to decay, and be wasted, this is a Forfeiture. Tr. 39 El. B. R. between (a) Raſtell and Turnor, admitted. Co. Lit. 63.

(a) Cro El. 598. S C. & S. P. ſeems to be admitted.

17. (b) If a Stranger commits Waſte upon the Copyhold, without the Aſſent of the Copyholder himſelf, this is not any Forfeiture of the Eſtate of the Copyholder. Co 4. 27. Cliſton's Caſe agrees.

(b) Moor 49 Pl. 149. S. P. per Curiam con. Dal. 49. S. P. per Curiam con.

18. If a Copyholder cuts down great Trees, (ſcilicet Elms) to repair his Copyhold Houſe, which is in Decay, and employs them accordingly, this is not any Forfeiture, (c) because the Law allows it to him, without any Cuſtom to warrant it. M. 38, 39 Eliz. B. R. between (d) Eaſt and Harding, per Curiam, agreed and adjudged.

(c) Cro. Eliz. 5. S. P. per Curiam con. But in the Caſe of Hepdon and Smith, 13 Cro. 68. it was reſolved, That of common Right, a Copyholder may take Hedge-Boot, Houſe-Boot, and Plough-Boot, upon his Copyhold, though this Power may be reſtrained by Cuſtom; as that the Copyholder ſhall not take it unleſs by the Aſſignment of the Lord or his Bailiff. Godb. 172. reſolved per Curiam. 2 Brownl. 329, 330. reſolved per totam Curiam, præter Walmſly. (d) Cro. El. 292. S. C. & S. P. per Popl. 499. S. C. but S. P. does not appear; for it was found, that by the Cuſtom the Copyholder might cut down Trees for Repairs. Moor 392. Pl. 508. S. C. adjudged, though employed Five Years after cut down, and after an Entry for a Forfeiture.

19. So if a Copyholder cuts down Two great Trees (ſcilicet Elms) to repair his Copyhold Houſe, which is in Decay, and employs one of them accordingly, and leaves the other ready to be employed; though he had cut down more than would ſerve his Turn for the preſent, yet this is not any Forfeiture, for a Man cannot preciſely know what will be ſufficient. M. (e) 38, 39 El. B. R. between Eaſt and Harding, per Curiam. Et 40 & 41 El. adjudged.

(e) Cro. El. 499. S. C. & S. P. per Curiam, but adjornatur.

20. If a Copyholder cuts Trees to repair his Houſe, and after does not employ them accordingly, but ſuffers them after the Cutting to be putrified and rotten; this is a Forfeiture. (f) M. 38 & 39 El. B. R. by Clinch.

(f) Moor 392. Pl 508. S. C. & S. P. per Curiam.

21. If *B.* is ſeiſed in Fee of 16 Acres, by Copy of Court-Roll, and there is a Cuſtom within the Manor, That the Lord hath had a Fold-Courſe within the Manor for 500 Ewes in the Field in which the 15 Acres lie, from *Michaelmas* to *Lady-Day*, and that no Copyholder might encloſe without the Licence of the Lord, and that if any encloſed without Licence, then a reaſonable Fine ſhould be aſſeſſed by the Lord, or his Steward, if the Lord would accept thereof, and if not, that then the Copyholder ſo encloſing ſhould be puniſhed at every Court till he opened the Incloſure; and *B.* encloſes the 15 Acres with an Hedge and Fence of Quickſet 3 Foot deep and 6 Foot broad, and leaves Four Spaces of 9 Foot broad in the ſaid 15 Acres: This is no Forfeiture, becauſe a Prejudice only to the Lord's Fold-Courſe; and that which makes a Forfeiture ought to be ſo to the Copyhold Tenement; and this is no Incloſure, becauſe all is not incloſed; and Forfeitures which are odious in Law ſhall be taken ſtrictly. *Paſch.* 5 *Car.* between (g) *Paſton* and *Utber. Hut.* 102. adjudged.

(g) Hetl. 5. S. C. adjornatur. Lit. Rep. 267. S. C. adjudged, because by the Cuſtom the Copyholder might be amerced till, &c. ſo that the Lord had another Remedy; but it was reſolved, That notwithſtanding the Gaps, this was an Incloſure againſt the Cuſtom. Lit. Rep. 267.

22. A Copyholder of Inheritance was (h) convicted of Felony, &c. and whether this was a Forfeiture without (i) a Special Cuſtom, *Hill.* 20 & 21 *Car.* 2. between *Fory* and *Pawly*, 1 *Lev.* 263. *dubitatur*; and the Court inclined ſtrongly that it was not: But upon the Importunity of Counſel, a Day was appointed to argue it.

(h) The Lord cannot ſeize before Conviction or Attainder. 2 Vent. 38, 39. the Court inclined accordingly. —And a Cuſtom to ſeize upon the Preſentment of the Homage, that the Copyholder has committed Felony, though he is after acquitted of it at the Aſſizes, is void. Godb. 267. adjudged. But Gittins and Cowper, 2 Brownl. 217 1 Bulſ. 13. dubitatur, and ended by Compoſition. (i) For this, vid. 1 Leon. 1. Godb. 267. 1 Bulſ. 13. 2 Brownl. 217. 1 Levin. 34.

(E) In what Caſes a Forfeiture of Part ſhall be a Forfeiture of the Whole.

Fol. 509.

1. (a) **If a Copyholder makes a Feoffment of an Acre of Land, Parcel of his Copyhold; all the Copyhold is not forfeited by this, but only that Acre.** P. 41 El. B. R. between Fuller and Terry.

(a) 4 Co. 27. a. S. P. per Curiam con.

2. **If a Copyholder cuts down a Tree which grows upon an Acre of Land, Parcel of the Copyhold; this is a Forfeiture of all the Copyhold, becauſe the Trees are to be employed in Building and Reparation of the Houſes and Copyhold; and therefore by the doing of Waſte all the Copyhold is impaired.** P. 41 El. B. R. between Fuller and Terry.

3. But if a Copyholder holds Three ſeveral Acres by Three ſeveral Copies, and commits Waſte in one Acre, he ſhall forfeit that Acre only; for though they are all in one Hand, yet every Acre is ſeverally held, and to every Acre there is a ſeveral Condition in Law tacitly annexed. *Trin.* 26 *Eliz.* between *Taverner* and *Cromwell.* 4 *Co.* 27. a. *per Curiam.*

4. So if ſuch Copyholder that holds Three Acres by Three ſeveral Copies, ſurrenders to the Uſe of *A.* and his Heirs, and the Lord admits *A. tenend' per antiqua Servitia inde prius debita, & de Jure conſueta,* and after *A.* commits Waſte in one Acre; he ſhall forfeit that Acre only, for the *Tenendum* (b) continues the ſeveral Tenures, though the Parcels are now all put in one Copy. *Trin.* 26 *Eliz.* between *Taverner* and *Cromwell.* 4 *Co.* 28. b. adjudged.

(b) 4 Co. 28. a. S. P. reſolved.

5. So if ſeveral Copyholds eſcheat, and the Lord grants them all to one Man, *tenend' per antiqua Servitia, &c.* (c) *Trin.* 26 *Eliz.* 4 *Co.* 28. b. *per Curiam.*

(c) 3 Leon. 109. S. C. & S. P. per Curiam. Cro. El. 353. S. C. & S. P. adjudged, there being to each Parcel a ſeveral Habendum and Reddendum.

(F) In what Caſes the Forfeiture of one ſhall be of another.

1. **If there be Tenant for Life, the Remainder in Fee, of a Copyhold, and the Tenant for Life commits a Forfeiture; (a) this ſhall not bind the Remainder.**

(a) Without a Special Cuſtom. 9 Co. 107. a.

(b) Moor 49. Pl. 149. S. P. per Curiam. con. Dal. 49 S P. per Curiam con. (c) 1 Rol. Abr. 568. Pl. 5.

2. (b) As if there be Tenant for Life, the Remainder in Fee, of a Copyhold, and the Tenant for Life ſuffers the Houſe to decay and be waſted, by which the Eſtate of the Tenant for Life is forfeited, and the Lord enters for the Forfeiture, (c) yet this ſhall not bind him in Remainder, but only the Tenant for Life. Tr. 39 El. B. R between (d) Raſtel and Turner, adjudged upon a Special Verdict.

(d) Cro. El. 598. S. C. adjudged. Cro. El. 880. S. C. cited. Noy 42. S. C. cited.

(e) Diverſity taken where Tenant for Life, and where in Fee. 2 Rol. Rep. 372. Palm. 384. (f) If the Lord entered in the Life of the Baron. Palm. 385. 2 Rol. Rep. 344, 373. (g) 4 Co. 27. a.

3. If a Feme Tenant (e) for Life of a Copyhold takes Husband, and the Husband commits a Forfeiture of the Copyhold, and dies; (f) This Forfeiture ſhall bind the Feme. 4 Co. between (g) Clifton and Molineux reſolved.

4. If a Copyholder leaſes for Years, by Licence of the Lord, and after the Leſſee makes a Feoffment; this ſhall forfeit only his Eſtate, and not the Eſtate of the Copyholder. P. 1 Ja. B. between White and Hunt. (h) Hobart's Reports 239.

(h) I ſuppoſe the Caſe intended is Hob. Fol. 177. where it is ſaid, That if the Copyholder forfeit his Eſtate, perhaps the Leaſe may ſtand good againſt the Lord. Et vid. Palm. 384. 2 Rol. Rep. 372.

(i) Cro. El. 149 S. P. dubitatur. (k) Cro. Car. 7. S. C. adjudged, and a Writ of Error brought, and Judgment reverſed for another Reaſon.

5. (i) If a Feme Copyholder takes Baron, and the Baron makes a Leaſe for Years: Though the Lord enters for a Forfeiture, yet this is not any Forfeiture to the Feme after the Death of the Baron; but ſhe may well enter, becauſe this Act was a Tort to the Feme as well as to the Lord; and where there is a Tort to the Feme, 'tis not reaſonable that it ſhould be a Forfeiture of her Eſtate. Mich. 21 Jac. B. R. between (k) Saben and adjudged upon a Special Verdict.

Palm. 383, 384. S. C. adjudged. 2 Rol. Rep. 344, 361, 372, 373. S. C. adjudged. Godb. 344, 345. S. C. adjourned.

(l) Diverſity taken where for Life, and where in Fee. 2 Rol. Rep. 272. Palm. 384.

6. But if a Baron (l) ſeiſed of a Copyhold in the Right of his Feme, does Waſte, this Forfeiture ſhall bind the Feme after the Death of the Baron; becauſe the Act done is not any Tort to the Feme, but lawful as to her, and only a Tort to the Lord. Co. 4. 27.

(G) Who ſhall take Advantage of a Forfeiture.

1. A Copyholder for Life, where the Remainder is over for Life, commits a Forfeiture; he in the Remainder ſhall not enter, but the Lord, becauſe the Remainder is to commence in Poſſeſſion after the Death of the Leſſee by the Cuſtom.

(a) 1 Brownl. 132. S. P. per Curiam. (b) Cro. El. 499. S. C. & S. P. agreed per Curiam.

2. (a) Leſſee for Years of a Manor ſhall take Advantage of a Forfeiture committed by a Copyholder of the Manor, for he is Dominus pro Tempore. M. 38, 39 El. B. R. in (b) Eaſt and Harding's Caſe, agreed per Curiam. Tr. 10 Ja. B. between Rawles and Maſon, per Curiam.

3. If there be a Lord of a Manor, in which there are Copyholders Tenants of the Manor, and the Lord grants to a Stranger the Freehold of a Copyhold in Fee: Tho' by this the Tenement

is divided from the * Manor, and not demiſable by Copy again, yet the Grantee of the Freehold ſhall take Advantage of a (c) Forfeiture committed (d) after by the Copyholder; for he ought to pay his Rent to the Grantee.

* Fol. 519.

(c) Such Forfeitures as accrue by Reaſon of the Court are diſcharged, but not Forfeitures at Common Law, as Waſte, &c. Moor 393. Ow. 63. 4 Co. 25. b. 25. a. (d) But not of a Forfeiture committed before the Grant, for the Grant of the Freehold made by the Lord before Entry, implies an Aſſent, That the Copyholder, &c. ſhall continue his Eſtate, and ſo is in Nature of a Confirmation. Ow. 63. Et vid. Lat. 227. Palm. 416. —The Copyholder commits Treaſon, and the Lord aliens his Manor, and after the Copyholder is attainted by Act of Parliament, whether the Alience ſhall take Advantage of the Forfeiture. 2 Vent. 38, 39. dubitatur.

4. So in this Caſe, if the Grantee of the Freehold makes a Leaſe for Years of the Freehold, this Leſſee for Years ſhall take Advantage of a Forfeiture committed (e) after by the Copyholder, becauſe he is Dominus pro Tempore. Mich. 38, 39 Eliz. B. R. between (f) Eaſt and Harding, adjudged by the Opinion of all the Judges.

(e) After the Leaſe made, and before the Commencement of it. Moor 393.

(f) Cro. El. 499. S. C. adjornatur. Moor 393. Pl. 508. S. C. adjudged. Ow. 63. S. C. & S. P. ſeems to be intended per Popham, but darkly reported.

5. If a Copyholder for Life makes a Contract at one Time to make Three ſeveral Leaſes by Indenture, one to commence after the other, there being Two Days between each, and after makes the Three ſeveral Leaſes accordingly, and ſeals them at one Time, and the Leſſee enters, and after the Copyholder ſurrenders to the Lord to the Uſe of the Lord, who hath not any Conuſance of the making of theſe Leaſes; and after the Lord enters, and makes a Leaſe for Years to J. S. and the firſt Leſſee for Years brings Treſpaſs againſt the Second Leſſee; and adjudged it does not lie, becauſe it was a Forfeiture, and a void Leaſe againſt the Lord; ſo that by his Entry he was in of his ancient Right. Mich. 7 Car. B. R. between (g) Mathews and Wheaton, adjudged upon a Special Verdict, I my ſelf being de Conſilio Querentis. Intratur, Hill. 5 Car. B. R. Rot. 496.

(g) Cro. Car. 234. S. C. adjudged, for the Lord's Acceptance of the Surrender, not knowing of the Forfeiture, could be no Diſpenſation therewith. 1 Jon. 240. S. C. adjudged; and that when the Surrender was made to the Lord, the Leaſe was void as to him, and the Intereſt diſcharged without any Entry or Seiſure for the Forfeiture.

6. (h) If a Copyholder commits a Forfeiture, and the Lord of the Manor dies before Entry or Seiſure for the Forfeiture, he in Reverſion or Remainder ſhall not take Advantage of the Forfeiture committed before his Time. *Paſch.* 13 *Jac.* in the Lady (i) *Mountague's* Caſe, *Cro. Jac.* 301. reſolved *per Curiam.*

(h) 1 Mod. 200. S. P. reſolved.

(i) 1 Bulſ. 190. S. C. & S. P. ſeems to be admitted per Curiam.

7. If a Copyholder commits Waſte, and the Lord dies, whether the Heir of the Lord may enter for this Forfeiture? *Trin.* 22 *Jac.* between (k) *Cornwallis* and *Hammond. Palm.* 416. *dubitatur & adjornatur.*

(k) Lat. 226. S. C. adjornatur. Et vid. 2 Sid. 8, 9.

8. If Tenant for Life of a Copyhold ſuffers a Common Recovery, this is no Forfeiture of his Eſtate, for the Freehold is not concerned; and it being in a Court-Baron, there is no Eſtoppel, and the Lord can take no Advantage of it, becauſe he is Party to it. *Paſch.* 27 *Car.* 2. between *Bird* and *Kirke.* 1 *Mod.* 199, 200. reſolved.

9. If a Copyhold is granted to *A.* for Life, and after, according to the Cuſtom, the Reverſion is granted to *B.* for Life, *immediate poſt Mortem forisfacturam ſive aliam Determinationem Stat. pred. A.* and *A.* is attainted of

(l) By the Outlawry of a Tenant at Will, his Eſtate is determined: Secus of a Copyholder. Lit. Rep. 234.

of Felony; by this, his Eſtate is determined; (l) for being in the Eye of the Law but an Eſtate at Will, his Will is determined by the Attainder, for by the Attainder he cannot hold an Eſtate; and *B.* may take Advantage thereof, without any Entry made by the Lord. *Mich.* 34 *Car.* 2. between *Strode* and *Deniſon.* 1 *Levin.* 94. adjudged upon a Writ of Error, and the Firſt Judgment affirmed accordingly.

cited to have been adjudged. Hetl. 127. cited to have been adjudged. Et vid. 1 Leon. 99.

(H) What (a) Thing will be an Extinguiſhment of a Copyhold.

(a) If a Copyhold is in the Hand of a Subject, who after becomes King, the Copyhold is extinct, for it is below the Majeſty of a King to perform ſuch ſervile Services; yet after his Deceaſe, the next that hath Right ſhall be admitted, and the Tenure revived. 2 Sid. 82.

1. (b) **The Severance of the Freehold and Inheritance of the Land, held by Copy of the Manor, does not (c) extinguiſh or determine the Copyholder's Eſtate, for the Cuſtom hath eſtabliſhed his Eſtate; ſo that the Lord cannot ouſt him ſo long as he pays and performs his Cuſtoms and Services.** Co. 2 Lane 17. reſolved.

(b) Murrel and Smith S. P. 4 Co. 24. adjudged. Cro. El. 252. S. C. adjudged. Et vid. 2 Leon. 208, 209. 4 Co. 26. b. Cro. El. 103. (c) But ſuch Copyholder cannot after alien otherwiſe than by Decree in Chancery, by which the Intereſt in the Land is not bound, but the Perſon only. 4 Co. 25. a. Cro. El. 252, 443.

(d) Godb. 11. S. P. per Curiam, 101. S. P. ſaid to have been reſolved. Moor 184. Pl. 330. S. P. per Curiam, and cited to have been adjudged. But vid. 2 Leon. 72. Sav. 70. Lat. 213 Cro. Jac. 84. 2 Bulſ. 81. 1 Brownl. 32. 4 Co. 31. a. b. (b) But if he takes a Leaſe for Years of the Manor, that is only a Suſpenſion of his Copyhold during the Term, per Cro. Jac. 84. Sav. 70, 71. but per Cro El. 7. Moor 185. Pl. 330. 'tis extinguiſhed. — But the Leſſee may regrant the Copyhold again to whom he pleaſes. 4 Co. 31. b.

2. (d) **If a Copyholder in Fee accepts a Leaſe for Years of the (e) ſame Land from the Lord; this determines his Copyhold Eſtate.** Co. 2. Lane 16. b. 17. reſolved.

(f) 1 Leon. 170. S. C. adjudged. 1 And. 191. S. C. adjudged, Gouldſ. 34. S. C. adjudged.

3. **So if there be a Copyholder in Fee of Lands, and the Lord leaſes the Land to another for Years, who aſſigns over the Term to the Copyholder; this extinguiſhes his Copyhold Eſtate, for this is all one as if he had accepted this Leaſe from the Lord himſelf.** Co. 2. (f) Lane 17. reſolved.

(g) Diverſity where the Inheritance of many, and where of one ſingle Copyhold only is granted. 4 Co. 27. a.

4. If a Lord of a Manor having (g) many ancient Copyholds in (h) a Town, grants the (i) Inheritance of theſe Copyholds to another, the Grantee may keep a Court for the Cuſtomary Tenants, and accept Surrenders, and make Admittances and Grants; for though it is not a Manor in Law, for Want of Freeholders, yet as to the Copyhold Tenants, the Grantee hath ſuch a Manor, that he may keep Courts, *&c. Trin.* 30 *El.* between (k) *Melwich* and *Luter.* 4 *Co.* 26. b. adjudged.

(h) By the Report of this Caſe, Cro. El. 102, 103. it appears he had Copyholds in other Towns alſo, Parcel of his Manor. (i) So if he leaſes all the Copyholds for Years. 4 Co. 26. b. 27. a. Cro. El. 395. (k) Cro. El. 102, 103. S. C. adjudged; but upon a Writ of Error it was held otherways, though it was ſaid no Judgment was given, but that the Parties compounded. 443. S. C. cited, and ſaid, That it was a ſtrange Judgment, and never enter'd by the Direction of the Court; and that upon a Writ of Error in the Exchequer-Chamber, the Opinion of the Juſtices was, That it was erroneous, but the Copyholder compounded, and took only his Corn, and relinquiſhed the Title: But vid. Cro. El. 661. 1 Leon. 289.

5. If

5. If *A.* is Tenant in Tail of a Copyhold, and it is found that by the Cuſtom it cannot be barred but by Seiſure of the Lord, *& non aliter nec alio Modo*, and *A.* accepts a Feoffment of his Copyhold Lands; the Copyhold is ſuſpended, but not deſtroyed *quoad* his Iſſue: But if *A.* afterwardes levies a Fine of the Land, though the Copyhold Intereſt cannot paſs, yet it may be barr'd and extinguiſh'd by the Fine. *Paſch.* 17 *Car.* between *Taylor* and *Shaw*. *Cart.* 6. 22, 23, *&c.* adjudged.

(I) What ſhall be ſaid an Extinguiſhment of the Incidents of a Copyhold.

1. (a) IF there be a Cuſtom of a Manor, that if Copyholders for Life die ſeiſed, their Wives ſhall have it during their Widowhood, and A. being a Copyholder for Life of a Tenement, the Lord of the Manor conveys the Freehold and Inheritance of the Copyhold Tenement of A. by the Procurement of A. to J. S. a (b) Stranger, and to his Heirs during the Life of A. the Remainder to B. the Wife of A. for Life, the Remainder in Fee to A. and after A. grants the Remainder to W. his Son, and after B. the Wife of A. dies, and A. takes C. to Wife, and dies ſeiſed; the Widowhood of C. is not extinguiſhed by the Purchaſe and Conveyance of A. her Husband; for the Freehold being in J. S. a Stranger, during the Life of A. the Eſtate of A. was not extinguiſhed, and by Conſequence this excreſcent Eſtate, ſcilicet the Widowhood, continues. Hobart's Reports 244. between (c) Howard and Bartlet.

(a) Cro. Jac. 126. S P. per Curiam.

(b) Secus if he had conveyed the Inheritance to the Copyholder, who had after died ſeiſed. Cro. Jac. 126.

(c) Hob. Fol. 181. S. C.

adjudged. Waldoe and Bertlet, Cro. Jac. 573. S. C. adjudged, becauſe the Privilege by the Cuſtom, annexed to the Copyhold Eſtate, ſhall not be deſtroyed ſo long as the Copyhold continues. 1 Rol. Rep. 178. S. C. adjudged. And vid. Hut 18.

2. So if A. be a Copyholder in Fee, where the Cuſtom is for their Wives to have their Widowhood, if the Baron dies ſeiſed, and the Lord grants the Freehold and Inheritance over to a Stranger; this ſhall not deſtroy the Widowhood. Hobart's Reports (d) 244.

(d) Hob. Fol. 181.

3. But in the ſaid Caſe, if the Cuſtom be, that the Wife ſhall be admitted before ſhe ſhall have her Eſtate, there ſhe muſt loſe it, becauſe the Cuſtomary Court, which ſhould relieve her, is gone as to her, becauſe her Eſtate is altogether eſtranged from the Manor. Hobart's Reports (e) 244.

Fol. 511.

(e) Hob. Fol. 181. S. C. & S. P. ſeems to be admitted.

4. If the King is ſeiſed of a Manor, Parcel of the Dutchy, in which by the Cuſtom Copyholders may take Fire-wood, *&c.* growing upon their Copyholds, to be ſpent in their Houſes, and for Fences, *&c.* and by Leaſe under the Dutchy-Seal demiſes the Manor, *exceptis omnibus boſcis, ſubboſcis, arboribus, & mairem. &c.* for 21 Years, and after grants the Reverſion, *& Premiſſa ſic except.* to *J. S.* and his Heirs, and after the Aſſignee of the Leſſee, makes a voluntary Grant of a Copyhold for Life, according to the Cuſtom of the Manor, this Grantee ſhall have the Eſtovers. *Mich.* 6 *Ja.* (f) *Swayn's* Caſe, 8 *Co.* 63. adjudged; for though 'twas objected, the Leſſee had no Intereſt in the Wood, and that by Conſequence the Copyholder who claimed from him could not meddle therewith, yet it was anſwered and reſolved *per totam Curiam*, That the Eſtate of the Copyholder is not derived out of the Eſtate of the Lord;

(f) Moor 811. Pl 1098. S.C. adjudged. 1 Brownl. 231. S. C. adjudged, becauſe the

Leaſe being for Years, the Trees excepted remained Parcel of the Manor: Otherwiſe if the Leaſe had been for Life.

for he is but an Inſtrument to make the Grant, but by the Cuſtom of the Manor 'tis eſtabliſhed and made firm to the Grantee.

5. So if Copyholders for Life, according to the Cuſtom, have uſed to have Common in the Waſte of the Lord, or Eſtovers in his Woods, or other Profit apprender in any Parcel of the Manor, and the Lord aliens his Waſtes or Words, *&c.* to another in Fee, and after grants a Copyhold Meſſuage, *&c.* for Life, ſuch Grantee ſhall have Common of Eſtovers, *&c.* notwithſtanding the Severance, for the Title of the Copyholder is paramount, and the Cuſtom unites the Common, *&c.* which are but as Acceſſaries or Incidents ſo long as the Meſſuage, *&c.* being the Principal, is maintained by the Cuſtom. (g) 8 *Co.* 63, 64. reſolved *per Curiam.*

(g) Moor 812. S. C. & S. P. 1 Brownl. 211. S. C. & S. P. per Curiam.

6. (h) If by the Cuſtom all the Copyholders for Life have Common in the (i) Waſte of the Lord, and the Lord grants and confirms to one of them and his Heirs all his Copyhold, Meſſuage and Land, *cum Pertinentiis*, he ſhall not have Common; for by the Cuſtom that was annexed to his Cuſtomary Eſtate, which being deſtroyed by his own Act in making it a Freehold, his Common is deſtroyed alſo, and cannot continue without (k) ſpecial Words. *Mich.* 8 *Jac.* between (l) *Marſham* and *Hunter*, *Cro. Jac.* 253. adjudged *per totam Curiam.*

(h) Fort and Ward S. P. Moor 667. Pl. 915. adjudged, tho' the Lord granted the Meſſuage, &c. and all Common thereto appertaining, for the Common appertained to the Cuſtomary Eſtate, which is determined. 2 Brownl. 211. cited. Cro. Jac. 253. cited. (i) Otherways if they have Common in the Soil of a Stranger. 2 Sid. 84. per Glyn. Hob. 253. dubitatur. (k) Viz. with all Commons before uſed. 1 Bulſ. 2. But for this, vid. 1 Part 801. Pl. 8. (l) Yelv. 189, 190. S. C. adjudged. Noy 126. S. C. adjudged. 1 Bulſ. 2. S. C. adjudged. 1 Brownl. 220. S. C. adjudged. 2 Brownl. 209, 210. S. C. adjudged. Et vid. 2 Rol. Abr. 61.

(K) What ſhall be a ſufficient Lord to give Licence.

1. A Lord at Will of a Copyhold Manor cannot give Licence to a Copyhold Tenant to (a) make a Leaſe for Years, though he may grant a Copyhold for Life according to the Cuſtom. Hill. 8 Ja. B. between (b) Pettis and Debbans, per Curiam.

(a) Though made by Licence of the Lord, yet it is the Leaſe of the Copyholder; and he may ſurrender his Reverſionary Intereſt by the Name of a Reverſion. Hob. 177. Et vid. Poph. 188. (b) 2 Brownl. 40. S. C. & S. P. per Curiam.

2. If a Lord for Life of a Copyhold Manor gives Licence to a Tenant to make a Leaſe for Years; this Leaſe ſhall not continue longer than the Life of the Lord. H. 8 Ja. B. between (c) Pettis and Debbans, per Curiam.

(c) 2 Brownl. 40. S. C. & S. P. per Curiam.

(L) Cuſtom

(L) Cuſtom.

Purſuance.

What ſhall be ſaid a Purſuance of the Cuſtom.

Copyhold.

1. (a) If the Cuſtom of the Manor be, That the Lord may demiſe the Copyholds in Fee, he may demiſe them (b) for Life, Years, or in Tail; for theſe Eſtates are included within a Fee which is the greater. Mich. 37 Eliz. B. R. between (c) Staunton and Barns, adjudged; and there ſaid by Popham, That it was ſo agreed per Curiam at St. Alban's Term. Co. Lit. 52. b.

(a) Godb. 20. S. P. by Two Juſtices. 1 Leon. 56. S. P. per Curiam.

(b) And after the Death of the Tenant for Life, the Lord may grant the ſame again in Fee; for the Grant for Life was not any Interruption of the Cuſtom. 1 Leon. 56. per Curiam.

(c) Cro. El. 373. S. C. adjudged.

2. So if the Cuſtom of the Manor be, That the Lord may ſolummodo demiſe his Copyhold Land in Fee, yet the Lord may demiſe it for Life, Years, or in Tail, tho' there were never any ſuch Eſtates made before; for the Word Solummodo is not to be taken ſo ſtrictly to reſtrain the Lord from this Liberty, which the Law gives him upon the general Cuſtom; but that he had uſed Solummodo to grant in Fee, which does not take away the Liberty which the Law gives. Mich. 37 Eliz. B. R. between (d) Staunton and Barns, adjudged, which intratur Hill. 36 Eliz. Rot. 492. Co. Lit. 52. b.

(d) Cro. El. 373. S. C. adjudged.

3. If the Cuſtom be, That Copyholds may be granted for Three Lives, a Copy (e) may be granted to Three for the Lives of Two within the Cuſtom, for there is not any Inconvenience to the Lord, though it be for the Life of another; for there ſhall not be any Occupancy thereof, but the Lord ſhall have it, if the Tenants pur auter vie die, living the ceſtuy que vies; and this is not a greater Eſtate than for Three Lives; but it is for Two Lives, which is leſs than the Cuſtom warrants. M. 15 Ja. B. R. between Ven and Howell, per Curiam.

(e) So it may be granted to one durante Viduitate ſua, for that is a leſs Eſtate than for her Life. Down and Hopkins, 4 Co. 29. b. 30. a. adjudged. Cro. El. 323. adjudged.

4. If by the Cuſtom a Copyhold may be granted for Three Lives, and it is granted to one (f) for his Life, Remainder to ſuch Woman as he ſhall marry, and to the Firſt Son of his Body; both theſe Remainders are void, but the Eſtate for his own Life is good. *Mich.* 44 & 45 *Eliz.* between *Webſter* and *Allen*. *Moor* 677. *Pl.* 922. adjudged.

(f) If by the Cuſtom 'tis demiſable in Fee, or for Life, ſolummodo

ea capienti extra manus Domini, yet a Surrender may be to the Uſe of one for Life, Remainder in Tail, Remainder in Fee. Cro. El. 373. adjudged, though it was objected, the Taking ought to be immediate; but the particular Eſtate and Remainders make but one Eſtate.

Grant

Grant thereof.

Not ſubject to the Incumbrances of the Lord.

1. IF the Lord of a Copyhold Manor, in which are ſeveral Copyholders for Life, (a) takes Wife, and a Copyholder dies, and the Lord after Coverture grants the Land again according to the Cuſtom of the Manor for Life, and dies, his Wife in a Writ of Dower ſhall not avoid this Grant; for tho' the Grant was after her Title of Dower, yet the Cuſtom, which is the Life and Force of the Grant, was long before. (b) *Paſch.* 26 *Eliz.* 4 *Co.* 24. adjudged.

(a) So if he grants a Rent Charge, &c. 2 Leon. 109. 8 Co. 63. b. But for this, vid. 1 Leon. 4. 16. 2 Leon. 152. 3 a Copyhold, (b) 8 Co. 63. b. cited. 2 Leon. 59. Godb. 130. Moor 94. Pl. 233. 1 Rol. Abr. 684. Pl. 2. —But if the Heir grants and after aſſigns Dower, the Wife ſhall avoid it. Moor 237. per Curiam. But Quære.

(a) The Effect and (b) Operation of the Surrender.

1. (c) IF the Limitation of the Uſe be (d) general, then *Ceſtuy que Uſe* taketh but an Eſtate for Life; for the Eſtates of Copyholds, as a neceſſary Conſequence upon the Cuſtom, ſhall be directed by the Rules of Law, unleſs within the Manor there be a ſpecial Cuſtom to the contrary; as that *ſibi & ſuis*, or *ſibi & aſſignatis*, or ſuch like Words ſhall create a Fee. 4 *Co.* 29. b.

(a) Where no Uſe is limited upon the Surrender, nothing paſſes to the Lord. 1 Rol. Rep. 253. per Dod', arguendo, —So if a Copyholder ſurrenders to the Uſe of himſelf and his Heirs, becauſe the Limitation of the Uſe is to him who had it before, it is void. Godb. 265. (b) If a Copyholder ſurrenders to the Uſe of his Will, the Fee continues in him, and not in the Lord. Fitz. and Huckly. 4. Co. 23. adjudged. Cro. Eliz. 441. adjudged. (c) Co. Lit. 59. b. S. P. (d) The Surrender was to the Uſe of a Stranger for ever, and the Lord admitted the Surrenderee, habend' to him and his Heirs, and what Eſtate he had, Godb. 137. dubitatur.

2. If *B.* a Copyholder ſurrenders into the Hands of the Lord, by the Hands of Tenants, according to Cuſtom, *&c.* without ſaying to whoſe Uſe the Surrender ſhall be, and at the next Court *B.* is admitted, *habendum* to him and his Wife in Tail, the Remainder to the right Heirs of *B.* the ſubſequent Admittance explains the general Surrender, and the Wife ſhall take by the Admittance, tho' not named in the Premiſſes, but in the *habendum* only. *Trin.* 15 *Jac.* (e) *Brook*'s Caſe. *Poph.* 125, 126. adjudged, tho' it was agreed, it was otherways in Feoffments and *Grants* at Common Law.

(e) Cro. Jac. 434. S. C. adjudged; and ſaid, That in many Manors there are no other Forms of Grants and Limitations. 2 Rol. Abr. 67. Pl. 18. S. C. which vid. and the Notes there.

3. If a Copyholder ſurrenders (f) *habend' a tempore mortis* of the Copyholder, to the Uſe of another and his Heirs, this is meerly void; for a Copyholder in Fee can no more ſurrender *habend* after his Death, than a Tenant in Fee can convey his Lands *habend'* after his Death, for then he ſhould leave a particular Eſtate in himſelf, which is (g) againſt the Rules of Law. *Hill.* 2 *Jac.* between (h) *Sympſon* and *Southern*. *Cro. Jac.* 376. adjudged.

(f) So if he ſurrenders poſt mortem ſuam in manus Domini ad uſum, &c. Clamp's Caſe. 4 Leon. 8. adjudged. Cro. El. 29. adjudged. 1 Rol. Rep. 254. cited. 1 Bulſ. 274, 275. cited. Cro. Jac. 376. and Godb. 451. So ruled upon Evidence; and vid. 1 Brownl. 41. (g) For this, vid. 1 Rol. Abr. 824. Pl. 1, 2, 3, &c. (h) Godb. 264. S. C. adjudged, That a Surrender can no more commence at a Day to come than a Livery. 1 Bulſ. 272, 273, &c. S. C. adjudged. 1 Rol. Rep. 109, 137. 253. S. C. adjudged.

4. If *A.* be Tenant for Life, the Remainder to *B.* in Fee, of Copyhold Lands, and *B.* ſurrenders to the Uſe of *A.* for his Life, the Remainder to *C.* This ſhall enure as an immediate Settlement upon *C.* and not by Way of Remainder; for though it is void as to *A.* and his Eſtate is not encreaſed thereby, yet being in Nature of the Limitation of an Uſe, the Intereſt veſts in *C.* immediately. *Paſch.* 20 *Car.* 2. between (h) *Wade* and *Bach.* 1 *Saund.* 149, *&c.* adjudged.

(h) 1 Sid. 360. S C. adjudged. And by Twyſden, this is a preſent Surrender to the Uſe of C. cum poſt mortem A. acciderit. 2 Keb. 341. adjudged.

5. If there be Tenant for Life, the Remainder for Life, of a Copyhold, and the Remainder-Man for Life enters upon the Tenant for Life in Poſſeſſion, and makes a Surrender; nothing paſſes thereby, for by his Entry he is a Diſſeiſor, and has no Cuſtomary Eſtate in him whereof to make a Surrender. *Paſch.* 27 *Car.* 2. between *Bird* and *Kirke.* 1 *Mod.* 199. adjudged.

Where a Right to, or Intereſt in, a Copyhold may be transferred, or (a) extinguiſhed, otherways than by Surrender.

(a) Where it may be extinguiſhed by a Fine. Cart. 6 23. 24.

1. (h) THO' a Copyholder cannot alien by Deed, yet he that hath Right only to a Copyhold, may by Deed or Copy releaſe it (c) to one that is admitted Tenant *de facto.* *Co. Lit.* 59. a.

(b) 4 Co. 25. b. S. P. adjudged. Hut. 65. S. P. arguendo. Cro. Jac. 101. S. P. dubitatur. (c) But not to one that ouſts the Copyholder by Wrong, for he gains no Cuſtomary Eſtate upon which the Releaſe of the Cuſtomary Right may enure. 4 Co. 25. b. 1 Leon. 102.

2. (d) If there be a Copyholder in Fee, and the Lord grants the Freehold and Inheritance thereof to *J. S.* and the Copyholder releaſes all his Right to *J. S.* by this Releaſe his Copyhold Intereſt is extinguiſhed and utterly gone. *Paſch.* 30 *Eliz.* in *Wakeford's* Caſe. 1 *Leon.* 102. adjudged.

(d) Hut. 65. S. P. arguendo.

3. If a Copyholder ſurrenders upon Condition, he may after releaſe the Condition by Deed. *Trin.* 2 *Jac.* between *Hall* and *Shorbrook.* *Cro. Jac.* 36. adjudged.

4. If there be two Joint-Copyholders, and one of them releaſes to the other: This is good without any Surrender or Admittance, for the firſt Admittance was of them and either of them, and their Ability to releaſe was from the firſt Conveyance and Admittance. *Hill.* 16 *Jac.* between *Waſe* and *Pretty.* *Winch.* 3. adjudged.

5. If a Copyholder bargains and ſells his Copyhold to the Leſſee for Years of the Manor, his Copyhold is thereby extinguiſhed; for between the Lord and Tenant the Conveyance need not be according to Cuſtom, and the Uſe of the Cuſtom is to convey the Land to another. *Trin.* 19 *Jac.* between (e) *Blemmerhaſſet* and *Humberſton.* *Hut.* 65. adjudged.

(e) Winch. 67. S. C. adjudged. 1 Jon. 41, 42. S. C. adjudged; for that in reſpect of the Lord, his Eſtate may be determined by any Act that ſhews it to be the Will of the Tenant to hold no longer by Copy.

Fines.

What Fines ſhall be paid.

(a) 1 Rol. Abr. 562. Pl. 4, 5. 6.

1. BY the Change of the Tenant, either by the Act of God, or by the Act of the Party, a Fine may be due. (a) *Co. Lit.* 59. b.

2. So by Cuſtom, upon the Change of the Lord by the Act of God. *Co. Lit.* 59. b.

3. Otherways upon Change of the Lord by the Act of the Party; for if the Lord alledge a Cuſtom within his Manor, to have a Fine of every Copyholder at the Change of the Lord of the Manor, be it by Alienation, Demiſe, Death, or otherways, this is a Cuſtom againſt Law as to the Change of the Lord by the Act of the Party; otherwiſe the Copyholders might be oppreſſed by a Multitude of Fines. *Co. Lit.* 59. b.

4. If one Copyholder hath ſeveral Lands held by ſeveral Services by Copy, the Lord ought to aſſeſs and demand the Fines ſeverally for every Parcel ſo ſeverally held; for the Tenant may refuſe to pay the Fine for one Parcel, and forfeit that, and pay the Fine for the reſt. *Mich.* 42 & 43 *Eliz.* between (b) *Hubbard* and *Hammond.* 4 *Co.* 28. a. reſolved.

(b) Dalton and Hammond. S. C. and S. P. reſolved. Cro. Eliz. 779. Moor 622. Pl. 851.

(a) Certain or (b) (c) Uncertain.

(a) Lit. Rep. 252. It was ſaid by Richardſon, That there is ſcarce any Copyhold in England, but in Truth the Fine is uncertain; for if by the Rolls it appears, that at any Time a greater or leſs Sum hath been paid, this ſhews the Fine to be uncertain: —But per Godb, 265. A few Inſtances of uncertain Fines ſhall not deſtroy the Cuſtom for Fines certain. (b) A Cuſtom to pay two Years Rent or under for a Fine, is good, and therefore to prove Fines uncertain, 'tis not enough to ſhew ſeveral Rolls, by which it appears, that ſometimes more and ſometimes leſs hath been paid, but never above two Years Rent. Per 2 Bulſ. 32. (c) Tho' a Surrender or Purchaſe, the Lord may take what Fine he pleaſes; yet for an Admittance upon a Diſcent, it may by Cuſtom be certain. Per 2 Bulſ. 32, 33. (d) 13 Co. 2, 3. S. P. adjudged. (e) For what ſhall be adjudged a reaſonable Fine or not, vid. 13 Co. 3. 1 Rol. Rep. 75. Cro. Car. 196. Cro. Jac. 671. (f) A Cuſtom to pay a Fine according to the yearly Value of the Land, is good. Titus and Perkins. 3 Lev. 255. adjudged. 3 Mod. 132. affirmed upon Error; and vid. Cro. Jac. 671. (g) The Lord is not bound to aver, or ſhew, that the Fine is reaſonable; but it is on the Copyholder's part to ſhew the Circumſtances of the Caſe, to make it appear to the Court to be unreaſonable. Hob. 135. (h) 1 Rol. Abr. 525. Pl. 2. 2 Rol. Abr. 578. Pl. 7. (i) Appearing upon Demurrer, or upon Evidence to a Jury, upon Confeſſion or Proof of the yearly Value of the Land. 4 Co. 27. b.

1. (d) FInes uncertain muſt be (e) (f) reaſonable, and (g) their Reaſonableneſs ſhall be diſcuſſed (h) by the Juſtices, (i) upon the true Circumſtances of the Caſe. *Co. Lit.* 59 b.

(k) 4 Co. 27. b.

2. (k) If the Fine is unreaſonable, the Copyholder is not bound to pay it. *Co. Lit.* 59. b. 60. a.

3. If by the Cuſtom, the Fines are uncertain, but the Lord aſſeſſes a reaſonable Fine, and requires the Copyholder to pay it, he is not bound to pay it immediately, for he could not tell what the Lord would aſſeſs, and therefore could not provide any certain Sum of Money, but ſhall have a convenient Time for Payment, if the Lord does not limit (l) a certain Day. *Mich.* 42 & 43 *Eliz.* between (m) *Hubbard* and *Hammond.*

(l) If the Lord will take Advantage of the Forfeiture of the Copyhold for Non-Payment, he muſt ſet a certain Time and Place when and where the ſame ſhall be paid. 13 Co. 2. Cro. Jac. 617. (m) Dalton and Hammond. S. C. Cro. Eliz. 779. Moor 622. Pl. 851.

Hammond. 4 *Co* 28. a. Otherways in Caſe of a Fine certain. *Mich.* 42 & 43 *El.* between (n) *Hubbard* and *Hammond.* 4 *Co.* 21. a. reſolved. (n) Dalton and Hammond S. C. Cro. El. 779. and held, the Heir ought to tender it upon his Prayer to be admitted. Moor 622. Pl. 851.

Forfeiture.

(a) What (b) Act ſhall diſpenſe therewith.

(a) Where it ſhall be diſpenſed with by Acceptance of Rent, &c. vid. under Title Confirmation.

1. IF a Copyholder makes a Leaſe for Years, and after ſurrenders to the Uſe of the Lord, and he (c) not having Notice of the Leaſe, accepts the Surrender; this is no Diſpenſation with the Forfeiture. *Mich* 7 *Car.* between (d) *Mathews* and *Whetton*, *Cro. Car.* 233. adjudged for the Leſſee of the Lord againſt the Leſſee of the Copyholder.

(b) If the Copyholder is amerced for Non-appearance at the Lord's Court, though it is not eſtreated or levied, yet it is a Diſpenſation with the Forfeiture. 1 Leon. 104. per Curiam. (c) But the Lord ſhall be preſumed to have Notice of the Failure of Suit of Court, Non-payment of Rent, &c. 2 Vent. 38. (d) 1 Jon. 249. S. C. adjudged. 1 Rol. Abr. 510. Pl. 5. S. C.

2. If he that is *Dominus pro Tempore* of the Manor admits one to a Copyhold, he thereby diſpenſes with all precedent Forfeitures, not only as to himſelf, but alſo as to him in Reverſion; (e) for ſuch new Grant and Admittance amounts to an Entry for the Forfeiture and a new Grant. *Paſch.* 13 *Car.* between (f) *Milfax* and *Baker.* 1 *Lev.* 26. adjudged.

(e) Winch. 67. Cro. Jac. 101.

(f) 1 Keb. 25. 26. S. C. adjudged.

3. But the Lord by Wrong or Diſſeiſin cannot by ſuch Admittance purge the Forfeiture, as to the rightful Lord. *Paſch.* 13 *Car* 2. 1 *Lev.* 26. *per Curiam.*

Copyhold.

Where and how to be ſued for and recovered.

1. COpyholders ſhall neither implead nor be impleaded for their Tenements by Writ, but by Plaint entered in the Lord's Court. *Lit. Sect.* 76. *Co Lit.* 60. a.

2. (a) And if upon ſuch Plaint an erroneous Judgment be given, (b) no Writ of Falſe Judgment lies in Reſpect of the Baſeneſs of the Eſtate, being in the Eye of the Law but an Eſtate at Will; (c) but he ſhall have a Petition to (d) the Lord in Nature of a Writ of Falſe Judgment, and therein aſſign Errors, and have Remedy according to Law. *Co. Lit.* 60. a.

(a) 4 Co. 21. b. S. P. Moor 68. Pl. 185. S. P. per Dyer: And that the Lord may do Right according to Conſcience, for he hath Power as a Chancellor within his own Court. So Ow. 63. per Dyer. Dal. 70. S. P. per Dyer. 1 Rol. Abr. 539. Pl. 8. S. P. admitted, 600. Pl. 9. 4 Co. 30. b. = If a Copyholder ſurrenders to the Uſe of B. upon Truſt, that he ſhall hold the Land until he hath levied certain Money, and that after he ſhall ſurrender to the Uſe of C. the Money is levied, and B. required to make a Surrender to the Uſe of C. and refuſes, and C. exhibits his Bill to the Lord of the Manor againſt B. who, upon hearing the Cauſe, decrees againſt B. that he ſhall ſurrender: Now if B. refuſes, the Lord may ſeiſe, and admit C. to the Copyhold; for in ſuch Caſes he is Chancellor in his own Court. 1 Leon 2. per totam Curiam. (b) F. N. B. 12. b. S. P. (c) Or ſuch Judgment may be reverſed by Bill in Chancery. Lan. 98. cited to have been decreed accordingly.—But Caſes in Parliament 67. a. a Bill in Chancery to compel the Lord to receive a Petition for reverſing a Common Recovery was diſmiſſed, and that Diſmiſſion after confirmed in the Houſe of Lords. (d) Where the King is Lord, he may be relieved by Bill or Petition to the King in the Exchequer-Chamber. 1 Rol. Abr. 539. Pl. 8. Lan. 98.

(e) Otherways of a Grantee for Years by Copy. Cro. El. 676. per Poph. 2 Leon. 328. Cro. El. 225.

3. A (e) Leſſee of a Copyholder for one Year ſhall maintain an Ejectment; for, inaſmuch as his Term is (f) warranted by Law, by Force of the (g) general (h) Cuſtom of the Realm, it is Reaſon that if he be ejected, he ſhould have an *Ejectione firmæ*, which is a ſpeedy Courſe for the Copyholder to obtain the Poſſeſſion of the Land againſt a Stranger. *Trin.* 30 *El.* between (i) *Melwich* and *Luter.* 4 *Co.* 26. adjudged.

—But if the Lord commits the Cuſtody of the Body and Lands of an Infant, according to Cuſtom, till, &c. and the Committee is ejected, he may have an Ejectione Cuſtodiæ. Cole and Walls, 1 Leon. 328. adjudged. Cro. El. 224, 225. adjudged, becauſe it was an Action upon the Caſe, in Nature of an Ejectione Cuſtodiæ, and not upon a Grant by Copy, but upon a Grant by the Common Law. (f) Though there were no Cuſtom, yet it ſhould be good againſt all but him that had the Freehold and Inheritance, as if Leſſee at Will at Common Law leaſes, &c. Cro. El. 462, 676. Moor 569. Pl. 776. Ow. 18. Styl. 380. Hetl. 127. —But yet vid. Cro. El. 395, 469. Moor 50. Pl. 150. 1 Brownl. 133. 2 Brownl. 40. (g) Yet there may be a particular Cuſtom, that ſuch Leaſe ſhall determine by his Death. Lit. Rep. 233. Hut. 101, 102. Hetl. 126, 127. (h) But a Cuſtom for a Copyholder to leaſe for Life is void. Godb. 171. (i) Cro. El. 103. S. C. but as to S. P. it is ſaid, that nothing was ſpoke to it. —But for this, vid. Cro. El. 483, 484, 535, 717, 728. Moor 271, 272. Pl. 425. 539. Pl. 709. 569. Pl. 776. 679. Pl. 927. 1 Leon. 16, 100. Cro. Car. 234.

4. If the Wife of a Copyholder in Fee by Special Cuſtom recovers Dower by Plaint in the Court of the Manor, and 50 *l.* Damages, an Action of Debt will not lie at Common Law for the Damages. *Trin.* 37 *Eliz.* between (k) *Shaw* and *Thompſon.* 4 *Co.* 30. b. *per Curiam.*

(k) Moor 410, 411.

S. C. by Three Judges againſt One; and at another Day it was held by Three Judges, that the Action lay, becauſe the Court-Baron could not award Execution for ſo great Damage, though they were well aſſeſſed there. Cro. El. 426. S. C. adjornatur. 1 Rol. Abr. 600. Pl. 9. S. C.

Copyholds.

(a) Pleading.

(a) That he was ſeiſed ſecundum Conſuetudinem Manerii, does not neceſſarily import a Copyhold. 3 Bulſ. 230. 1 Rol. Rep. 311. 2 Vent. 144.

1. EVery Admittance, as well upon a Diſcent as Surrender, may be pleaded as a Grant, to avoid the Inconvenience which would follow if the Copyholder ſhould be forced in Pleading to ſhew the firſt Grant; for that was either before the Time of Memory, and ſo not pleadable, or within the Time of Memory, and then the Cuſtom fails. 4 *Co.* 22. b.

2. So he may alledge the Admittance of his Anceſtor as a Grant, and ſhew the Diſcent to him, and that he entered, without ſhewing any Admittance of himſelf. 4 *Co.* 22. b.

(b) Without ſhewing of whoſe Grant. Cro. Jac. 103. adjudged naught upon a general Demurrer. Cro. Car. 190. per totam Curiam;

3. But he cannot plead that his Father was (b) ſeiſed in Fee at the Will of the Lord, by Copy of Court-Roll of ſuch a Manor, according to the Cuſtom of the Manor, and that he died ſeiſed, and it deſcended to him; for in Truth his Intereſt, in Judgment of Law, is but a particular Intereſt at Will. 4 *Co.* 22. b.

though the Son had there ſhewed, that after the Diſcent he was admitted; but by Three Judges 'tis but a Fault in Form; and the Iſſue being taken upon a collateral Matter, and found for the Plaintiff, 'tis help'd by the Statute of Jeofails. —But if A. pleads the Grant of the Reverſion of a Copyhold after the Death of B. Tenant for Life, he need not ſhew the Beginning of the Eſtate of B. nor by whom granted, for 'tis not the Title of A. but Matter of Inducement only. Cro. Jac. 52. 2 Vent. 182.

(a) Coroners.

(a) So call'd, because they deal principally with Pleas of the Crown. 4 Inſt. 271. —No certain Number appointed by Law. 2 Inſt. 175.

Their Election.

1. (b) THEY ever were, and yet are elected in full County by the Freeholders, by Force of the King's (c) Writ *de Coronatore eligendo*, for that both King and County have a great Intereſt and Benefit in the due Execution of their Office. 2 *Inſt.* 174.

(b) 4 Inſt. 271. S. P. (c) F. N. B. 163.

2. By the Statute of *Weſtminſter* 1. made 3 *Edw.* 1. *cap.* 10. it is enacted, That ſufficient of the moſt wiſe and diſcreet (d) Knights ſhall be choſen in all Counties for Coroners.

(d) In ancient Time, none under this Degree were choſen; and by ſome the Word Chivalier was put into this Statute, that the Party choſe might have ſufficient; and it muſt be ſo interpreted according to Uſe and Experience. 2 Inſt. 32. 176. 2 Leon. 160, 161.

3. By 14 *Edw.* 3. *cap.* 8. Coroners ſhall have Lands in Fee in the ſame County, whereof to anſwer all People.

4 By the Statute of 28 *Edw.* 3. *cap.* 6. Coroners ſhall be choſe in full County, of the moſt meet and lawful People, ſaving to the King and other Lords, which ought to make Coroners their Franchiſes.

Their Duty and (a) Authority.

(b) Inquiſitions before them.

(a) Where Coroners act as Miniſters, they muſt all join; where as Judges, they may divide. Hob. 70.

1. BY *Magna Charta*, *cap.* 17. no Sheriff, *&c.* Coroner, or other Bailiff, ſhall (c) hold Pleas of the Crown.

2 Rol. Abr. 673. Pl. 1. And vid. 3 Leon. 399. (b) When taken before a Coroner of a particular Liberty, it ought to appear by what Authority he is made. Cro. El. 193. (c) The Coroner had the ſame Authority after as before this Act, when a Man came to a violent and untimely Death, ſuper Viſum Corporis, &c. Abjurations and Outlawries, &c. Appeals of Death by Bill, &c. and this Authority of the Coroner ſolely to take an Indictment ſuper Viſum Corporis, and to take an Appeal, and enter it, and the Count, remain at this Day; but he can proceed no farther either upon the Indictment or Appeal, but deliver him over to the Juſtices; and this is ſaved to them by the Statute of Weſtminſter 1. cap. 10. 2 Inſt. 32. 1 Part. 492.

2. But by the Statute of *Weſtminſter* 1. made 3 *Edw.* 1. *cap.* 10. it is enacted, That (d) Coroners ſhall lawfully attach and preſent Pleas of the Crown, and that Sheriffs ſhall have Counter-Rolls with the Coroners, as well of Appeals as of Inqueſts of Attachment, or of other Things to that Office belonging.

(d) So that the Coroners are the Judges, and not the Sheriff, though the Sheriff is to have a Counter-Roll by Force of this Act. 2 Inſ. 176. Et vid. 1 Part 492.

3. By the Statute *de Officio Coronatoris*, made 4 *Edw.* 1. it is declared, He ſhall go to the Place where any be ſlain, ſuddenly dead, or wounded, or where Houſes broken, or Treaſure ſaid to be found, and ſhall forthwith command Four of the next Towns, or Five or Six, to appear

before him, and upon the Oath of (e) them ſhall enquire (f) where (g) the Perſon was ſlain, in what Company, and who there, (h) who guilty of the Act or Force, and who preſent, of what Age ſoever, if they can ſpeak or have Diſcretion, *&c.* *Vide* the Statute at large, with the Duty of the Coroner therein ſet forth at large.

(e) Intended that the Inquiſition was ſo taken, though it did not appear to be ſo by the Return of the Coroner. 1 Sid. 204. Vid. Poph. 210. (f) May find ſuch a Nuſance as occaſions the Death of a Man, viz. that by Reaſon of the Breach of a Bridge in the Town of A. he fell into the River, &c. and the Townſhip ſhall be amerced thereupon. Al. 51. But there, becauſe it was not found that the Town was bound to repair the Bridge, the Inquiſition was quaſh'd. —That they may enquire of all Circumſtances upon the Murder. Kelw. 67. b. (g) By 3 H. 7. cap. 1. 'tis declared, he ſhall enquire of the Murderers, Abettors, and Conſenters, and who were preſent when the Murder was done, and their Names found, to inroll and certify, &c. (h) He may enquire of Procurers before, though in another County. Kelw. 67. b. —But cannot enquire of Acceſſories after. Kelw. 67. b. Moor 29. Pl. 95. Dal. 32.

4. (i) 28 *Edw.* 1. *cap* 3. In Caſe of Death within the Verge, the Coroner of the County (k) together with the King's Coroner, ſhall do his Office, *&c.*

(i) For the Expoſition of this Act, vide 2 Inſ. 549.

(k) That one Man may be Coroner of both, vid. 4. Co. 460. 3 Inſ. 134. 2 Leon. 160.

5. By 3 *H.* 7. *cap.* 1. If one is ſlain in the Day, and the Murderer eſcapes, the Town where done ſhall be amerced, and the Coroner ſhall enquire thereof upon the View of the Body.

(l) 4 Inſ. 271.

6. (l) By the ſame Act, the Coroners ſhall deliver their Inquiſitions before the Juſtices of the next Gaol-Delivery there, who ſhall proceed againſt the Murderers, if in Gaol, or elſe the ſame Juſtices ſhall certify the Inquiſitions into the *King's-Bench.*

(m) 4 Inſ. 271.

7. (m) By 1 *&* 2 *Ph. & Mar. cap.* 13. A Coroner, upon an Inquiſition before him of Murder or Manſlaughter, or as Acceſſory before, ſhall put in Writing the Effect of the Evidence given to the Jury before him, being material, and hath Power by Recognizance or Obligation to bind all ſuch as declare any Thing material, to the next Gaol-Delivery in the County, City, *&c.* where the Trial ſhall be.

8. As the Sheriff in his Turn may enquire of all Felonies by the Common Law, ſaving of the Death of a Man; ſo the Coroner can enquire of no Felony, but of the Death of a Man, (n) and that *ſuper Viſum Corporis.* 4 *Inſt.* 271.

(n) Poph. 209. S. P. per Curiam. —But when a Man drowns himſelf, and his Body cannot be found, an Inquiſition may be taken before the Juſtices of Peace, ſo as to entitle the King to the Forfeiture of his Goods. 3 Inſ. 55. Poph. 209. 1 Rol. Rep. 217. Et vid. 1 Vent. 182. 2 Levin. 141. —Where the Death may be preſented at the Aſſizes, and there traverſed. 2 Sid. 90. 101. 1 Vent. 351.

Inquiſition (a) before the Coroner.

(b) Traverſe thereof.

(a) Where for Miſmanagement in the Coroner, &c. the Filing the Inquiſition may be ſtopp'd, or the Party grieved may have other, and what Remedy. 2 Sid. 90. 101. 1 Mod. 82. 3 Mod. 80. 238. 1 Vent. 182, 352. —Where the Coroner ſhall attend, and amend his Inquiſition. 1 Sid. 225. 259. (b) This Inquiſition being final, the Coroner ought to hear Counſel and Evidence on both Sides. 2 Sid. 90. 101. (c) 2 Jon. 198. S. P. per Curiam con. and ſaid, That my Lord Hale had declared his Opinion to be ſo. 2 Levin. 141. per Curiam, That as the Law was then taken, the Inquiſition was not traverſable: but Hale ſaid, That anciently the Inqueſt of the Coroner was traverſable, though a Fugam fecit found before him was not. 1 Vent. 278. per Curiam, ſo agreed. 2 Levin. 152. S. P. by Three Judges con.

1. (c) WHere it is found before the Coroner, *ſuper Viſum Corporis*, that a Man was *Felo de ſe*, the Executors or Adminiſtrators of the Deceaſed cannot traverſe it. 3 *Inſ.* 55.

2. Otherways if taken before Juſtices of Peace, or in the (d) *King's Bench*, as it may be where the Felony is committed in the County where that ſits. 3 *Inſ.* 55.

(d) The Chief Juſtice is the Sovereign Coroner of England. 4 Co. 57. b. 2 Sid. 101.——The Judges of this Court the Sovereign Coroners. 4 Inſ. 73.

Fees.

What Fees a Coroner may take.

1. (a) BY the Statute of *Weſtminſter* 1. made 3 *Ed. cap.* 10. A Coroner ſhall demand or take nothing (b) for doing his Office.

(a) By the ancient Law of England, none having any Office concerning the Adminiſtration of Juſtice, could take any Fee or Reward for doing his Office, and therefore this Statute was only in Affirmance of the Common Law. 2 Inſ. 176, 209. (b) A Coroner received 1 d. of every Viſne when they came before the Juſtices in Eyre, as belonging to his Office, and this was held neither againſt the Common Law, nor this Statute, becauſe not taken for doing his Office, but as a Right due to his Office, which might have a reaſonable Beginning, towards his Trouble, Attendance, and Charges. 2 Inſ. 176.

2. (c) But by 3 *H.* 7. *cap.* 1. Upon an Inquiſition taken upon View of the Body, the Coroner ſhall have 13 *s.* 4 *d.* of the Goods of the Murderer, and if he hath nothing of the Amerciament of the Townſhip for the Eſcape.

(c) 4 Inſ. 271.

3. (d) By 1 *H.* 7. *cap.* 8. He ſhall have nothing where taken upon View of one ſlain by Miſadventure.

(d) 4 Inſ. 271.

(a) Coroner.

For what Cauſe he may be removed.

(a) But being elected by the County, his Office determines not by the Death of the King. 2 Inſ. 175. Dal. 15.

1. THE King by (b) Writ may diſcharge a Coroner from his Office, *quia minus Idoneus*, generally, or for (c) good Cauſes, which are not traverſable. 5 *Rep.* 58. b. 8 *Rep.* 41. b.

1 Leon. 120. (b) F. N. B. 163. (c) What ſhall be good Cauſe, vid. F. N. B. 163. 8 Rep. 41. b. 2 Inſ. 32.

Corpo-

Fol. 512.

(a) (b) Corporations.

(a) Are ſo called, becauſe the Members are made into a Body, and capacitated to take & grant. Co Lit. 250. a.

(b) Are either Eccleſiaſtical or Lay, and Eccleſiaſtical are either Regular, as Abbots, Priors, &c. or Secular, as Biſhops, Deans, &c. Co. Lit. 250. a.

(A) By what Means a Coporation may commence, and by what Words and Names, and by whom, & *econtra*.

1. A Corporation conſiſts of one ſingle Perſon only, as the King, Biſhop, Parſon, &c. Co. 10. 29. b. a Prebend, Co. 10. 31. b.

2. (c) Or (d) (e) aggregated of many, as Mayor and Commonalty, Dean and Chapter, and theſe in the Civil Law are called Univerſities or Colleges. 10 Co. 29. b.

(c) Co. Lit. 250. a. S. P. (d) Of all Perſons capable, or of one Perſon capable, and the reſt incapable. Co. Lit. 2. a. — Such Corporation aggregate may be without a Head, as where the King granted gildam Mercatoriam. 10 Co. 30. b. (e) Such Corporations are not capable of a Protection prorectur' or moratur', becauſe the Corporation it ſelf is inviſible, and reſteth only in Conſideration of Law. Co. Lit. 130. a. b. 2 Bulſ. 233. — It hath not been known that a Corporation hath been bound in a Recognizance or Statute-Merchant. Moor 68. Pl. 182. per Dyer. — They cannot be eſſoined. Dal. 121. Pl. 154. — Or outlawed. 10 Co. 32. b. — Nor can do Homage or Fealty, becauſe they muſt be done in Perſon. Co. Lit. 66. b. 4 Co. 11. a. 10 Co. 32. b. — Whether they may be an Executor, vid. 1 Rol. Abr. 915. Pl. 1. — They cannot diſtrain in their own Perſons, but by their Bailiff, and therefore no Replevin lies againſt them by the Name of their Corporation. 1 Brownl. 175.

3. There are Four Sorts of Corporations by the Common Law, as the King. Co. 10. 29. b.
4. By Authority of Parliament.
5. By the King's Charter,
6. By Preſcription.

(B) Who may make a Corporation.

(a) The King only could grant Licence to found a Spiritual Corporation. Cawdry's Caſe, 5 Co. 26. a.

1. None but the King can (a) make a Corporation. Co. 10. 33. b. (b) 49 Ed. 3. 4. 49 Aſſ. 8.

(b) Br. Preſcription 12. S. C.

2. The King may give Power to a common Perſon to name the Perſons, and the Name of the Corporation; and when he hath done ſo, this Corporation is not ſaid to be made by the common Perſon, but by the King. Co. 10. 33. b.

(c) 1 Sid. 291. like Point dubitatur.

3. (c) If the Mayor and Commonalty of London preſcribe to make another Corporation in the City, and their Cuſtoms are confirmed, yet it is not good without the King's Charter. (d) 49 Ed. 3. 4. (e) 49 Aſſ. 8.

(d) Br. Preſcription 12. S. C. Br. Corporation 45. S. C. (e) Moor 584 S. C. cited.

4. The

4. The Pope could not have founded or incorporated a College, &c. here, but it ought to have been done by the King himſelf. 4 Co. 107. b.

(C) Of what Perſons a Corporation may be made.

1. ONE Corporation may be made out of another Corporation. Co. 10. Bridewel 31. b.

2. The King may grant to the Commonalty of *D.* that they ſhall be incorporated by the Name of Mayor, &c and that they may chuſe a Mayor, &c. and this is a good Corporation, though the Election of a Mayor is *in Futuro*; for there is a Diverſity between a Power, Liberty, Franchiſe, or other Thing newly created, which may take Effect *in Futuro*, and an Eſtate or Intereſt which none can take without a preſent Capacity. 10 Co. 27. b. 31. a. b.

(D) Of what (a) Place.

(a) 2 Brownl. 244.

1. THere ought to be a Place of Corporation. Co. 10. 29 b 123.

2. There ought to be a Place ſuppoſed in England; and if there be not any ſuch Place in England, yet it is good, as of Jeruſalem, in England. Co. 10. 32. b.

(E) Of what Name.

1. THere ought to be a Name by which it ought to be incorporated. Co. 10. 29. b.

2. The Name of the Corporation is as the (a) Name of Baptiſm. Co. 10. 28. b. 123. 21 E. 4. 56. b.

(a) 2 Inſt. 666.

3. The King may incorporate a Town by a Name, and after by another Name, * and then they ſhall uſe their Name according to the Second Corporation, and (b) yet they ſhall continue the (c) Poſſeſſions they had before by the other Name. (d) 21 Edw. 4. 59.

* Fol. 513.

(b) So a Debt to the Corporation remains, though their Name is changed by a new Charter. 3 Lev. 238. (c) And all other Franchiſes and Privileges. 4 Co. 87. b. (d) Fitz. Grant 30. S. C.

4. A Corporation may be incorporated by one Name, and Power given them to ſue and purchaſe Lands by another Name. *Trin.* 8 *Car.* between the (e) College of Phyſicians and *Butler*, 1 *Jon.* 261, 262. *per Curiam* reſolved.

(e) Lit. Rep. 168, 212, 350 S. C. Cro. Car. 256. S. C. but by theſe Books the ſame Point does not ſo clearly appear,

(F) By (a) (b) what Words.

(a) Conſtituimus the Men of ſuch a Town a Corporation, viz. Mayor, &c. 2 Rol. Abr. 197. Pl. 1, 2. vid. the Lockſmiths

1. **These Words**, incorporo, fundo, erigo, &c. **are not of Neceſſity to be uſed in making a Corporation, but Words equivalent are ſufficient.** Co. 10. 30.

(b) Where the Biſhop of D. having Jura Regalia, confirmed the Orders made by in D. this made them not a Corporation. Styl. 198.

2. **Of ancient Time the Inhabitants of a Town were incorporated when the King granted to them to have** Guildam Mercatoriam. Reg. 219. Co. 10. 30.

3. **The King gave Licence to** Ramſy **to grant a Rent** cuidam Capellano: **This made a Corporation.** 2 H. 7. (c) R. 155. 2 H. 7. 13. Co. 10. 28.

(c) I know not what is intended by this, unleſs it be Rot. 155. 'tis Fol. 13. which vid. Fitz. Grant 36. Br. Patent 44. b.

4. **If the King grants Lands to the Men or Inhabitants** of D. Heredibus & Succeſſoribus ſuis, **rendring a Rent**; (d) for any **Thing touching** (e) **theſe Lands** (f) **this is a Corporation, but not to other Purpoſes.** 21 Ed. 4. 56. 7 E. 4. 30. (g) 2 H. 7. 13.

(d) By this they have a Capacity to take, but not to grant the Lands to another. Cro. Eliz. 35. adjudged. (e) Where a Charter made to Aliens may incorporate them, quoad the King, and not quoad others. 1 Rol. Rep 148, 296. (f) But if the King releaſes the Rent, the Corporation is ipſo facto diſſolved. Dyer. 100. Pl. 70. (g) Fitz. Grant 36. S. C. Br. Patent 44. b.

(h) Co. Lit. 3. a S. P. —But by the Foreſt-Law,

5. (h) **But if the King grants Land** Hominibus or Inhabitantibus de D. **if they be not incorporated before, the Grant is void, if no Rent be reſerved to the King.** 21 Ed. 4. 56.

a Grant of Privilege within a Foreſt to all the Inhabitants, being Freeholders within this Foreſt, is good. 4 Inſ. 297.

6. **But if the King grants** Hominibus de Iſlington **to be diſcharged of Toll; this is a good Corporation to this Intent, but not to purchaſe.** 21 Ed. 4. 59. (R. **this is Matter of Diſcharge.**)

7. **If the King gives Lands to the Inhabitants** of Iſlington, **and their Succeſſors; if they were not incorporated before, this is a void Grant, for the King is deceived.** 7 E. 4. 30.

8. By a Special Act of Parliament it was enacted, that there may be built one meet Houſe, *&c.* that the ſame may be called, *&c.* and the Lord, *&c.* may be Governors, *&c.* and the ſaid Governors, *&c.* ſhall for ever hereafter be incorporated, *&c.* 10 *Co.* 23. a. b. 24. b. 25. a. it was reſolved, That no Hoſpital was incorporated by this Act, becauſe all the Words are *de Futuro.*

9. King *John* granted *Burgenſibus de Yarmouth*, that they ſhould be incorporated, *& tenere Placita coram Ballivis, &c.* being an old Grant, it was held good, without naming their Succeſſors. *Hill.* 7 *Jac* the Borough of *Yarmouth*'s Caſe, 2 *Brownl.* 292. *per Curiam*; but becauſe in Pleading it was not averred there were Bailiffs there, *adjornatur:* And *Coke* ſaid, he had ſeen many old Grants to the Citizens of ſuch a Town.

(G) What

(G) What Thing ſhall be incident to a Corporation without Special Grant or Preſcription.

1. When a Corporation is duly created, all other Incidents are tacitly annexed. Co. 10. 30. b. P. 11 Ja. B. R. St. Saviour's Caſe reſolved.

2. As if the King makes a general Corporation by a certain Name, without any Words of Licence to purchaſe Lands, or implead or be impleaded, yet the Corporation may purchaſe, plead, or be impleaded well enough, for that by the making of the Corporation, all thoſe (a) neceſſary Incidents are included. P. 11 Jac. Scaccario, St. Saviour's Caſe, reſolved per Curiam. Co. 10. 30. b. Hobart's Reports (b) 285.

(a) And if the King incorporates, &c. and that they ſhall not alien their Poſſeſſions, &c. this teſtifies the Deſire of the King, but deprives not them of the Power of Alienation, which is incident. 10 Co. 30. b. (b) Hob. Fol. 211. S. C. & S. P. per Hobart.

3. But by ſpecial Words the King may make a limited Corporation, or a Corporation for a ſpecial Purpoſe; as if the King grants probis Hominibus de Iſlington, & Succeſſoribus ſuis, rendring a Rent, this is a Corporation to render the Rent to the King, and not otherwiſe. P. 11 Ja. (c) Scaccario, St. Saviour's Caſe, per Curiam reſolved.

(c) Lan 21, 22. S. C. And by Tanfield, Chief Baron, ſuch Leaſe ſhall not make a Corporation where the King conceives there is no Corporation before; but the King ſhall rather be ſaid to be deceived; and he took a Difference where there is a reputed Corporation in Being and not; and the Barons directed the Jury accordingly, vide.

4. If the King creates a Corporation, and does not give any expreſs Power in the Letters Patents to make Laws, (d) yet this Power is incident to the Corporation, and included in their Incorporation; but theſe Laws ought always to be ſubject to the Laws of the Realm, as ſubordinate thereto; for a Body Politick cannot be governed without Laws. Hobart's Reports (e) 285.

(d) But per 10 Co. 31. to make Ordinances is neceſſary for good Order and Government, but not of the Eſſence of a Corporation: Et vid. Moor 584. (e) Hob. Fol. 211. S. C. & S. P. per Hobart.

5. If the King creates a Corporation of a Mayor and 8 (f) Aldermen, with a Clauſe in the Patent, quod ſuper Mortem vel Remotionem alicujus Aldermanni, liceat majori, & cæteris Aldermannis infra octo dies proxime poſt Mortem vel Remotionem, &c. to elect another Alderman into his Place, &c. Tho' no Election be within Eight Days after the Death of * an Alderman, yet they may elect an Alderman at any Time after, (g) for they have Power to elect another, as incident to the Corporation created; for ancient Corporations have no ſuch Clauſe, giving Power to elect; and this affirmative Power does not take away the implicative Power incident to the Corporation. P. 8 Car. B. R. In the Caſe between Hicks and the Town of Lanceſton in Cornwal, reſolved per Curiam, ſcilicet, Richardſon and Croke, no other of the Judges being there, and a Writ granted accordingly to elect another Alderman.

(f) For the Original and Signification of the Word, vid. 4 Inſt. 75. Lat. 231.

* Fol. 514.

(g) Caſes in Parliament 45.

6. If a Corporation be created of a Mayor and 8 Aldermen, with a Clauſe in the Patent, That if any of the Aldermen die, or be removed, that it ſhall be lawful for the Mayor and the reſt of the Aldermen, within Eight Days after the Death or Removal, to elect another in his Place: Though it is not limited

that they, or (h) the greater Number of them, may elect, yet the greater Number may elect. P. 8 Car. B. R. between Hicks and the Borough of Lanceſton, admitted per Curiam.

(h) Where an Appearance entered by the greater Part ſhall bind the reſt. Godb. 439. — But a Patent procured by ſome few Perſons only ſhall not bind the reſt. 1 Rol. Rep. 226. — Inhabitants of a Town cannot be incorporated without the Aſſent of the major Part. 2 Brownl. 100.

7. And in the ſaid Caſe, if the Mayor, at the Time of the Death of an Alderman, be abſent from London till after the Eight Days, and the Aldermen, within the Eight Days, come to the Deputy, and require him to make an Aſſembly of them to elect another within the Eight Days, and he refuſes, and thereupon the greater Part of the Aldermen aſſemble themſelves without the Mayor or his Deputy, and elect an Alderman, this is a void Election, for the Mayor ought to be preſent at it by the Words of the Grant. P. 8 Car. B. R. between Hicks and the Borough of Lanceſton, per Curiam.

8. If the Church-wardens of *A* are incorporated by the King's Letters Patents, in which there is a Clauſe, That the Pariſhioners, or the greater Number of them, may yearly elect Two Church-wardens, and that they and their Succeſſors ſhall be a Corporation capable to take, *&c.* and after the (i) Biſhop of the Dioceſe, in regard of the great Number of Inhabitants, makes an Order, That the Pariſhioners ſhall appoint a certain Number of the Pariſh to be called Veſtry-men, which Veſtry-men from Time to Time ſhall elect the Church-wardens for and in the Name of the whole Pariſh, and the Church-wardens are elected ſo for a long Time, and after *B.* and *C.* at the uſual Day and Place, are elected Church-wardens by the Veſtry-men: This is a good Election, and they are capable of purchaſing Lands; for by Intendment all the Pariſhioners had Notice of the Election, and might have appeared and oppoſed it: And it would be hard if the Election by thoſe that were preſent had not been good. *Paſch.* 4 *Jac. Lan.* 21. ruled accordingly upon a Tryal at Bar: But it was agreed, That the Order made by the Biſhop was of no Effect.

(i) But where an Election by a By-Law may be limited to a ſelect Number, vid. 1 Part 737. Pl. 4. And for this, vid. 3 Bulſ. 71.

(H) Who ſhall be ſaid the Founder.

1. He that gave the Firſt Poſſeſſions to the Corporation is the Founder. Co. 10. Hoſpital 33. b. (a) 38 Aſſ. 22. 50 Aſſ. 6.

2. If the King hath a Chapel, and gives Poſſeſſions to it, by which he is the Founder thereof: Though the Seculars are after tranſlated into Regulars, yet the King ſhall be the Founder thereof, becauſe he gave the Firſt Poſſeſſions. (b) 38 Aſſ. 22.

3. If the King and a common Perſon give Poſſeſſions to a Corporation at one and the ſame Time, the King ſhall be the Founder only by his Prerogative. 50 Aſſ. 6. per Kniver.

(a) Br. Corody 12. S. C. Fitz. Grant 1. S. C.

(b) Br. Corody 12. S. C. Fitz. Grant 1. S. C.

(I) What Thing (a) (b) diſſolves the Corporation.

1. If a Corporation be made of Co-brethren and Siſters, and after all the Siſters are dead, all Grants and Acts made by the Co-brethren after are void; for when the Siſters are dead, this is not any perfect Corporation. M. 37 El. B. R. in the Caſe between Serjeant Lovelace and Manwood, it is there cited to be ſo.

(a) If Lands are given to a Corporation, which is afterwards diſſolved, the Donor ſhall have the Lands again. Co. Lit. 13. a. But for this, vid. 1 Rol. Abr. 816.

Pl. 3, 4. (b) If the Maſter and Wardens of the Company of Woodmongers enter into Bond thus, viz. Noverint, &c. Magiſtrum & Guardianos, &c. teneri, &c. and the Common Seal is put thereto, and it is ſigned as uſual by the Principal of the Company, and the Corporation is diſſolved after, yet they ſhall not be charged in their natural Capacity. 1 Lev. 237. adjudged, though endorſed, Sigillat, & deliberat' in Preſentia, &c. Where a Corporation granted an Annuity, and was after diſſolved, vid. Ow. 73. 2 And. 107.

2. If the King makes a Corporation, conſiſting of Twelve Men, to continue always in Succeſſion, and when any of them die, the others may chuſe another in his Place: (c) If Three or Four of them die, (d) yet all Acts done by the reſt ſhall be ſufficient, for this is not like to the aforeſaid Caſe. M. 37 El. B. R. per Curiam.

(c) 10 Co. 30. b.

(d) But if the Body Politick wanteth its Head, Commonalty, nothing can be done during the Vacation, as in Caſe of a Dean and Chapter, Mayor and when there is no Dean or Mayor. Co. Lit. 264. b. 265. a. Et vid. Moor 52. Dal. 55. —Therefore the Maſter of a College cannot deviſe Lands to the Houſe of which he is Head. Dal. 31. 4 Leon. 223.

3. If a Prior and Covent, *concurrentibus his quæ in Jure requiruntur*, are tranſlated to an Abbot and Covent, or to a Dean and Chapter, though the (e) Name is changed, yet the Body is not diſſolved. *Co. Lit.* 102. b.

(e) Where the Debt to a Corporation remains, though their Name is changed by a new Charter. 3 Lev. 238. And vid. Ow. 73. 2 And. 107.

4. Though a Dean and Chapter had ſurrendred (f) all their Poſſeſſions to the King, yet their Corporation continued, and they remained the Chapter of the Biſhop, to aſſiſt him in Spiritual Matters, *&c.* for all their Poſſeſſions were from the Biſhop; and a Prebend, though he hath no Poſſeſſions, hath *Stallum in Choro, & Vocem in Capitulo.* 3 Co. 75. b.

(f) But there cannot be a Guardian of a Chapel when the Chapel and all the Poſſeſſions thereof are alienes. 3 Co. 75. a. 10 Co. 32. a. b. for there cannot be a Guardian of nothing.

(K) What (a) Things a Coporation may do (b) without Deed.

1. A Corporation aggregate cannot without Deed command their Bailiff to enter into certain Lands of their Leaſe for Years for a Condition broke, for (c) ſuch Command without

(a) Where if pleaded that the Thing is done, it muſt be intended by Deed. Cro. Jac. 411. 2 Saund. 305.

(b) An Abbot, Biſhop, Parſon, &c. or other ſole Body Politick; might have been enfeoff'd without Deed; but a Gift to a Dean and Chapter, or other Corporation aggregate, muſt have been by Deed. Co. Lit. 94. b. (c) A Corporation may employ one in ordinary Services without Deed, as a Butler, Cook, &c. but not to appear for them in an Aſſiſe, or to do any other Act which concerns their Intereſt or Title. 1 Vent. 47, 48. 1 Mod. 18. And for this, vid. Cro Car. 170. 2 Saund. 305. Raym. 194,—A Man may avow the taking Cattle Damage-Feſant as Bailiff to a Corporation aggregate, without having any Precept in Writing. Manby and Long, 3 Lev. 107. adjudged. —Upon a Grant of ſo many Acres in ſuch a Waſte to a Corporation, how they ſhall make their Election, vid. 1 Leon. 30. —They cannot attorn without Deed. 6 Co. 38. b.

(d) Cro. El. 815, 816. S. C. adjudged. 4 Co. 119 b. S. C. but S. P. does not appear. 2 Rol. Abr. 699. Pl. 11. S. C. Et vid. Cro Jac. 411. Cro. Car. 169.

Deed is void. P. 43 El. B. R. **between** (d) Dumper **and** Sims **adjudged.**

2. If the Sheriff makes a Warrant to a Corporation that hath Return of Writs, to arreſt a Man, they may by Parol make a Bailiff to execute it. *Paſch.* 41 *Eliz. Vaviſor*'s Caſe. *Moor* 552. *Pl.* 744. agreed *per totam Curiam.*

3. If a Leaſe for Years be made to a Corporation aggregate of many, they cannot make an actual Surrender thereof but by Deed under their Seal. *Trin.* 11 *Jac.* 10 *Co.* 68. *per Curiam* adjudged.

4. But if they accept a new Leaſe thereof, this is a Surrender in Law of their firſt Leaſe. 11 *Jac.* 10 *Co.* 68. b.

5 If the Church-wardens of *S.* are incorporated, *&c.* and the King leaſes, *&c.* to them for 21 Years, and in Conſideration of a Surrender thereof, leaſes to them for 50 Years; they may with their own Hands, and without Writing, (e) deliver the firſt Letters Patents into *Chancery* to be cancelled. *Trin.* 11 *Jac.* 10 *Co.* 68. *per Curiam.*

(e) A Dean and Chapter in their Chapter-Houſe acknowledged a Deed of Grant of their Lands to the King, without making an Attorney. Moor 676. Pl. 920. held clearly by Egerton, Lord Keeper, that it might be done, as well as to put their Common Seal to a Deed without Attorney: But vid. 1 Leon. 184. 1 Rol. Rep. 82.

Fol. 515.

(L) What Things ſhall go in Succeſſion.

(a) But a ſole Corporation by Cuſtom may be enabled by the ſame Cuſtom to take a Chattel in Succeſſion. 4 Co. 65. Cro. El. 464, 682. (b) Hob. 64. S. P. Dyer 48. Pl. 15. Co. Lit. 9. a.

1. (a) **Regularly, (b) no Chattel ſhall go in Succeſſion, in Caſe of a ſole Corporation.** Co. Lit. 46. b. Coke 4. Fulwood 65.

(c) Co. Lit. 46. b.

(d) The Ornaments of the Chapel of the Predeceſſor belong to the ſucceeding Biſhop, and are meerly in Succeſſion; though other Chattels in Caſe of a ſole Corporation belong to the Executors of the Deceaſed, and go not in Succeſſion. 12 Co. 105. —So the ancient Jewels of the Crown ſhall go to the Succeſſor, and are not deviſable by Teſtament. Co. Lit. 18. b. —But may be diſpoſed of by Patent. Cro. Car. 344.

2. (c) **If a (d) Leaſe for Years be made to a Biſhop and his Succeſſors, and the Biſhop dies, this ſhall not go to his Succeſſors, but to his Executors.** Co. Lit. 46. b.

(f) Where the Succeſſor of an Abbot ſhall recover Damages in a Writ of Entry, tho' 'tis otherways in Caſe of a Biſhop, and other ſole Secular Bodies Politick. 2 Inſt. 286. (g) Br. Corporation 25. S. C. Br. Arrearages 6. S. C.

3. **If a (f) Maſter of an Houſe that hath a Covent and Common Seal recovers in an Annuity, and after Arrearages incur, and after he dies, the Succeſſor-Maſter ſhall have the Arrearages, and not the Executor of the Predeceſſor, becauſe the Predeceſſor could not make a Teſtament.** (g) 19 H. 6. 44. b. adjudged.

(h) Br. Arrearages 6. S. C.

4. **But if a Parſon recovers an Annuity, and after Arrearages incur, and after the Parſon dies, the Executor of the Parſon ſhall have the Arrearages, and not the Succeſſor, becauſe he could make a Teſtament.** (h) 19 H. 6. 44. b.

5. The Patent confirmed by Act of Parliament is, That Offenders in practising Physick in London, without Admission by the College of Physicians, shall forfeit 5 l. for every Month, unum Dimidium Regi, & alterum Dimidium dicto Presidenti & Collegio: If the President of the College recovers in Debt against an Offender, and dies, the Successor shall have a Scire Facias to execute it, and not the Executor, for the Predecessor recovered it as due to him and the College. P. 5 Ja. B. R. between (f) Atkins and Gardiner, adjudged.

(i) Cro. Jac. 159. S. C. adjudged. Noy 121. S. C. adjudged. 1 Brownl. 93. S. C. no Judgment.

(a) Pleader.

1. IN Pleading a Leaſe by a Dean and Chapter (b) the Name of the Dean (c) muſt be ſhewed. *Co. Lit.* 3. a.

(a) Quod Villa de B. incorporata fuit is well enough, tho' it had been more proper to have ſaid, That the Mayor, Burgeſſes, &c. or the Inhabitants, &c. were incorporated, &c. Noy 54. Et vid. 2 Brownl. 292. In Debt by the Wardens, &c. for the Forfeiture upon a By-Law, they need not ſhew how they were incorporated, for that their Name argues a Corporation. Hob. 211. (b) And what Eſtate they had. Lat. 14. 121. (c) But vid. 1 Leon. 307.

2. If a Writ of Right is brought by the (d) Warden and College of *All-Souls*, for Lands, *&c. quod clamant eſſe Jus & Hereditatem ſuam*; this is well enough, though 'tis not ſaid *Jure Collegii*, for they have no other Capacity. *Paſch.* 33 *Eliz.* (e) the Warden of *All-Souls* and *Tamworth*, *Cro. El.* 232. adjudged.

(d) But if a Parſon pleads he was ſeiſed, he muſt ſay, Jure Eccleſiæ, for that he hath Two Capacities. Secus of an Abbot, Dean and Chapter, &c. 1 Leon. 153. per Anderſon. —So in Caſe of a Biſhop it muſt be ſhew'd Quo Jure, &c. Davenant and the Biſhop of Saliſbury, 2 Lev. 68. 1 Vent. 223. —Where it cannot be alledged that a Man was ſeiſed Jure Presbyteratus, but ought to be Jure Cantariæ, vid. Cro. Car. 215. —If a Dean and Chapter, being Parſons impersonee of the Church of D. demand the whole Church, &c. they ſhall ſay they were ſeiſed in Jure Eccleſiæ Cathedralis; but if they claim Part of the Glebe only, they ſhall ſay they were ſeiſed Jure Eccleſiæ de D. Pl. Com. 503. b. (e) 1 Leon. 153. S. C. adjudged. 1 And. 272. S. C. adjudged. Et vid. Lat. 14. 121.

Coſts.

Fol. 516.

(a) By 16 Car. 1. cap. 15. in all Caſes where by Law the Plaintiff or Defendant hath Coſts, they ſhall in the Stannary-Courts have the like Coſts.

(a) Coſts.

(A) To whom Coſts ſhall be given.

1. IF Baron and Feme join in an Action, and a Verdict is given for the Plaintiffs, and the Jury aſſeſs Damages, ultra Miſas & Cuſtagia per ipſum, (who is the Baron) circa Sectam ſuam expoſita to ſo much, & pro Miſis & Cuſtagiis illis to ſo much, and thereupon Judgment is given, that the Baron and Feme ſhall recover the Coſts and Damages: Though it is found, that the Baron only expended and diſburſed the Money for the Coſts of the Suit, inaſmuch as the Feme had nothing, yet the Judgment is good, that the Baron and Feme ſhall recover the Coſts; for there cannot be one Judgment for the Coſts, and another for the Damages. M. 9 Car. B. R. between Cruſee and Berry, adjudged in a Writ of Error. Intratur T. 9 Car. Rot. 1163.

(B) In what Actions.

(a) But now vid. 8 & 9 Will. cap. 10.

1. IN a (a) Prohibition, if Iſſue be joined between others, whether the Defendant hath proſecuted in the Court Chriſtian after the Prohibition granted, and it is found againſt the Defendant, the Plaintiff ſhall have his Coſts, as well as where the Defendant is found guilty in an Attachment upon a Prohibition. Mich. 15 Car. B. R. between (b) Facey and Lauge, adjudged, and then vouched Trin. 7 Car. B. where it was ſo reſolved per Curiam, upon a View of ſeveral ancient Precedents.

(b) 1 Rol. Ab. 575. Pl. 24. S. C. which vide, and the Notes there.

2. In an Action upon the Statute of (c) 21 H. 8. for taking a Mortuary againſt the Statute, the Plaintiff ſhall have ſome Coſts, though it is on a Penal Law, (d) becauſe it is brought for a Debt. (e) New Entries 164. contra, Mich. 12 Jac. B. Smith's Caſe, per Curiam.

(c) Cap. 6.

(d) In the Original it is pur ceo que eſt un Debt port.

(e) Co. Entr.

3. If Coſts are awarded to the Defendant in a Prohibition by the Statute of 2 Ed. 6. upon a Conſultation granted, and the Party to whom they are awarded brings Debt for them, he ſhall have his Coſts in this Suit. Mich. 22 Jac. B. R. between Cockeram and Davis, dubitatur; but H. 22 Jac. B. R. it was adjudged per Curiam, that he ſhall have Coſts, becauſe this is a new Suit and Judgment.

4. In an Action of Debt upon the Statute of 1 & 2 Ph. & Ma. cap. 12. of Diſtreſſes upon the Branch of the Statute, by which the 5 l. and triple Damages are given to the Party grieved, for driving a Diſtreſs out of the Hundred, no Coſts are to be given by the Law, becauſe the Statute by Intendment gives triple Damages in lieu of the whole. (f) D. 2 Eliz. 177. 32. Co. Magna Char. 289.

(f) Kelw. 209. a. S. C. N. Bendl. 80. Pl. 125. S. C.

5. But upon the Branch of this Statute of 1 & 2 Ph. & Ma. by which it is enacted, That if any one takes more than 4 d. for impounding a Distress, he shall forfeit 5 l. to the Party grieved, over and besides the Sum taken ultra 4 d. if an Action of Debt be brought by the Party grieved for the 5 l. for that the Defendant took 6 l. ultra the 4 d. for the impounding a Distress, and the Defendant pleads nil debet, and it is found against him, the Jury ought to give * Costs; (g) for here this is a certain Debt before the Action brought, though it be by a Penal Law, and Costs shall be given for the Delay in Non-payment of the Money at the Return of the Summons, as he might have paid it, and been discharged of the Costs; for this is not like to the first Branch of this Statute, where triple Damages are given, nor to other penal Statutes, where the Damages or Debt are uncertain, as upon the 2d of Edw. 6. till Recovery. Mich. 15 Car. B. R. between (h) North and Musgrave, in a Writ of Error upon a Judgment in Banco, where Costs given upon Advice, adjudged per Curiam, and the first Judgment affirmed. Intratur Tr. 15. Rot. 975. New Entries 163. upon the Statute of 13 Eliz. cap. 5. of Forgery of false Deeds. New Entries 164. upon the Statute of 21 H. 8. cap. 6. of Mortuaries, Costs given.

1 Jon. 447. S. C. adjudged.

* Fol. 517.

(g) Whether in an Action by Informer, &c. for 5 l. upon 31 Eliz. for selling an Horse without Telling, &c. vid. 3 Levin. 374.

(h) Cro. Car. 559. 560. S. C. adjudged. March. 56, 61. S. C. adjornatur.

* 5. In an Action upon the Statute of 2 H. 4. cap. 1. for suing before the Admiral for a Thing done upon the Land, in which Case the Statute gives to the Plaintiff double Damages, without speaking of any Costs, yet he shall recover as well double Costs as double Damages. Co. 10. Bilford 116. D. 4, 5 Ma. 159.

(*) In the Original this is 5, as here, and therefore misprinted there.

6. And in the said Action upon 2 H. 4. the Jurors may assess the Damages and Costs entirely, if they will, for Damages include all. Co. 10. Bilford 116.

7. But it seems upon the Statute of 2 H. 4. no Costs shall be given de Incremento by the Court, but only the Costs given by the Jury shall be double, and nothing de Incremento. Hill. 16 Car. B. C between Trelawny and Babbe, so done upon Advice. Intratur P. 16 Car. Rot. 137.

8. But Master Hoddesdon said, there were some (i) Precedents that the Costs given by the Jury should be doubled, and also the Costs given de Incremento; but it seemed to him the other Way, scilicet, to double the Costs given by the Jury only, without any Increase by the Court, to be the sure and safe Way.

(i) Vid. under this Title the Division Double and Triple Costs: Et vid. 3 Lev. 352.

9. At the Common Law, Costs of Suit were not recovered in Plea real, personal, or mix'd. 2 *Inst.* 288.

10. But by the Statute of *Glouceſter*, made 6 *E.* 1. *cap.* 1. by which, in an Assise, *&c.* Damages upon the Insufficiency of the Disseisor are given against him that is found Tenant, and Damages are given in a Writ of *Mort d' Ancestor, Aiel, &c.* reciting, That whereas before that Time, Damages were not taxed but to the Value of the Issues of the Land, it is provided the Demandant may recover against the Tenant the (k) Costs (l) of his Writ, together with his Damage; and that this Act should hold Place (m) in all Cases where the Party is to recover Damages.

(k) This extends to all legal Costs of Suit, but not his Expences of Travel, Loss of Time, &c. 2 Inst. 288. —In a Writ by Journeys-Account, the Plaintiff shall recover his Costs of the first Writ, and the Proceedings thereupon. 2 Inst. 289. —Secus if the first Writ was naught through the Plaintiff's Default. 2 Inst. 288. as if brought against one Joint-Tenant only. Kelw. 127. b. (l) If Judgment arrested, the Plaintiff in a new Action shall not recover the Costs of his First. Cro. Car. 545. (m) This extends to give Costs where Damages are given in any Action by a subsequent Act. Per 2 Inst. 289. —But by Co. 10. 116. a. where a Man before or by this Act did not recover Damages, though single, double, or triple, &c. are given by a subsequent Act, the Plaintiff shall recover no Costs. —As in a Quare impedit. 2 Inst. 289. 10 Co. 116. a. Kelw. 26 a. —Decies tantum. 10 Co. 116. b. —So in an Action upon 5 E. 6. cap. 14. of Ingrossers. 10 Co. 116. b. — But in all Cases where Damages were recovered before or by this Act, the Plaintiff shall recover his Costs also. 10 Co. 116. b.

11. By 43 *Eliz. cap.* 6. in personal Actions in the Courts at *Westminster*, not being for any Title or Interest of Land, nor concerning the Freehold or Inheritance thereof, nor for any Battery, if it shall appear to the Court, and be so signified by the Judge before whom tried, that the Debt or Damage to be recovered amounts not to 40 *s.* the Judges shall award to the Plaintiff no more Costs than Damage, but may less at their Discretions.

12. By 21 *Jac. cap.* 16. it is enacted, That in Case for (n) slanderous (o) Words, to be sued or (p) prosecuted in the Courts at *Westminster*, or other Courts that have Power to hold Plea thereof, after the End of that Session of Parliament, if the Damage is found to be under 40 *s.* the Plaintiff shall recover no more Costs than Damage.

(n) It extends not to Actions for Slander of Title, for that is not properly Slander, but a Cause of Damage; and the Slander intended by the Statute, is to the Person. Law and Horwood, Cro. Car. 141. adjudged. Ley. 82. adjudged. Palm 530, 531. adjudged. 1 Jon. 196. adjudged. (o) If for calling Thief, and causing him to be arrested, &c. and the Defendant is found guilty of both, 'tis not within the Act. Cro. Car. 163, 307. (p) It extends to Actions begun before, and prosecuted after. 2 Rol. Rep. 485. Lat. 2. 58.

13. By 22 & 23 *Car.* 2. *cap.* 9. *Paragr.* 136. for preventing trivial Suits, contrary to the Intention of 43 *El.* (q) commenced in the (r) Courts at *Westminster*, it is enacted, for the making the said Law effectual, That in (s) all (t) (u) Actions of Trespass, Assault and Battery, and other personal Actions, wherein the Judge at the Trial shall not find and (x) certify under his Hand upon the Back of the Record, that an Assault and (y) Battery was sufficiently proved, or that the Freehold or (z) Title of the Land mentioned in the Plaintiff's Declaration was chiefly in Question: If the Jury find Damages under 40 *s.* the Plaintiff shall not recover more Costs than the Damage; and if more Costs given, the Judgment shall be (a) void, &c. and the Defendant may have his Action for such vexatious Suit, &c.

(q) When commenced in inferior Court, and after removed by Habeas Corpus 2 Levin. 124. dubitatur.

(r) By 11 & 12 Will. cap. 9. reciting, that this Act had been taken to extend to the Courts at Westminster only, it is enacted it shall extend to the Courts, &c. in Wales, &c. (s) In Trespass, quare clausum fregit, &c. the Defendant as to the clausum fregit pleads Not guilty, and justifies as to the rest, and for those it is found for him, but as to the clausum fregit against him, and Damage under, &c. 2 Vent. 180, 195. the Plaintiff shall have no more Costs than Damage, because it is in Effect now as if the general Issue was pleaded to the Whole. (t) Trespass for breaking his Close, and putting Stakes in the Ground, is within the Act. Secus if any Thing carried away. 2 Vent. 48. —Where digging Roots, and removing them about Two Yards in the same Ground, amounted to an Asportavit. 2 Vent. 215. (u) For throwing down certain Stalls of the Plaintiff, though Damage under 40 s. yet Costs, because the Statute is intended of such Actions only in which the Freehold might apparently come in Question. Smith and Batterton, Raym. 487. adjudged. 2 Jon. 232. adjudged. —So in an Action for breaking his Close, and impounding his Cattle. Barns and Edgard, 3 Mod. 39, 40. (x) There is no need of a Certificate where by the Pleading it appears that the Title or Interest of the Land is in Question, as in an Action for eating his Grass, per quod his Common was impaired. 2 Mod. 141, 142. (y) But if an Assault only proved, he shall have no more Costs than Damage. 1 Vent. 256. 2 Levin. 102. (z) Where the Defendant justifies for a Way, and Issue is joined upon extra Viam, and found for the Plaintiff, he shall have full Costs. 2 Levin. 234. (a) Yet Q. if it may be avoided by Plea. 2 Vent. 36.

14. By 8 & 9 *Will. cap.* 10. In all Actions of Waste and Debt, upon the Statute for not setting forth Tithes, wherein the single Value, or Damages found by the Jury, shall not exceed 20 Nobles, and in all Writs of *Scire Facias*, and Suits upon Prohibitions, the Plaintiff obtaining Judgment, or any Award of Execution after Plea pleaded, or Demurrer joined, shall recover Costs.

15. And by the same Act, in all Actions of Trespass, where it shall appear at the Trial, and be certified by the Judge on the Back of the Record, that the Trespass was wilful and malicious, the Plaintiff shall recover his full Costs.

Double or Treble Coſts.

1. (a) WHere Damages were before recoverable, and a Statute increaſes them to double or treble the Value, the Plaintiff ſhall recover his double or treble Damages; and Coſts alſo, as (b) Parcel of the Damages, ſhall be trebled. 2 *Inſ.* 289.

(a) 10 Co. 116. a. Hard. 152. S. P. arguendo.

(b) Where the Word Damna includes Coſts alſo. 10 Co. 116. b. Co. Lit. 257. a.

2. But where double or treble Damages are given, where no Damages were formerly recoverable, (c) thoſe Damages only ſhall be recovered, and no Coſts. 2 *Inſ.* 285.

(c) As upon the Statute, 2 Edw. 6. cap. 13. for not ſetting out Tithes, &c. 2 Inſ. 651, Cro. Jac. 70. Cro. Car. 560. Hard. 152. arguendo.

3. (d) In an (e) Action for a forcible Entry upon 8 *H.* 6. *cap.* 9. which gives treble Damages, the Plaintiff ſhall recover not only treble Damages, but (f) treble Coſts alſo. 2 *Inſ.* 289.

(d) 10 Co. 116. b. S. P. 1 Vent. 22. S. P. adjudged. (e) So in an Aſſiſe upon that Statute, for a Diſſeiſin with Force. 10 Co. 116. b. (f) And the Coſts de Incremento, as well as thoſe given by the Jury, ſhall be trebled. Cro. El. 582. 1 Leon. 282. 2 Leon. 52. Co. Lit. 257. b. 3 Levin. 352.

4. (g) In an Action of Waſte againſt Tenant for Life or Years, by the Statute of *Gloceſter*, *cap.* 6. the Place waſted, and treble Damages ſhall be recovered, (h) but no Coſt, becauſe no Action lay againſt them at the Common Law, but the Action and Damages are newly given. 2 *Inſ.* 289.

(g) Kelw. 26. a. S. P. Godb. 210 S. P. adjudged. (h) But vid. 8 & 9 Will. cap. 10. Ant. 222. Pl. 14.

5. But in Waſte againſt Tenant in Dower, *&c.* treble Damages and Coſts alſo ſhall be recovered, becauſe (i) an Action of Waſte lay againſt them at the Common Law, and for Waſte, Damages ſhould have been recovered. 2 *Inſ.* 289.

(i) A Prohibition of Waſte only, in which no Damages were recoverable, but only for Waſte after the Prohibition delivered. 10 Co. 116. a, b.

(a) Joint or ſeveral.

(a) Where Judgment reverſed as to Part of the Damages, ſtood as to the intire Coſts, vid. 1 Rol. Abr. 775. Pl. 3.

1. IF in Debt the Defendant pleads 4 ſeveral Pleas, upon which they are at Iſſue, and the Jury find one Iſſue for the Plaintiff, and Damages 12 *d.* another Iſſue for the Plaintiff, and Damages 10 *d.* and another Iſſue for the Plaintiff, and Damages 6 *d.* and one Iſſue againſt the Plaintiff, (b) they muſt aſſeſs the Coſts entirely, and not according to the Damage ſeverally for every Iſſue found for the Plaintiff. *Hill.* 18 *H.* 8. *Kelw.* 48. ruled accordingly, *per Curiam*.

(b) 2 Leon. 177, 178. 1 Brownl. 3.

2. If in Treſpaſs brought againſt Two Defendants, one is found guilty for himſelf, and the other guilty for himſelf, and Damages ſeverally aſſeſſed, yet the Coſts ſhall be joint. 10 *Co.* 117. b.

Where

Where and in what Cases the Defendant shall have his Costs.

1. BY 23 *H.* 8. *cap.* 15. it is enacted, That in any Suit in a Court of Record or elsewhere, in any Action, Bill, or Plaint of Trespass, upon 5 *Rich.* 2. Debt or Covenant upon any Specialty or Contract, Detinue, Accompt, Charging as Bailiff or Receiver, Case, or (a) upon any Statute for any Offence or Wrong (b) personal immediately done to the Plaintiff; if the (c) Plaintiff (d) after Appearance of the Defendant be (e) nonsuited, or (f) any (g) Verdict (h) pass by lawful Trial against the Plaintiff, the Defendant (i) shall have Judgment to recover his Costs, to be taxed by the Judge of the Court, and the Defendant shall have such Process and Execution for the same, as the Plaintiff should have had in case the Judgment had been for him.

(a) Extends not to an Action for an Escape; for though within the Equity of Westm. 2. that gives it against the Warden of the Fleet, yet it is not properly an Action upon the Statute, because no Mention is made of the Statute in the Declaration, and this was no personal Wrong. 2 Leon. 9, 10. 4 Leon. 182. —Nor to an Action upon 8 H. 6. for a forcible Entry, for that was no personal Wrong; and the Writ says, quod desseisivit. 2 Leon. 9, 10. 4 Leon. 182. —So it extends not to an Action upon 1 & 2 Ph. & Mar. for unlawfully impounding a Distress. 2 Leon. 52. 3 Leon. 92. and the rather because this Action is grounded upon a subsequent Statute. —Nor to an Action upon 5 El. for Perjury. Hut. 22. 1 Brownl. 66. Cro. El. 177. —So it extends not to an Action upon 2 Ed. 6. for not setting forth Tithes, because a meer Nonfesance, and no personal Wrong. 2 Inst. 651. Noy 32. (b) It extends not to an Assise. 1 Brownl. 28, 29. (c) Otherways if he is an Infant. Cro. El. 33. Et vid. 1 Bulst. 189. —Or if the Suit be in auter droit, as by an Executor or Administrator, in the Right of the Testator. N. Bendl. 19. Pl. 28. Kelw. 207. b. Cro. El. 69, 503. Winch. 10, 70. Savil 133. Cro. Jac. 361. 1 Rol. Rep. 63. Cro. Car. 289. Hut. 69. But an Executor, &c. Defendant in such Case shall have Costs. Cro El. 503. Hut. 69, 79. —But if Executors, &c. bring an Action in their own Right, as for a Conversion or Trespass in their own Time, they shall pay Costs. Sav. 134. Hut. 79. (d) 2 Levin. 81, 82. (e) Secus if the Original be discontinued. 1 Leon. 105. Hut. 36. Cro. Car. 575. —The Plaintiff, the Day before the Trial, came into Court, and enter'd a Nolle prosequi; and whether the Defendant should have Costs, Hard. 152. dubitatur. (f) Though special. Cro. El. 465. Hard. 152. (g) In Covenant against Two for not Building, Judgment is given against One by Default, and the other pleads Performance, and it is found for him, the Plaintiff can have no Judgment, but the Defendant shall have his Costs. 1 Levin. 63. (h) Not upon Demurrer, that goes to the Writ only: Secus if to the Action. 1 And. 187. But Q. if upon any Demurrer: Et vid. Hard. 152. Cro. Car. 533. March. 30. & 8 & 9 Will. cap. 10. by which given. (i) Though Judgment is not given upon the Nonsuit, but upon the Insufficiency of the Pleading. Moor 625. Pl. 857. Winch. 69. 3 Bulst. 248. Godb. 220. Et vid. Dyer 32. b. Cro. Jac. 159.

2. Provided that if at the (l) Commencement of the Suit, the Plaintiff is admitted *in Forma Pauperis*, he shall pay no Costs, (m) but shall suffer such other Punishment as the Judge of the Court shall think fit.

(l) One is admitted in Forma Pauperis. and after dispaupered, &c, whether he should pay Costs, 1 Rol. Rep. 88. dubitatur. (m) The usual Course in such Cases is to tax Costs, and if not paid, to whip the Plaintiff; but upon Consideration of the Circumstances of the Case, it is in the Discretion of the Court to spare both. 1 Sid. 261.

3. But by 24 *H.* 8. *cap.* 8. the Defendant shall recover Costs where an Action is sued to the King's Use.

4 By 8 *Eliz. cap.* 2. If upon a *Latitat*, *alias* or *Plurias Capias* issuing out of the *King's Bench*, the Plaintiff does not declare within Three Days after Bail put in, or after Declaration, shall delay, (n) or suffer his Suit to be discontinued, or be nonsuit, the Court shall award the Defendant his Costs and Damage.

(n) 1 Leon. 105.

5. So by the same Act; in the Court of *Marshalsea*, and other Corporations and Liberties where the Courts are kept *de Die in Diem*; but if not kept so, then the Plaintiff shall declare at the next Court after Appearance; and if after Declaration he shall delay, *&c.*

6. By (o) 18 *Eliz. cap.* 5. for redreſſing Diſorders in (p) common Informers, *inter alia* it is enacted, That if any ſuch Informer or Plaintiff delays his Suit, diſcontinues, or is nonſuit, or the Trial or Matter paſs againſt him by Verdict, or (q) Judgment of Law, he ſhall pay Coſt and Damage, to be aſſigned by the Court, for which the Defendant ſhall have a *Capias*, *&c.*

(o) This Act is perpetual by 27 El. cap. 10.
(p) Extends to one that never informed before.

1 And. 116. —But not where the Penalty is given to the Party grieved, and he informs for himſelf and the King. 1 And. 116. Sav. 50, 51. Cro. El. 177. 2 Leon. 116. —But where after a Verdict for the Informer, the Judgment was arreſted, becauſe the Statute upon which grounded was expired. Hut. 35. dubitatur. (q) As Demurrer. Hut. 36.

7. Provided this Act ſhall not reſtrain any Perſon, *&c.* to whoſe Uſe any Forfeiture, *&c.* is limited.

8. Provided it ſhall not extend to any Officers that have uſed to exhibit Informations, *&c.*

9. By the Statute of 4 *Jac. cap.* 3. it is enacted, That if (r) any Perſon, after the End of that Seſſion of Parliament, ſhould commence or ſue in any Court of Record, or other Court, any Action, Bill, or Plaint of Treſpaſs, Ejectment, or other Action (s) wherein the Plaintiff or Demandant (t) might have Coſts, and after Appearance of the Defendant becomes nonſuit, or any Verdict paſſes by lawful Trial againſt him, the Defendant ſhall have Judgment to recover his Coſts, to be aſſeſſed and levied as Coſts by 23 *H.* 8.

(r) Extends not to Executors who ſue in auter Droit. Cro. Jac. 229. Yelv. 168. 1 Brownl 107. Et vid. the Notes upon 23 H. 8. —But where for a Converſion or Tort in their own Time, they ſhall pay Coſts. Arkey and Heard, Cro. Car. 219. 1 Jon. 241. 1 Vent. 109, 110. Et vid. Lat. 114. Noy 64. —Tho' named therein Executors, for it is but Surpluſage. Dal. 96. Lat. 220 1 Vent. 92. —But vid. Maſon and Jackſon, 2 Levin. 60. adjudged con: per totam Curiam, becauſe in the Right of the Teſtator, though of a Thing done in their own Time. —So in a Raviſhment of Ward brought by Executors, for a Raviſhment in their Time. Peacock and Steer, Cro. Car. 29 by Three Judges con. Yelv. Hut 78. Two againſt Two. —But if an Executor brings an Indebitatus upon an Account made in his Time, it is in the Right of his Executorſhip, and he ſhall pay no Coſts. Bull and Palm. 2 Levin. 165. 2 Jon. 47. adjudged. (s) Not in an Attaint where the firſt Verdict is affirmed, becauſe if the Jurors had been attainted, the Plaintiff ſhould have had ſuch Coſts only as in the firſt Action, if found for him, but not more, in Reſpect of the Attaint. Daly and Bellamy, Cro. Car. 542. adjudged. March 24. adjudged. 1 Jon 432. adjudged. (t) Though the Declaration is inſufficient, yet the Defendant ſhall have Coſts. Dove and Knapp, 2 Rol. Rep. 213. adjudged. Palm. 147. adjudged. Et vid Godb. 329, 345. Hob. 219, 284. Hut. 16. Palm. 365. Et vid. 3 Levin. 322. Styl. 153. —Tho' the Niſi Prius Roll varied from the Pleas Roll, ſo as the Nonſuit was immaterial. Ray 38.

10. By the Statute, 7 *Jac. cap.* 5. it is enacted, That if any Action upon the Caſe, Treſpaſs, Battery, or Falſe Impriſonment, ſhall be brought in the Courts at *Weſtminſter*, or elſewhere, againſt any Juſtice of Peace, Mayor, Bailiff of City or Town-Corporate, Headborough, Portreeve, Mayor, Bailiff, (u) Conſtable, Tithing men, Collectors of Fifteenths and Subſidies, concerning any Thing by them done by Vertue of their Office; they, and all others doing any Thing in their Aſſiſtance, or by their Command, concerning their Office, may plead the general Iſſue, *&c.* and (w) if the Verdict ſhall paſs with the Defendant in any (x) ſuch Action, or the Plaintiff become nonſuit, or ſuffer a Diſcontinuance, the Juſtices, or (y) ſuch Judge before whom the Matter ſhall be tried, ſhall allow the (z) Defendant his double Coſts, *&c.*

(u) Extends to a Deputy-Conſtable. 3 Bulſ. 77. per Curiam, but no Judgment. 1 Rol. Rep. 274. Moor. 845. Pl. 1141.
(w) Though
(x) But this extends not to an Action upon the Caſe againſt a Conſtable, for preſenting that the Plaintiff was an Inhabitant of A. by reaſon of which he was compelled to pay, &c. unjuſtly, becauſe no Treſpaſs or Falſe Impriſonment, wherein Liberty is given to plead Not guilty. Cro. Car. 467 —Nor to an Action by a Freeman againſt a Mayor, for refuſing his Vote in the Election of a Mayor, becauſe a Nonfeſance. 2 Levin. 251. and ſaid per Curiam, That the Intent of the Statute was to give double Coſts in Falſe Impriſonment, &c. where it enabled to plead the general Iſſue. (y) It cannot be allowed, unleſs the Judge of Aſſiſe marks the Poſtea. 2 Vent. 45. 2 Levin. 251. Winch 16.
(z) All the Defendants. Vaugh. 117.

Judgment is after given upon the Inſufficiency of the Declaration. Cro. Car. 175.

11. By the Statute 21 *Jac. cap.* 12. the Statute 7 *Jac.* is made perpetual: And it is thereby further enacted, That Church-wardens, and all Perſons call'd Sworn-men, executing the Office of Church-wardens and

(a) Vid. 43. Eliz. cap. 2. paragr. 19. (b) Not where an Action is brought against Church-wardens for falsely and maliciously presenting the Plaintiff for Incontinency, because meerly Ecclesiastical, and the Statute is intended only where troubled concerning Temporal Matters. Kercheval and Smith, Cro. Car. 286. adjudged. 1 Jon. 305. adjudged.

(a) Overseers of the Poor, and others which shall do (b) any Thing by their Assistance or Command concerning their Office, shall have Benefit of 7 *Jac.*

12. By 8 & 9 *Will. cap.* 10. in Trespass, Assault, false Imprisonment, or Ejectment against several, if any one or more is acquitted by Verdict, every Person so acquitted shall recover his Costs, as if a Verdict had been given against the Plaintiff, unless the Judge shall immediately after Trial, in open Court, certify upon the Record, that there was a reasonable Cause for making such Person Defendant.

13. And by the same Act, in all Actions of Waste, Debt upon the Statute, for not setting forth of Tithes, where the single Value, or Damage, found by the Jury, exceeds not 20 Nobles, and in a *Scire Facias*, and Suits upon Prohibitions, the Plaintiff shall recover his Costs; and if the Plaintiff be nonsuit, or discontinue, or a Verdict pass against him, the Defendant shall recover his Cost, *&c.*

Costs and Damages.

In Replevin.

1. AT the Common Law, no Damages were to be given for the Defendant in Replevin; though in many Cases, where an Avowry or Conusance was made, and a Return prayed, the Defendant was an Actor. *Trin.* 15 *Car.* 2. 1 *Jon.* 434. by *Bramston* Chief Justice.

2. But by 7 *H.* 8. *cap.* 4. every Avowant, and Person that makes Conusance, or justifies as Bailiff in Replevin, or Second Deliverance, (a) for (b) any Rent, Custom, or Service, if (c) their Avowry, Conusance, or Justification, be found for them, or the (d) Plaintiffs otherways barred, shall recover their Damages and Costs as the Plaintiff should have done if he had recovered.

(a) Extends not where Avowry Damage-Feasant. Dyer 141. b. Ow. 14. (b) Not if for a Rent Charge. Ow. 14. (c) If Defendant avows for 36 l. for a Year and half's Rent, and the Plaintiff pleads Payment of 12 l. and there is another Issue for the 24 l. and the First Issue is found for the Plaintiff, and the Second for the Defendant, the Plaintiff shall have no Costs or Damages, but the Avowant shall have a Return, Damages, and Costs, Cro. Jac. 473. (d) Extends not to a Nonsuit. 1 Jon. 423.

(e) Extends to Executors that avow by 32 H. 8. a subsequent Statute. 2 Rol. Rep. 457.

3. But by 21 *H.* 8. *cap.* 19. by which the Lord may avow as in Lands within his Fee, without naming any Tenant in certain, 'tis further enacted, That (e) every Avowant, or other Person (f) making Justification or Conusance as Bailiff or Servant, in Repleviu or Second Deliverance, (g) for Rents, Customs, (h) Services,

(f) Extends not to Defendant that claims Property. Hard. 153 (g) The Defendant avowed the Taking as a Stray within his Manor; and whether he should have Costs, Haslop and Chaplain dubitatur, but Judgment reversed for another Cause. Cro. El. 257, 329. Ow. 13. But 1 Jon. 435. cited, and said, the Judgment was reversed, because Damages and Costs were given, and that this Reason is enter'd upon the Roll. —Not if an Avowry for an Amercement in a Leet, &c. Porter and Gray, Cro. El. 300. adjudged. Samuel and Loder, Moor 893. Pl. 1257. Cro. Jac. 520. 2 Rol. Rep. 75, 76. but releasing his Damgaes, he had Cost by 4 Jac. Et vid. 1 Jon. 424, 435. But by Cro. El. 257, 329. it has been the constant Practice since this Act to give Cost and Damages. —Where the Avowry was for the Penalty upon Breach of a By-Law, James and Tinny, the Court divided. Cro. Car. 497, 532. 1 Jon. 421, 435. March. 29, 30. (h) Where the Avowry for Relief dubitatur, because no Service, but a Flower thereof only, and goes to Executors. Cro. Jac. 28. Cro. Car. 422, 533, 534. 1 Jon. 422. 2 Rol. Rep 75. —But upon a Distress for an Herriot, no Question but Costs shall be paid. Cro. Jac. 28. per Poph. Yet vid. Cro. El. 257, 329

(i) Damage Feſant, or for other (k) Rent or Rents, if the Avowry, Conuſance, or Juſtification, be found for them, or the (l) Plaintiff be nonſuit, or otherways barred, they ſhall recover Damages and Coſts as the Plaintiff ſhould have done.

(i) But he ſhall recover Damages for the Treſpaſs at the Time of the taking only, and not for the mean Time. Dal. 52. (k) Extends not to an Avowry for a Nomine Pœnæ. (l) Therefore, 2 Sid. 155. where the Defendant avowed for a Rent-Charge, and the Plaintiff after Evidence was nonſuit, the Court took the Verdict of the Jurors, who found for the Defendant, and aſſeſſed Damages and Coſts.

Coſts.

In a Writ of Error.

1. AT Common Law, no Coſts were recoverable in a Writ of Error. *Mich.* 39 *&* 40 *Eliz. Cro. El.* 588. *per Curiam.*

2. By (a) 3 *H.* 7. *cap.* 10. whereas Plaintiffs or Demandants had been delayed of Execution, for that Defendants, *&c.* againſt whom the Judgment was given. or others bound thereby, brought Error to reverſe the Judgment, to the Intent only to delay Execution, it is enacted, That if any (b) Defendant, *&c.* or (c) others bound thereby, before Execution had, bring any Writ of Error, (d) in Delay of Execution, then if Judgment be affirmed, or the Writ of Error diſcontinued through Default of the Party, or the Plaintiff therein be nonſuit in the ſame, the Party againſt whom the Writ of Error is uſed ſhall recover his Coſts and Damage for the Delay and wrongful Vexation, by the Diſcretion of the Juſtices before whom the (e) Writ of Error is ſued.

(a) Extends not to Ireland. 1 Sid. 357. therefore a Judgment upon a Writ of Error in the King's-Bench there, wherein Coſts was given, was reverſed here.

(b) Extends not where Judgment was given for the Defendant, and the Plaintiff brings the Writ of Error. 2 And. 123. Cro. Car. 401. But vid. 8 & 9 Will. cap 10. (c) Extends not to Executors or Adminiſtrators, that bring Error upon a Judgment againſt their Teſtator, becauſe in auter droit. 1 Vent. 166. 1 Mod. 77. — Nor where they bring it upon a Judgment againſt themſelves. 3 Levin. 375. (d) Nor Coſts given, where upon Examination it appears that Execution was ſerv'd tho' it appeared not by the Record. Cro. Jac 636. Cro. Car. 401. — Nor in Error upon a Judgment in Ejectment, where Execution was ſerved, as to the Coſt and Damages, but not as to the Term. 1 Vent. 88. — Nor in Error upon a Judgment in a Formedon, or other Action, wherein no Coſts or Damages were recovered in the firſt Action, ſo that Execution was delayed for the Land only. Cro. Car. 425. 1 Vent 88. 1 Levin. 146. Raym. 134. — But yet vid. Cro. El 6·7. 659. con. —— Secus in a Quare impedit, though therein no Coſts are recoverable, but Damages only. Dyer. 77. Cro. Car. 145, 175. (e) Extends to a Writ of Error in the Exchequer-Chamber, though given by a ſubſequent Statute. 2 And. 123. Cro. El. 588.

3. By the Statute of 19 *H.* 7. *cap.* 20. the Act of 3 *H.* 7. is confirmed; and it is further enacted, That the ſame ſhould from thenceforth be put in Execution.

4. By 13 *Car.* 2. *Stat.* 2. *cap* 2. *paragr.* 10. it is enacted, That if any proſecute a Writ of Error for Reverſal of any Judgment after Verdict, in the Courts of *Weſtminſter*, Counties Palatine of *Cheſter*, *Lancaſter*, or *Durham*, or of the Great Seſſions in *Wales*, and the Judgment is affirmed, they ſhall pay double Coſts, popular Actions upon penal Laws, (except Debt for Tithes) Indictment, Informations, *&c* excepted.

5. By 8 *&* 9 *Will. cap.* 10. if in any Action, *&c.* upon Demurrer by Plaintiff or Defendant, Judgment ſhall be given for the Defendant, or if after Judgment for the Defendant in ſuch Action, *&c.* the Plaintiff ſhall bring Error, and the Judgment ſhall be affirmed, the Writ of Error diſcontinued, or the Plaintiff nonſuit, the Defendant ſhall have Judgment for his Coſts, and Execution for the ſame by *Capias ad ſatisfaciendum*, *&c.*

Covenant.

(A) How.

(z) But not upon the Counterpart. Mid. Noy 53.

1. **An Action of Covenant lies upon a Deed (z) indented without Doubt.**

2. **An Action of Covenant lies upon a Deed-Poll.**

3. **As if A. recovers a Debt against B. and B. pays the Money to A. upon which A. releases all Actions and Executions, &c. to B. and by the same Deed promises him to discharge the said Judgment, and not to sue Execution thereupon, and after sues Execution against him, he may have a Writ of Covenant upon this Deed, and not an Action upon the Case.** Mich. 16 Jac. B. R. **between** (a) Bemishe **and** Hilderfly **adjudged.**

(a) 1 Part 33. Pl. 21. S. C. Cro. Jac. 505, 506. S. C. adjudged per totam Curiam.

4. If *A.* having Licence by Patent to buy *Spanish* Wool, *&c.* by Indenture grants the Licence to *B.* for Eight Years, and in Consideration thereof, *B.* covenants to pay him 100 *l.* Yearly at *Lady-day* and *Michaelmas*, and that every Year at *Lady-day*, or within 20 Days after, he will make a new Bond for Payment of the Money; provided that if *B* does not yearly make the Bond, or fails in Payment of the Money, that then and from thenceforth the Indenture, and every Clause, *&c.* therein contained, shall be void: And *B.* fails of making the Obligation at the first Day, yet *A.* may have an Action upon the Covenant, for it was said, the Intent of the Parties was only that it should be void as to have any Benefit of Covenants broken *in Futuro*; but as to Covenants broken before, it was never their Intent (b) but that the Party should have Advantage of them. *Mich.* 29 *&* 30 *El.* between *Nunns* and *Gee*, *Cro. El.* 77, 78. adjudged; though it was objected, that the Breach of the Covenants made the Indenture void; and being both at a Time, there was no Priority.

(b) Cro. El. 244. 2 Brownl. 167. 3 Leon. 69. Hob. 168.

5. The Dean and Chapter of *Norwich*, 8 *El.* leased to *B.* for 99 Years, and after, in 42 *Eliz.* they leased to *C.* for Three Lives, and covenanted to save him harmless against *B.* If he is disturbed by *B.* he may have an Action of Covenant against the Dean and Chapter, (c) tho' the Lease is void; because the Covenant is for a Thing collateral, as that the Lessor is Owner, *&c.* and the Covenant was broke immediately upon sealing the Lease to *C.* *Pasch.* 10 *Jac.* between (d) *Waller* and the Dean and Chapter of *Norwich*, *Ow.* 136. adjudged.

(c) Secus if Lessee for Years grants so much of the Term as shall be to come at the Time of his Death, and covenants that the Lessee shall enjoy it. Caponhurst and Caponhurst, 1 Lev. 45. adjudged; and that the Bond for Performance of Covenants was void also. Ray. 27. adjudged. Yelv. 19. Styl. 357. (d) 1 Brownl. 21, S. C. adjudged; and said by Coke, that otherways the Mischief would be great, for the Dean might lease to one, and after to another; and though there was a Covenant for Enjoyment in the second Lease, yet the Lessee should be without Remedy. Moor 877. S. C. but said, the Court agreed the Lease was not void, because the Dean was living. Et vid. 2 Brownl. 134, 136, 158, 159, &c.

(B) Upon

(B) Upon what Deed.

1. (a) A Writ of Covenant lies upon the King's Patent, tho' there is no Counterpart ſealed by the Leſſee who is to be charged. My Reports, 14 Jac. B. Sir J. (b) Brett and Cumberland, for his own Acceptance. Hill. 16 Ja. B. R. in a new Action between the ſame Parties, adjudged again.

(a) Lord Ewze and Strickland S. P. Cro. Jac. 240. adjudged. 1 Bulſ. 21.

S. C. But S. P. does not appear. (b) Cro. Jac. 399, 521, 522. S. C. adjudged. 3 Bulſ. 163, 164. S. C. adjudged. 1 Rol. Rep. 359. 2 Rol. Rep. 63, 64. S. C. adjudged. Poph. 136, 137. S. C. adjornatur. Godb. 276. S. C. adjornatur.

2. If A. grants a Rent to B. payable at a certain Feaſt Yearly, and covenants to pay the Rent at the Feaſt; an Action of Covenant lies for Non-payment, (c) though he might have had an Action of Debt for it. M. 7 Ja. B. between (d) Stronge and Wats, per Curiam adjudged.

Fol. 518.

(c) But where Covenant or Debt lies. vid. the Diviſions, Title Debt.

(d) Wordant and Wats, 1 Brownl. 19. ſeems to be the S. C.

3. If one Man covenants with another to pay him 20 l. at a Day; though he may have (e) an Action of Debt for the 20 l. yet he may have a Writ of Covenant at his Election. H. 7 Ja. B. per Curiam.

(e) But where Debt or Covenant lies, vid. the Diviſions, Title Debt.

(C) What Words will make an expreſs Covenant.

1. These Words in a Deed of Leaſe, And the Leſſee ſhall repair the Mills (being the Thing leaſed) as often as Need ſhall require, and ſhall leave them ſufficiently repaired at the End of the Term, make a Covenant, (a) becauſe it is a clear Agreement of the Parties, and otherways the Words ſhall leave, &c. ſhould have no Effect. My Reports, 14 Ja. (b) Sir J. Brett againſt Cumberland. Hill. 16 Ja. B. R. between the ſame Parties, adjudged again in a new Action.

(a) As if A. by Indenture agrees to give B. 70 l. for an Houſe: If B. executes one Part of the Indenture to A. A. may bring Covenant for the Houſe. Pordage and Cole, 1 Lev. 274. per Curiam. Raym. 183. per Curiam. 1 Saund. 319, 320. that on the Part of B. it amounted to a Covenant to convey. 1 Sid. 423. per Curiam.

(b) Cro. Jac. 399, 521, 522. S. C. adjudged. 3 Bulſ. 163, 164. S. C. adjudged. 1 Rol. Rep. 359 2 Rol. Rep. 63, 64. S. C. adjudged. Godb. 276. S. C. adjornatur. Et vid. Moor. 135. Pl. 280.

2. If Leſſee for Years covenants to repair, &c Provided always, and it is agreed, That the Leſſor ſhall find great Timber, &c. This makes a Covenant of the Part of the Leſſor to find great Timber, by the Word agreed; and it ſhall not be a Qualification of the Covenant of the Leſſee. Tr. 12 Ja. B. between (c) Holder and Taylor, per Curiam.

(c) Hob. 12. ſeems to be S. C. but S. P. does not appear. 1 Brownl. 23. S. C. and S. P. appears. 1 Sid. 423. S. C. cited. Et vid. 2 Rep. 72. b.

3. But if the Leſſee covenants to repair, (d) Provided always, That the Leſſor ſhall find great Timber, without the Word agreed;

(d) Where the Word when inſerted by Way of Agreement, makes a Covenant, and not a Condition, vid. 1 Lev. 155.

this Proviso shall not make any Covenant on the Part of the Lessor, but it shall be only a Qualification of the Covenant of the Lessee. Tr. 12 Ja. B. between Holder and Taylor, per Curiam.

4. If there are Articles of Agreement, made by Indenture between A. and B. in which A. agrees, That B. shall have a House in a Street in London for certain Years; provided, and upon Condition, That B. shall receive and pay the Rents of the other Houses of A. in the same Street, mentioned in a Schedule annexed to the Indenture; and it is further agreed, That B. for his Labour in the Collection of the said Rents, shall have the Overplus of the Rents over and above such a certain Sum: This is not any Covenant on the Part of B. to bind him to receive and pay the Rents mentioned in the Schedule; but the Proviso and Condition only will make the Estate of B. void in the House, (this being a Lease) and will not make a Covenant. Mich. 4 Car. B. R. between (e) Geary and Read, adjudged upon a Demurrer upon the Declaration; which intratur, P. 4 Car. Rot. 432.

(e) Cro. Car. 128, 129. S. C. adjudged.

5. If A. leases to B. for Years, upon Condition that he shall acquit the Lessor of ordinary and extraordinary Charges, and shall keep and leave the Houses at the End of the Term in as good Plight as he found them: If he does not leave them well repaired at the End of the Term, an Action of Covenant lies. (f) 40 Ed. 3. 5. b.

(f) Br. Covenant 4.

S. C. Fitz. Covenant 16. S. C. Vide the Books, by which it appears the Action was brought upon other Woods.

6. If A. leases to B. for Life, with a Proviso, That if the Lessee dies within the Term of 40 Years, that then the Executors of the Lessee shall have it for so many of the Years as amount to the Number of 40 Years, to be accounted from the Date of the Indenture of Lease: (g) This Proviso shall not be a Lease, but only a Covenant. (h) D. 3. 4 Ma. 150. S. 83. (i) Co. 1. Rect. Ched. 155.

(g) Where Words of Covenant make a Lease, and where not, vide 1 Rol. Abr. 487. Letter X. (h) Moor 247. Pl. 388. cited. (i) Moor 478, 480. Pl. 684. S. C. 1 Rol. Abr. 848. S. C. Et vid. the Notes thereupon.

7. If there are Articles of Agreement between A. and B. by which it is agreed, upon a Marriage intended between A. and C. That all the Stock of C. shall remain in the Hands of B. till A. shall make a certain Jointure to C. ipso B. annuatim solvendo to A. Interesse proinde, secundum Ratam 8 l. per Centum, * &c. If B. does not pay the said Interest, an Action of Covenant lies against him upon these Words, because (k) every (l) Agreement by Deed is a Covenant, and otherways A. shall not have any Remedy for the Money. M. 8 Car. B. R. between Cross and Northey adjudged upon Demurrer. Intratur, P. 8. Rot. I my self being de Consilio Querentis.

* Fol. 519.

(k) So where a Man acknowledges himself to be accountable to another for all Monot by him charged upon A. to be paid to B. 1 Lev. 47. —Where the Words were only by Way of Recital, that it was intended that a Fine should be levied, &c. 2 Mod. 89, 91. And vid. 1 Leon. 122.

(l) Where a Man assigns and transfers a Chose in Action, though nothing passes, yet it amounts to a Covenant, that the other shall have the Thing. 1 Mod. 133.

8. If A. makes a Deed to B. in these Words: I have in my Custody one Writing Obligatory, in which Writing Obligatory one William now standeth bound to the said B. for the Payment of 400 l. upon such a Day, being the proper Money of B. and (m) I will be ready at

(m) So where the Words of a Deed are, I oblige my self to pay so much Money at such a Day, and so much at another. Hard. 178 adjudged. But the Chief Baron doubted if the Words had been, teneri & firmiter obligari; for that those Words found in Debt, and not in Covenant.

all Times when I ſhall be required, to re-deliver the ſame Writing Obligatory to the ſaid B. If B. after demands the ſaid Obligation of A. and he refuſes to deliver it, B may have an Action of Covenant upon this Deed by Force of the Words, and I will be ready at all Times when I ſhall be required to redeliver the ſame. Paſch. 11 Car. B. R. between Walker and Walker, adjudged upon a Demurrer per Curiam, this Matter being opened and conceived by the Court; but the Counſel of the other Part did not queſtion it. Intratur, Hill. 11 Caroli, Rot. 311.

9. If a Man conveys Lands to another in Fee, with (n) Warranty, and after the Land is evicted by elder Title for certain Years; the Grantee of the Land may have an Action of Covenant upon the ſaid Words againſt the Grantor upon this Eviction, though the Warranty be annexed to a Freehold; for the ſaid Words make a Covenant, if a Chattel be evicted, and a Warranty if a Freehold be demanded. My Reports, P. 12 Ja. Camera Scaccarii, between (o) Rudg and Pincombe, adjudged in a Writ of Error. Vid. ſame Caſe, P. 12. Jac. B. Hobart's Reports (p) 5.

(n) The Warranty was created by the Word Dedi only. Yelv. 139.

(o) 1 Rol. Rep. 25, 26. S. C adjudged, and affirmed upon a Writ of Error in Cam' Scac'. Yelv. 139. S. C. adjudged; and ſaid, that was the Firſt Caſe that was adjudged upon this Point. Noy 131. S. C. adjudged.

(p) Hob. Fol. 3. adjudged by all the Judges in Cam' Scac'.

10. If a Man leaſes for (q) Years, reſerving a Rent, an Action of Covenant lies for Non-payment of the Rent, for the (r) reddendo of the Rent is an Agreement for Payment of the Rent, which will make a Covenant.

(q) If for Life. 2 Jon. 102. dubitatur.

(r) Styl 387. S. P. adjudged, becauſe it is the Agreement of both Parties. Styl. 406, 407, 431. S. P. adjudged, and affirmed upon a Writ of Error; and that the Words, yielding and paying, make an expreſs Covenant to pay the Rent. Et vid. 2 Brownl. 215. 1 Sid. 266, 401, 447. 2 Mod. 92. 1 Ven. 10. 2 Jon. 102. 3 Lev. 155.

11. If Articles are made by Indenture between *A.* and *B.* by which *A.* covenants to pay 100 *l.* to *B.* at a Day, and *B.* covenants, upon Receipt of the 100 *l.* to give an Acquittance for it, and to enter into Bond to *A.* conditioned to ſave *A.* harmleſs from all Claims to certain Lands in his Poſſeſſion: If *A.* tenders the 100 *l.* at the Day to *B.* it is no Breach of *B*'s. Covenant, if he refuſes to receive it, and to make an Acquittance, *&c.* for perhaps it was the Intention of the Parties that it ſhould be in the Election of *B.* to receive the Money, and make the Acquittance, *&c.* or let it alone. *Trin.* 1655. between *London* and *Craven*, *Styl.* 481. adjudged, *niſi*, *&c.* but *quære*.

(D) In

(D) In what Caſes the Heir or Executor ſhall be bound by the expreſs Covenant of the Teſtator, without naming them.

(b) Cro. Eliz. 553. ſame Rule per Curiam. Dyer. 14. Pl. 69.

1. (b) **In every Caſe where the Teſtator is bound by a Covenant, the Executor ſhall be bound by it,** (c) **if it be not determined by his Death.** (d) 48 Ed. 3. 2.

(c) Viz. where it was to be performed by the Perſon of the Teſtator, the Executor cannot perform it. Cro. El. 553. Et vid. 2 Mod. 268. (d) Br. Covenant 12. S. C. Fitz. Covenant 21. S. C.

(e) Dyer 257. S. P. adjudged, by Three Judges againſt One, who differed from the others, becauſe the Leaſe was by Indenture, which is a Matter of Concluſion; but if it had been by Deed-Poll, he agreed with the reſt. Quære diverſitatem, 1 Brownl. 22. S. P. adjudged.

2. (e) If *A.* be (f) Tenant for Life, the Remainder to *B.* in Fee, and *A.* by Indenture demiſes, *&c.* to *C.* for 15 Years, and after *A.* dies, and *B.* enters upon *C.* yet *C.* ſhall have no Action of Covenant againſt the Executors of *A.* for the Covenant was but (g) during the Term, which determined by the Death of the Tenant for Life. *Mich.* 7 *Eliz.* between (h) *Swain* and *Serles & al'*, Executors of *Driland.* 1 *And.* 12. adjudged.

(f) So if Tenant in Tail demiſes, and dies without Iſſue. 1 And. 12. 1 Leon. 179. Cro. El. 157. Et vid. Lit. Rep. 334. (g) So if the Leſſee had granted, bargained, and ſold, all his Eſtate to another, (admitting there was by theſe Words a Warranty implied) yet it determines with the Eſtate. Landydal and Cheney. Cro. El. 157. adjudged. 1 Leon. 179. differs from the Report by Cro. (h) Moor 74. Pl. 204. S. C. adjudged. Benl. 150. Pl. 208. S. C.

(E) Executor.

(a) Br. Covenant 12. S. C. Fitz. Covenant 21. S. C.

If a Man covenants, That A. ſhall ſerve B. as an Apprentice for Seven Years, and dies; if A. departs within the Term, a Writ of Covenant lies againſt the Executor of the Covenantor without naming. (a) 48 Ed. 3. 2.

(F) Covenant in Law.

In what Caſes the Law will create a Covenant without the Words of the Party.

(a) In Andrew's Caſe, 2 Leon. 104. & Cro. El. 214. it is held by Two Judges to be otherways if a Stranger ouſts him; for by Fenner, when Covenant is brought upon the Word Dimiſi, the Plaintiff ſhall not recover Damages, but the Term it ſelf, which he cannot againſt a Stranger: But Q. for I think the Books admit not of this Diverſity where the Ouſter by the Stranger is with Title. (b) So if the Cattle of the Leſſee are diſtrained by the Lord Paramount, he may have Covenant againſt his Leſſor. Raym. 257. (c) Br. Covenant 12. S. C. Fitz. Covenant 21. S. C. (d) Br. Treſpaſs 65. S. C.

1. **If a Man leaſes for Years,** (a) **and** (b) **ouſts the Termor, he ſhall have Covenant againſt him, though there be no expreſs Covenant in the Deed.** (c) 48 Ed. 3. 2. b. (d) 7.

2. If a Man leaſes certain Goods for Years by Indenture, which are evicted within the Term, yet he ſhall not have a Writ of Covenant; for there the Law does not create any Covenant upon ſuch Perſonal Thing. Contra, Mich. 37 Eliz. between (e) Bedford and Bull.

(e) Bedford and Hall, Ow 104, 105. S. C. adjornatur.

3. If a Man (f) makes a Leaſe for Years of Land, by the Words (g) *conceſſi* or *dimiſi*, they import a Covenant: And if the Leſſee or his Aſſignee are evicted, they may bring an Action thereupon. 5 *Co.* 17. a. reſolved. 18. a.

(f) So if an Aſſignment thereof be made by the Word Grant. Perſon and Jones, 2 Rol. Rep. 399. Palm. 388. (g) A Man aſſignavit & tranſpoſuit all the Money that ſhould be allowed by any Order of a Foreign State to come to him in lieu of his Share in a Ship. 1 Mod. 113. ſaid by Hale, though it cannot be aſſigned, yet this amounts to a Covenant that he ſhall have all the Money: Et vid. 4 Co. 81. Cro. El. 214. 2 Leon. 104.

4. But if a Man leaſes for Years by the Word *Dimiſi*, and the Leſſor covenants that the Leſſee ſhall enjoy during the Term without Eviction by the Leſſor, or any claiming under him; this expreſs Covenant qualifies the Generality of the Covenant in Law, and reſtrains it by the mutual Conſent of both Parties, that it ſhall not extend further than the expreſs Covenant. *Trin.* 41 *El.* between (h) *Nokes* and *James*. 4 *Co.* 80.

(h) Cro. El. 674. S. C. Yelv. 175. S. C. cited and agreed, becauſe the Grant was good, and became void by Eviction afterwards.

5. If *A.* and *B.* are Joint-Leſſees of a Mill, and *B.* aſſigns to *C.* and dies, and after *A.* reciting the Jointenancy and Death of B. and that all ſurvived to *A.* grants the ſaid Mill to *D.* and covenants that *D.* ſhall enjoy it for any Act done by *A*, *&c.* If *C.* enters, *&c.* *D.* may have Covenant againſt *A.* (i) for as to a Moiety, the Grant was void, for *A.* had no Power to grant what before was granted by *B.* *Paſch.* 8 *Jac.* between (k) *Johnſon* and *Procter*, *Yelv.* 175. adjudged and affirmed upon a Writ of Error.

(i) And if the Special Covenant ſhould qualify the General, the Grantee ſhould not have any Remedy for the half at all. 2 Brownl. 214. (k) Cro. El. 809. S. C. adjourned. Cro Jac. 283. S. C. adjourned. 1 Bulſ. 2. S. C. and Judgment affirmed upon a Writ of Error accordingly. 2 Brownl. 212. S. C. and Judgment affirmed upon a Writ of Error, the Action being brought upon an Obligation conditioned to perform all Grants, &c. and the ſpecial Covenant does not qualify the general expreſs Grant.

6. *A.* by Indenture granted and demiſed to *B.* certain Lands, except a little Piece upon which a Pump was ſtanding, together with the Uſe and Occupation of the Pump, in common with other the Tenants of *A.* for 31 Years, and after the Pump became uſeleſs for Want of Repairs, and *B.* brought Covenant againſt *A.* and aſſigned the Breach in *A*'s permitting the Pump to run to Decay. *Mich.* 21 *Car.* 2. between (l) *Pomfret* and *Ricroft*. 1 *Saund.* 321. adjudged by Three Judges, that the Action lay, for that when the Uſe of a Thing (m) is demiſed, and it runs to Decay, ſo that the Leſſee cannot have the Uſe and Benefit thereof, he may have Covenant upon the Word *Dimiſi*: And here the Leſſee himſelf could not repair, having no Intereſt in the Pump, or Lands where it ſtood. But *Twyſden contra totis Viribus*, becauſe this was only a Nonfeſance, for which no Action lay: As if I grant a Way over my Land, I ſhall not be bound to repair it; and if any Action had lay, it ſhould rather have been an Action upon the Caſe: And he held, That the Leſſee might have repaired the Pump, for by the Grant of the Uſe of the Pump, all Things neceſſary for the Grantee's Enjoyment thereof are granted. But after this Judgment was *una Voce* reverſed in *Cam' Scac'* for *Twyſden*'s Reaſons: And *Hale* ſaid, That if I lend one a Piece of Plate, and covenant he ſhall have the Uſe thereof, yet if the Plate

(l) 1 Vent. 26, 44. S. C. adjudged by Three Judges againſt Twyſden. 1 Sid. 429, 430. S. C. adjudged by Three Judges contra Twyſden; but after reverſed in Cam' Scac' (m) But if A. in Conſideration that B. will build a Mill upon the Land, and a Water-Courſe through the Land, demiſes to B. by the Words dedi & conceſſi, and after A. ſtops the Water-Courſe, yet no Action of Covenant lies, for the Covenant extends not to a Thing which was not in eſſe at the making the Leaſe. 1 Leon. 278.

be worn out by ordinary Uſe, without my Default, no Action of Covenant lies againſt me.

7. If one by Deed grants a Water courſe, and after ſtops it, an Action of Covenant lies againſt him. *Mich.* 21 *Car.* 2. 1 *Saund.* 322. agreed *per totam Curiam:* And *Twyſden* ſaid, this was a voluntary Misfeſance.

Fol. 520.

(G) In what Caſes the Law will create a Covenant.

1. If a Man leaſes to me by Indenture the Land of J. S. of which J. S. is ſeiſed at the Time, upon which I enter, and he re-enters, I ſhall have a Writ of Covenant upon this Indenture, though I was not in the Land by the Leaſe, but by Eſtoppel; for the Leſſor is eſtopped to ſay, that I was not in of his Leaſe. Trin. 3 Jac. B R. between (a) Stile and Herring adjudged, and that ſuch Traverſe is not good.

(a) Cro. Jac. 73. S. C. adjudged.

1 Rol. Abr. 871. Pl. 1. S. C.

2. So for the Cauſe aforeſaid, if a Man leaſes to me my own Land, of which I am ſeiſed in Fee, or otherways by Indenture: If I am ouſted by another that hath right, I ſhall have a Writ of Covenant. Tr. 3 Ja. B. R. in (b) Stile and Herring's Caſe, per Curiam.

(b) Cro. Jac. 73. S. C. & S. P. ſeems to to be admitted per Curiam.

1 Rol. Abr. 871. Pl. 1. S. C.

3. When a Man leaſes to me the Land of J. S. of which J. S. is ſeiſed at the Time; I ſhall have a Writ of Covenant (c) before Entry upon J. S. and Re-entry by him, for I need not alledge an Eviction, for this is a Covenant in Law, which is broke when he is not ſeized of the Land at the Time of the Demiſe, for the Word Demiſe imports a Power of Letting; and it is not reaſonable to enforce the Leſſee to enter into the Land, and ſo to commit a Treſpaſs. Hobart's Reports 18. P. 11 Jac. between (d) Holder and Taylor adjudged. Contra, Tr. 3 Ja. B. R. in (e) Stiles Caſe before cited.

(c) 2 Brownl. 22. S. P.

(d) Hob. 12. S. C. adjudged, and ſaid, that perhaps it would be otherways if the Action was brought upon an expreſs Covenant for quiet Enjoyment.

(e) Cro. Jac. 73.

4. (f) If a Man leaſes the Land of J. S. by Deed to J. D. J. S. being in Poſſeſſion of the Land at the Time of the Leaſe, and the Leſſee enters upon J. S. who re-enters, yet J. D. ſhall (g) not have any Action of Covenant thereupon, becauſe the Covenant in Law ought to be fixed upon an Eſtate, but here was no Eſtate, for it was a void Leaſe, and the Leſſee a Diſſeiſor by his Entry. Mich. 37 Eliz. B. R. in Were's Caſe, per Fenner.

(f) Ow. 105. S. P. per Fenner.

(g) This Word not is wanting in the Original.

5. So if a Man leaſes certain Goods to J. D. which are the Goods of another, and in his Poſſeſſion; if he cannot enjoy them, yet he ſhall not have any Covenant againſt the Leſſor, becauſe he was never a Leſſee. Mich. 37 Eliz. B. R. Were's Caſe dubitatur.

6. If a Man leaſes Lands for Years, and a Stranger enters before the Leſſee enters, he ſhall not have an Action of Covenant upon this Ouſter, becauſe he was never a Leſſee in Privity to have the Action. Mich. (h) 37 Eliz. per Fenner.

(h) Ow. 105. S. P. per Fenner.

(H) What

(H) What Perſons ſhall have Advantage of a Covenant.

The Heir.

1. **There are** (a) **ſome Covenants, of which** (b) **none ſhall have Advantage but the Party or his Heirs.** (c) 42 Ed. 3. 4.

(a) Such as are knit to the Eſtate.

Secus of Covenants in groſs. Palm. 558. (b) But for a Breach in the Time of the Covenantee, the Action ſhall be brought by his Executor, though the Covenant was with him his Heirs and Aſſigns only. Lucy and Levingſton, 1 Vent. 175, 176. adjudged. 2 Lev. 26. adjudged. (c) Fitz. Covenant 17. S. C.

2. (d) **Covenants of Inheritance ſhall deſcend to the Heir.**

3. **As if an Abbot covenants, and hath uſed Time out of Mind to ſing in the Manor of B. for him and his Servants, his Heirs ſhall have Advantage of this Covenant, if B. does not alien.** (e) 42 Ed. 3. 3.

(d) 1 And. 55. Palm. 558.

(e) Cr. Covenant 5. S. C. Fitz. Covenant 17. S. C.

4. **If an Abbot and Covent covenant to ſing for the Covenantee and his Heirs in ſuch a Chapel, his Heirs at all Times ſhall have a Writ of Covenant for the not doing thereof.** (f) 2 H. 4. 6 b. **adjudged.** Co. 5. Spencer 18.

(f) Br. Covenant 17 S. C. Fitz. Covenant 13. S. C.

5. If a Man leaſes for Years, and the Leſſee covenants with the Leſſor, his Executors and Adminiſtrators, to repair, and leave it in good Repair at the End of the Term, and the Leſſor dies, *&c.* his Heir may have an Action upon this Covenant; for this is a Covenant that runs with the Land, and ſhall go to the Heir, though he is not named; and it appears that it was intended to continue after the Death of the Leſſor, inaſmuch as his Executors, *&c.* are named. *Mich.* 25 *Car.* between *Lougher* and *Williams.* 2 *Lev.* 92.

(I) (a) The (b) Aſſignee.

Fol. 521.

1. (c) **If a Man leaſes Land to another by Indenture, this Covenant in Law, created by the Word** Demiſe, **ſhall go to the** (d) **Aſſignee of the** (e) **Term, and he ſhall have Advantage of it.** Contra, Mich. 32 El.

(a) The Aſſignee of the Aſſignee, the Executors of the Aſſignee, the Executors or Adminiſtrators of every Aſſignee, are all compriſed with this Word Aſſigns. 5 Co. 17. b. (b) Extends not to an Aſſignee of a Leaſe by Eſtoppel only. Auder and Mokes, Moor 419. Pl. 577. adjudged. Cro. El. 373. (c) Dyer 257. S. P. per Brown. 4 Co. 80. b. S. P. reſolved. 5 Co. 17 S. P. reſolved. (d) So of Tenant by Statute-Merchant, &c. of a Term. &c. though they came to the Land by Act in Law. 5 Co. 17. a. (e) When the Eſtate paſſes, though by Patol, the Warranty and Covenants follow it, and the Aſſignee of the Eſtate ſhall have the Benefit thereof. Cro. El. 273, 436, 437.

2. If one by Indenture leaſes an Houſe for 40 Years, and the Leſſee covenants with the Leſſor, that he will ſufficiently repair the Houſe during the Term, and that the Leſſor may enter every Year to ſee if the Repairs are done, and (f) if upon View of the Leſſor it was repaired according to the Agreement, that then the Leſſee ſhall hold the Houſe for 40 Years after the Firſt Term ended, and the Leſſee grants the Words, And the Leſſor covenanted that,

(f) This Caſe is ſtated as in the Report, but ſeem wanting.

to another *totum intereſſe Terminum & Terminos quæ tunc habuit in Tenementis*, and after the firſt Term ends, the Aſſignee ſhall not take Benefit of this Agreement. *Trin.* 3 *Fl. Skern*'s Caſe, *Moor* 27. *Pl.* 88. adjudged by Three Judges againſt *Catlyn*, who held, That the Poſſibility was inherent to the Land and Term; but the Three Judges held the contrary, and that the Words would not carry the Poſſibility to the Aſſignee; ſo that there was a Separation between the Term and the Poſſibility, (g) and by Conſequence that Poſſibility was determined, for that it could not ſtand in Groſs: And all the Judges agreed, That the Want of the Word *Aſſigns* upon the Creation of the Covenant was immaterial, for if the Poſſibility was inherent, it would paſs however.

(g) Moor 159. Pl. 300.

(K) In what Caſes the Aſſignee ſhall have Advantage of a Covenant.

1. There are ſome Covenants that none ſhall have Advantage of but the Party to the Covenant, or his Heirs. (a) 42 E. 3. 4.

(a) Br. Covenant 5. S. C. Fitz. Covenant 17. S. C.

2. (b) There are (c) ſome Covenants which have an Inheritance in the Land, (d) which paſs with the Land. (e) 42 E. 3. 4.

(b) As a Covenant to repair the Houſes demiſed, &c. Godb. 270. Moor 242. Pl. 380. (c) Where the Aſſignee of a Term ſhall take Benefit of a Covenant to permit him to retain his Rent in Caſe, &c. againſt the Aſſignee of the Reverſion. Bayly and Offord, Cro. Car. 137. 1 Jon. 242. (d) If the Leſſor grants to the Leſſee ſo many Eſtovers as will repair the Houſe, or that he ſhall burn within his Houſe during the Term; theſe, as Things appurtenant, ſhall go with it into whoſe Hands ſoever it comes. 5 Co. 17. b. (e) Br. Covenant 5. S. C. Fitz. Covenant 17. S. C.

3. (f) As if a Prior covenants with B. to ſing in a Chapel in his Manor of D. for him and his Servants, (in Fee, as it ſeems to be intended) the Aſſignee of the Manor ſhall have Covenant for a Default. (g) 42 E. 3. 3. b. Co. 5. Spencer 17. b. becauſe it is annexed to the Manor. (h) 2 H. 4. 6. b.

(f) Co. Lit 385. a. S. P.
(g) Br. Covenant 5. S. C. Fitz. Covenant 17. S. C.
(h) Br. Covenant 17. S. C. Fitz. Covenant 13.

4. (i) But if the Covenant be to ſing in the Chapel of a Stranger, the Aſſignee ſhall not have Covenant. (k) 2 H. 4. 6. adjudged. Co. 5. Spencer 18.

(i) Co. Lit. 385. a. S. P.
(k) Br. Covenant 17. S. C. Fitz. Covenant 13. S. C.

5. (l) Upon Equality of Partition, if one Coparcener covenants to acquit the other and her Heirs, of Suit, the Aſſignee of the Land ſhall have Benefit of this Covenant. (m) 42 E. 3. 3. b. Co. 5. Spencer 18.

(l) Co. Lit. 384. b. 385. a. S. P.
(m) Fitz Covenant 17. S. C. Br. Covenant 5. S. C.

6. If A. ſeiſed of Lands in Fee, conveys it by Deed indented to B. and covenants with B. his Heirs and Aſſigns, to make any other Aſſurance upon Requeſt, for the better Settlement of the Land, &c. and after B. conveys it to C. who conveys it to D. and after D. requires A. to make another Aſſurance according to the Covenant, and he refuſes, D. ſhall have an Action of Covenant in this Caſe againſt A. by the Common Law, as Aſſignee to B. Tr. 14 Car. B. R. between (n) Midlemore and Goodale, upon a Demurrer, admitted and agreed per Curiam; but Judgment was given againſt the Plaintiff for another Cauſe.

(n) Cro. Car. 503, 505. S. C. adjudged. 1 Jon. 406. S. C. & S. P. appears.

7. If *A.* by Deed enfeoffs *B.* of certain Lands, reſerving Rent, Fealty, and Suit of Court, and by the ſame Deed grants, That if the Feoffee ſhall be diſtrained, vexed, or charged for other Rents or Services, then he may enter, and diſtrain for his Amends in other Lands: This is annexed to the Eſtate of the Land, and ſhall go with it to every Aſſignee. *Mich.* 26 *Eliz.* between *Allen* and *Givers.* *Moor* 185. *Pl.* 331. *per Curiam.*

8. If *A.* leaſes an Houſe to *B.* for Years, and *A.* covenants to repair, and that *B.* his Heirs and Aſſigns, may at all Times enter, and ſee in what Plight the ſame is, and if upon ſuch View any Default ſhall be found in the not Repairing, and thereof Warning ſhall be given to *B.* his Executors, *&c.* then within Four Months after ſuch Warning, ſuch Default ſhall be amended; and after the Houſe, in Default of *B.* becomes ruinous, and *A.* grants the Reverſion to *C.* who, upon View of the Houſe, gives Warning to *B.* of the Default, *&c.* If it is not repair'd, *C.* may have an Action againſt *B.* as Aſſignee of *A.* though the Houſe became ruinous before *C.* was entitled to the Reverſion; (o) for the Action is not founded upon the ruinous Eſtate of the Houſe, but for not repairing within the Time appointed by the Covenant. *Mich.* 29 *&* 30 *Eliz.* (p) *Maſcall's* Caſe, 1 *Leon.* 61. adjudged.

(o) But an Aſſignee ſhall not have an Action upon a Breach of Covenant before his Time. Cro. El. 863. 3 Leon. 51. 2 Vent. 278. —But upon a Breach after his Time, though his Eſtate is determined, he may. Athow and Hemmings, 1 Rol. Rep. 80. Ow. 152. 2 Bulſ. 281. (p) Moor. 242. Pl. 380. S. C. adjudged.

9. If Leſſee for Years covenants to leave the Houſes in good Repair at the End of the Term, and the Leſſor grants his Reverſion to another: (q) Though this Covenant is not to be performed during the Term, yet for a Breach thereof, the Grantee of the Reverſion may bring an Action, and there cannot be a more apt Covenant to run with the Land. *Mich.* 39 *&* 40 *Eliz.* between (r) *Matures* and *Weſtwood.* *Cro. Eliz.* 599, 600, 617. *per Curiam.* And it was ſaid the Covenant was inſtantly broke upon the Determination of the Term.

(q) So where Leſſor covenants to make a new Leaſe at the End of the Term, and the Leſſor grants over his Reverſion, &c. Moor 150. 1 And. 82, 83. (r) Moor 527. Pl. 695. S. C. but S. P. does not appear. Goulſ. 175, 176. S. C. & S. P. Gaudy con. Fenner.

10. If *A.* leaſes Lands to *B.* for 200 Years, and *A.* by the ſame Deed covenants for himſelf, his Heirs and Aſſigns, with *B.* his Executors and Aſſigns, That if *B.* is diſturbed for Reſpite of Homage, or inforced to pay any Charge or Iſſues loſt, that he ſhall with-hold ſo much of his Rent, as he ſhall be inforced to pay; and *A.* grants his Reverſion to *C.* and *B.* aſſigns the Term to *D.* *D.* may take Benefit of this Covenant againſt *C.* for it runs with the Land. *Mich.* 4 *Car.* between (s) *Bayly* and *Offord,* *Cro. Car.* 137. reſolved *per Curiam:* And that in an Action for the Rent, *D.* may plead it in Bar; but adjudged againſt the Plaintiff for another Reaſon.

Bayly and Hughs, 1 Jon. 242. ſeems to have been the ſame Caſe, and S. P. per Curiam. And by this Book the Covenant was, If the Leſſee, his Executors or Aſſigns, ſhould be diſturbed, &c. but adjudged pro Quer', becauſe by the Defendant's Plea it appeared, the Charge for Homage was not legal.

(L) (a) Who ſhall be bound by (b) it without naming.

The Aſſignee.

(a) If A. having Land charged with the Payment of a Fee-Farm Rent, grants Part of the Land to B. and covenants that the ſame ſhall be diſcharged of the ſaid Rent, and after grants the Reſidue of the Land to C. this ſhall not be taken as a real Covenant, which ſhall in Equity charge the other Land granted to C. with the whole Rent. Hard. 87.

1. IF a Man leaſes for Years, and the Leſſee covenants in this Manner: Proviſo ſemper, & pred' J. the Leſſee doth covenant, That he will repair, maintain, and ſuſtain the Houſes upon the Premiſſes, ad omnia Tempora neceſſaria, during all the ſaid Term; and after the Leſſee aſſigns over the Term: The Aſſignee (c) ſhall be bound by this Covenant (d) to repair the Houſes during the Life of the firſt Leſſee, though the Aſſignee be not named, becauſe the Covenant runs with the Land, being made for the Maintenance of a Thing in (e) Eſſe at the Time of the Leaſe made. P. 38 El. B. R. between the (f) Dean of Windſor and Hide, adjudged in a Writ of Error upon a Judgment in Banco thereof.

(b) Where the Aſſignee ſhall be chargeable with a Nomine Pœnæ, incurr'd after Aſſignment. Thyn and Cholmly, Moor 357. Pl. 486. adjudged. Cro. El. 383. adjudged, for the Land is charged therewith, and the Aſſignee for his own Time ſhall be chargeable. Goulſ. 129. appears. (c) By the Common Law, but without Queſtion by the Statute of 32 H. 8. Cro. El. 457. (d) Kitchin and Buckly S. P. 1 Lev. 109. adjudged. 1 Sid. 157. adjudged. Raym. 80. appears. (e) When the Covenant extends to a Thing in eſſe, Parcel of the Demiſe, it is quaſi annexed to the Thing demiſed, and runs with the Land, and ſhall bind the Aſſignee, though not expreſly named. 5 Co. 16. b. Et vid. Godb. 270. (f) Cro. Eliz. 457, 552, 553. S. C. adjudged. Moor 399. S. C. adjudged upon a Writ of Error, and the Judgment affirmed accordingly. 5 Co. 24. S. C. adjudged.

2. But the Aſſignee ſhall not be charged in a Writ of Covenant for any Breath after the Death of the firſt Leſſee, inaſmuch as it is perſonal to the Leſſee himſelf. P. 38 El. B. R. agreed, between the (g) Dean of Windſor and Hide.

(g) Cro. Eliz. 457. S. C. & S. P. by Two Judges. Moor 399, 400. Pl. 523. S. C. & S. P. by Two Judges againſt Two; but after the Judgment was con.

(h) Moor 159. Pl. 300. S. P. debated.

3. (h) But if *A.* leaſes for Years to *B.* and *B.* for himſelf, his Executors and Adminiſtrators, covenants with *A.* to build a Wall upon Part of the Land demiſed, and after *B.* aſſigns: The Aſſignee is not bound by this Covenant, for the Law will not annex the Covenant to a Thing not *in Eſſe*. *Paſch.* 25 *El. Spencer's* Caſe, 5 *Co.* 15. adjudged.

4. But if *B.* had covenanted for him and his Aſſigns to build the Wall, *&c.* this would have bound the Aſſignee, becauſe it is to be done upon the Land, and the Aſſignee is to have the Benefit thereof. *Paſch.* 25 *El.* 5 *Co.* 15. *per Curiam.*

5. But though the Covenant be for him and his Aſſigns, yet if the Thing to be done be meerly collateral, and no way concern the Thing demiſed, the Covenant ſhall not bind the Aſſignee; as if it be to build an Houſe upon other Land of the Leſſor, or (i) to pay a collateral Sum. *Paſch.* 25 *Eliz.* 5 *Co.* 15. *per Curiam.*

(i) Cro. Jac. 438. S. P. adjudged.

6. But if a Man demiſes Sheep, or other perſonal Things, for a certain Time, and the Leſſee covenants for him and his Aſſigns at the End of the Term to deliver ſuch Sheep, *&c.* or the Price for them, and the Leſſee aſſigns them over; the Aſſignee ſhall not be bound by the Covenant, for 'tis but a perſonal Contract; and there is not ſuch Privity as between Leſſor and Leſſee of Land and his Aſſigns. 5 *Co.* 16. b. 17. a.

7. (k) So if a Man leaſes Land for Years, (l) with a Stock of Cattle, and the Leſſee for him and his Aſſigns covenants to deliver the Stock at the End of the Term. 5 *Co.* 17. a.

(k) A Man poſſeſſed of a Tavern for 6 Years, leaſes it to another for three Years; and it was covenanted that during the Three Years, quolibet Menſe, the Leſſee ſhould give an Account to the Leſſor of the Wine which he ſold, and ſhould pay unto him for every Tun ſold ſo much; and after the Leſſor grants the remaining Three Years to another: The Covenant being collateral, it paſſes not by the Aſſignment of the Three Years. Godb. 120. Moor 243. Pl. 382. though the Covenant was to account to the Leſſor or his Aſſigns. (l) As in the Caſe of Wood and Foſter; which vid. Ow. 139. 1 Leon. 42. Godb. 113.

8. If Leſſee for Years, for himſelf, his Executors and Adminiſtrators, covenants with his Leſſor to leave 15 Acres every Year for Paſture, *abſque Cultura*, and after the Leſſee aſſigns: The Aſſignee, though not named, muſt perform the Covenant, becauſe 'tis for the Benefit of the Eſtate, according to the Nature of the Soil; but a collateral Covenant as to build *de novo*, *&c.* ſhall not bind him, unleſs named. *Paſch.* 4 *Jac.* between *Cockſon* and *Cock*, *Cro. Jac.* 125. adjudged.

(M) In what Caſes it lies againſt an Aſſignee.

Fol. 522.

1. If A. demiſes to B. ſeveral Parcels of Land, and the Leſſee covenants for him and his Aſſigns to repair, &c. and after the Leſſee aſſigns to D. all his Eſtate, in Parcel of the Land demiſed; and after D. does not repair that to him aſſigned: The Leſſor may have an Action of Covenant againſt D. the Aſſignee. Tr. 7 Car. B. R. **between** (a) Conham **and** King, **adjudged** per Curiam, **this being moved in Arreſt of Judgment.**

(a) Cro. Car. 221, 222. S. C. adjudged, becauſe this Covenant is diviſible, and follows the Land with which the Defendant is chargeable by the Common or by Statute Law. 1 Jon. 245. S. C. adjudged. —So if the Leſſor had granted the Reverſion of Part to one, and of other Part to another, they might have brought an Action of Covenant. Kitchin and Buckly, 1 Lev. 109. appears. 1 Sid. 157. appears. Ray. 80. appears.

2. If a Man leaſes for Years, and the Leſſee covenants for him and his Aſſigns to pay the Rent ſo long as he and they ſhall have the Poſſeſſion of the Thing let; and the Leſſee aſſigns, the Term expires, and the Aſſignee continues the Poſſeſſion afterwards: An Action of Covenant will lie againſt him for Rent behind after the Expiration of the Term; for tho' he is not an Aſſignee ſtrictly according to the Rules of Law, yet he ſhall be accounted ſuch an Aſſignee as is to perform the Covenants. *Mich.* 1651. between *Bromefield* and Sir *John Williamſon*, *Styl.* 407. adjudged *niſi*.

(N) In

(N) In what Caſes it ought to be brought againſt the (a) Aſſignee, and in what Caſes againſt the Aſſignor.

(a) Where no Action lies againſt the Aſſignee after an Aſſignment by him made, and Notice, &c. Raym. 303, 304.

1. (b) If a Man leaſes for Years, rendring Rent, and the Leſſee covenants for him and his Aſſigns to repair the Houſe during the Term, and after the Leſſee aſſigns over the Term, and the Leſſor accepts the Rent from the Aſſignee, and after the Covenant is broke: Notwithſtanding the Acceptance of the Rent from the Aſſignee, yet an Action of Covenant lies againſt the firſt Leſſee, for the Leſſee hath covenanted expreſly for him and his Aſſigns; and this perſonal Covenant cannot be transferred by the Acceptance of the Rent. M. 10 Ja. B. R. between (c) Ventrice and Goodcheap, adjudged; and the ſame Term, between (d) Bernard and Godskall, adjudged. H. 16 Ja. B. R. between Sir J. (e) Brett and Cumberland, adjudged upon Demurrer. P. 16 Car. B. R. between (f) Norton and Ackland, adjudged upon Demurrer. Intratur, H. 15 Car. Rot. 549. Tr. 6 Car. B. R. between the Counteſs of Devon and Collier, adjudged, where the Breach was for Non-payment of Rent. P. 20 Car. B. between Crofts and Tailer, adjudged upon Demurrer, where the Breach was for Non-payment of Rent. Intratur, Hill. 19 Car. Rot. Barnard

(b) Batchelor and Gage like Point, Cro. Car. 188. adjudged, the Covenant being from him, his Executors and Aſſigns, not to build upon the Premiſes. 1 Jon. 223. adjudged. 1 Saund. 240. cited. 1 Brownl. 20. S. P. adjudged. Et vid. Styl. 300. 2 Mod. 139. 1 Sid. 402. 1 Saund. 240. (c) Cro. Jac 309. S. C. cited. (d) Cro. Jac. 309. S. C. adjudged. (e) Cro. Jac. 521, 522. S C. adjudged, that it lay againſt the Executor of the Leſſee. 1 Rol. Rep. 359. 2 Rol. Rep. 63, 64. S. C. adjudged. Poph. 136, 137. S. C. adjornatur. Godb. 276. S. C. adjornatur. Cro. Car. 188. S. C. cited. (f) Cro. Car. 580. S. C. adjudged.

(g) 1 Jon. 223. S. P. per Curiam. (h) He may charge both, but Execution ſhall be only againſt one of them; Cro. Jac. 523.

2. (g) If a Leſſee covenants, that he and his Aſſigns will repair the Houſe demiſed, and the Leſſee grants over his Term, and the Aſſignee does not repair it: An Action of Covenant lies either againſt the Aſſignee at Common Law, becauſe this Covenant runs with the Land, or it lies againſt the Leſſee (h) at the Election of the Leſſor. 25 H. 8. Brook Covenant 32.

for if he takes both in Execution, he that is laſt taken ſhall have an Judita Querela.

(i) 1 Brownl. 20, 21. 1 Sid. 447.

3. If *A.* leaſes to *B.* rendring Rent, and *B.* covenants to pay it, and after *B.* aſſigns to *C.* and *A.* grants the Reverſion to *D.* and *D.* after accepts Rent from *C.* yet for Non-payment at another Day, *D.* may have an Action againſt *B.* it being upon an (i) expreſs Covenant. *Trin.* 36 *Car.* 2. between *Edwards* and *Morgan*, 3 *Lev.* 233. adjudged.

(O) What will extinguiſh a Covenant.

1. If a Man covenants with Tenant for Life of an Houſe, to find a Chaplain to ſing, &c. in the Houſe every Saturday during the Life of the Covenantee; if the Covenantee ſurrenders to the Leſſor the Houſe, and re-takes an Eſtate for Years, yet the Covenant remains. 6 H. 4. (a) 3.

(a) I ſuppoſe this is miſprinted in the Original, and ſhould be Fol. 1.

2. The ſame Law, if he had granted the Houſe over, and he had not retook an Eſtate. 6 H. 4. 3. (Quære this, for after the Grant, how is it lawful for the Chaplain to come into the Houſe without a Treſpaſs?)

3. If *A.* grants a Rent-Charge to *B.* for the Life of *C. habend'* to *B.* his Heirs and Aſſigns, to the Uſe of *C.* and *A.* covenants to pay it *ad uſum C.* If the Rent is behind, *B.* may have an Action of Covenant againſt *A.* for though the Rent-Charge is executed by the Statute, and the Power of diſtraining, as incident thereto, transferred to *C.* yet the Covenant being collateral, is not transferred nor diſcharged, but remains with *B. Mich.* 28 *Car.* 2. between (b) *Boſcawen* and *Herle* and *Cooke*, 1 *Mod.* 223. adjudged.

(b) 2 Mod. 138 S. C. adjudged.

Covenant.

By the Statute of 32 H. 8.

1. PER 32 *H.* 8. *cap.* 34. reciting, Whereas divers had leaſed Manors, *&c.* or other Hereditaments, (a) for Life or Lives, or Years, by Writing, containing certain Conditions, Covenants, and Agreements, as well on the Part of the Leſſees and Grantees, their Executors and Aſſigns, as on the Part of the Leſſors and Grantors, their Heirs and Succeſſors; and whereas by the Common Law, no Stranger to any Condition or Covenant could take Advantage thereof, by Reaſon whereof all Grantees of Reverſions, and all Grantees and Patentees of the King of Abbey-Lands, could have no Entry or Action for any Breach, *&c.* it is enacted, That all Perſons, Bodies Politick, their Heirs, Succeſſors, and Aſſigns, which have or ſhall have any Grant of our (b) ſaid Lord the King, of any Lordſhip, *&c.* Rents, Tithes, Portions, or other Hereditaments, or any Reverſion thereof, which belonged to the Monaſteries, *&c.* or which belonged to any other Perſon, *&c.* and alſo all other Perſons, (c) (d) being (e) Grantees or Aſſignees (f) to or (g) by our ſaid Lord the King, or to or by any other Perſon or Perſons, and the Heirs, (h) Executors, Succeſſors, and Aſſigns, of every of them, (i) ſhall and may have (k) like Advantage, by Entry,

(a) It extends not to Gifts in Tail. Co. Lit. 215. a. Cro. El. 863.
(b) It extends to his Succeſſors, though not named. Co. Lit. 215. a.
(c) It extends not to Grantees by Fine till Attornment, for it muſt be intended of ſuch only as have had all

Ceremonies by Law requiſite. Co. Lit. 215. a. 5 Co. 112, 113. (d) Though after Breach, and before the Action brought, their Eſtate determines. Athow and Hemming, 1 Rol. Rep. 80. Ow. 151. 2 Bulſ. 281. (e) It extends to Grantees of Part of the State of the Reverſion, &c. Co. Lit. 215. a. Godb. 162. Athow and Hemming. 1 Rol. Rep. 80. Ow. 131, 152. 2 Bulſ. 181. Et vid. 1 Leon. 252. Moor 93. Pl. 230. —But not to Grantors, &c. of the Reverſion in Part of the Land. Co. Lit. 215. a Cro. El. 833. Moor 98 Pl 241. (f) It extends to him that comes in by Limitation of an Uſe, though in the Poſt; for coming in by the Act and Limitation of the Party, he is a ſufficient Grantee, &c. within the Statute. Co Lit. 115. a. b. Moor 98. Pl. 241. 4 Leon. 27, 29. —But it extends not to ſuch as come in meerly by Act in Law, as the Lord upon an Eſcheat, Alienation in Mortmain, &c. Co. Lit. 215. b. —Nor to him that is in of another Eſtate. Moor 876. Pl. 1228. (g) But if a Copyholder by Licence of the Lord leaſes for Years, &c. and after ſurrenders the Reverſion to the Uſe of another in Fee, who is admitted, yet he is not a Grantee, &c. within the Act, for he is not privy to the Leaſe made by the Copyholder, nor in by him, but may plead a Grant of his Eſtate immediately from the Lord. Braſier and Beal, Yelv. 222. per Curiam, upon the firſt Opening. Cro. Jac 205. adjudged by two Judges. Et vid. Cro. Car. 25, 44. Hob. 178. But in the Caſe of Glover and Cope, 3 Lev. 326. it is adjudged, that ſuch Surrenderee may have an Action of Covenant by this Act. (h) Leſſee for 20 Years leaſes for 10 Years, and his Leſſee covenants, &c. and the firſt Leſſee grants his Reverſion: This Grantee is a ſufficient Aſſignee within the Statute. Davy and Mathew, Moor 525. Pl. 694. adjudged. Cro. El. 649. adjudged. Mathewris and Weſteray, Moor 527. Pl. 695. adjudged. Cro. El. 599, 617. adjudged. Goulſ 175. adjudged. Et vid. Godb. 161, 162. (i) Whether this doth not imply, that the Grantor ſhall not. 3 Lev. 155. dubitatur. Et vid. 1 Sid. 402. (k) But he ſhall not take Advantage of a Condition before he has given Notice to the Leſſee. Co. Lit. 215. 5 Co. 113. b. —Secus of a Covenant. Godb. 262. Cro. Jac. 476. Bridg. 130.

for Non-payment of Rent, or for doing Waſte, or (l) other Forfeiture; and the (m) ſame Remedy by Action only for not performing other Conditions, Covenants, and Agreements, contained in the ſaid Leaſes, againſt the Leſſees and Grantees, their Executors, Adminiſtrators, and Aſſigns, as the (n) (o) Leſſors and Grantors, their Heirs or Succeſſors, ought, ſhould, or might have had, at any Time or Times, *&c.*

(l) Viz. by Force of a Condition incident to the Reverſion, as Rent, or for the Benefit of the Eſtate, as for doing Waſte, not keeping the Houſes in Repair, &c. and not for the Payment of any Sum in Groſs, Delivery of Corn, &c. ſo as other Forfeiture ſhall be taken for other Forfeitures, like to thoſe Examples put, viz. Payment of Rent, and not doing Waſte, which are for the Benefit of the Reverſion. Co. Lit. 215. b. Et vid. 5 Co. 18. Moor 159, 243. Pl. 382, 876. Pl. 1228. Ow. 41. 1 And. 82, 83. Ray 250. 1 Saund. 159. So if the Proviſo be to enter for Non-payment of a Rent or groſs Sum by Way of Fine, the Grantee of the Reverſion ſhall not take Advantage of it, for the Condition cannot be apportioned. Styl. 316. (m) The Privity of Action is transferred, and it may be brought in the County where the Covenant was made, though the Lands lie in another. Thursby and Plant, 1 Saund. 237. adjudged; but a Writ of Error was brought in Cam' Scac', and it was after compounded. 1 Sid. 401. adjudged. 1 Lev. 259. adjudged, but Error brought, &c. 1 Vent. 10. Et vid. 3 Mod. 338. (n) Therefore if the Conuſee of the Reverſion, before Attornment, bargain and ſells to another, to whom the Leſſee attorns, the Bargainee may, &c. though his Bargainor could not. 5 Co. 113. a. (o) A. deviſes to B. for Years, rendring Rent, upon Condition to re-enter for Non-payment, and after deviſes the Reverſion in Fee to another, and dies; the Deviſee may take Advantage of the Condition, though there was never any Reverſion, &c. in the Deviſor. 2 Leon. 33. per totam Curiam.

2. And by the ſame Act it is enacted, That all Farmers, Leſſees and Grantees of Lordſhips, *&c.* Rents, Tithes, Portions, or other Hereditaments, for Years, Life or Lives, their Executors, Adminiſtrators, and (p) Aſſigns, ſhall and may have like Action and Remedy againſt all Perſons, Bodies Politick, their Heirs, Succeſſors, and Aſſigns, which by Grant of the King, or other Perſons, ſhall have the Reverſion of the ſame Lordſhips, *&c.* ſo letten, or any Part thereof, for any Condition, Covenant, or Agreement, contained in their Leaſes, as the Leſſees, or any of them, might and ſhould have had againſt the Leſſors and Grantors, their Heirs and Succeſſors; Recovery in Value, by Reaſon of any Warranty in Deed or Law, only excepted.

(p) But if Leſſee for 30 Years leaſes to another for 10, he is no Aſſignee within the Statute, for he is not Tenant to the firſt Leſſor. Moor. 93. Pl. 230.

Covenant.

Where it may be taken Advantage of by Way of Plea.

1. IN Treſpaſs for cutting and Carrying away Four Aſhes, the Defendant may plead, That before the Plaintiff had any Thing in the Place where, *&c. A.* was ſeiſed thereof in Fee, and leaſed to *B.* excepting the Wood and Underwood, and covenanted, *quod licitum foret* for *B.* and his Aſſigns, upon the Premiſſes to take Houſebote, *&c.* and that *B.* aſſigned to C. and the Defendant, as Servant to *C.* took the Aſhes for Houſebote, *&c.* (a) Becauſe the Covenant is in the ſame Deed, *Mich.* 9 *Jac. inter Purfrey* and *Grime*, *Cro. Jac.* 292. the Court ſeemed to incline accordingly; though it was objected, That the Taking could not be juſtified for Want of the Word *Grant*; but the Plea in this Caſe was held to be naught for Want of ſhewing the Deed, and that C. had expended the Aſhes accordingly.

(a) For this, vid. Cro. El. 223, 709. 1 Leon. 237. Cro. Jac. 34. Yelv. 43. Bridg. 117. Cro. Car. 137. 1 Jon. 242. 3 Lev. 152. 2 Vent. 218.

—But where the Covenant is in a ſubſequent Deed, 'tis otherways.

Covenant.

(a) Pleading.

(b) Declaration.

1. IN an Action of Covenant the Plaintiff declared, That Queen *Elizabeth* leaſed a Meſſuage, *&c.* to the Defendant for 21 Years, and that the Defendant, his Executors and Aſſigns, were thereby bound to repair, and leave the Premiſſes at the End of the Term in good Repair, and that the Queen granted the Reverſion to *B.* and that *B.* granted the ſame to the Plaintiff; and for not repairing, *&c.* this is a good Declaration, though the Plaintiff is not named Aſſignee. *Paſch.* 8 *Jac.* between the Lord *Ewre* and *Strickland*, *Cro. Jac.* 240. adjudged.

(a) Where the Breach aſſigned, or Performance pleaded, muſt purſue the Words and Subſtance of the Covenant or Condition. 1 Leon. 245. Cro. El. 202, 203, 780. March 17. Al. 60. 2 Mod, 229. (b) Quod teneat, &c. & de Conventione fracta, all one. Hard. 178.

2. (c) If in an Action of Covenant the Plaintiff declares, Whereas by Indenture bearing Date, *&c. teſtatum exiſtit*, That the Plaintiff hath demiſed to the Defendant a Meſſuage and Garden for 21 Years, and the Defendant by the ſaid Indenture covenanted not to erect any Building in the Garden, *&c.* and avers *in Facto*, that he did erect, *&c.* This is a good Declaration, though he does not expreſly ſay, *quod dimiſit & convenit. Paſch.* 6 *Car.* between *Batchelor* and *Gaye*, *Cro. Car.* 188. adjudged in *B. R.* and ſaid, 'twas the uſual Courſe (d) there to declare in this Manner.

(c) Cro. El. 195. S. P. adjudged. Cro. Jac. 383. S. P. adjudged. 537. S. P. adjudged. Et vid. 1 Sid. 375, 376. where the Plaintiff declares per quoddam Scriptum, per quod teſtatum exiſtit, &c. (d) And ſo are the Precedents in B. Cro. El. 195. 2 Rol. Rep. 210, 211.

3. If Baron and Feme, being ſeiſed of an Houſe to them, and the Heirs of the Baron, leaſes to *A.* and he covenants with them, and the Heirs and Aſſigns of the Baron, to repair, *&c.* and the (e) Baron and Feme convey the Inheritance to *B.* In an Action upon this Covenant, *B.* may ſhew the whole Matter, and conclude, *quod Actio ei accrevit* as Aſſignee of the Baron, without ſhewing the Death of the Feme; for the Eſtate for Life being transferred with the Fee, it is drowned therein. *Mich.* 8 *Car.* between (f) *Major* and *Talbot*, *Cro. Car.* 285. adjudged.

(e) By the Report in Jon. the Baron was dead, and the Feme and the Heir of the Baron conveyed, and the Action was brought as Aſſignee of the Heir. (f) 1 Jon. 305 S. C. adjudged; and ſaid, that it was no Benefit to the Leſſee to have the Eſtate for Life continue, and therefore, &c.

4. If in an Action of Covenant the Plaintiff declares upon an Indenture, in which the Defendant had covenanted, that he was ſeiſed in Fee, *&c.* and would free the Premiſſes from all Incumbrances, and that the Plaintiff ſhould quietly enjoy, and for Breach, aſſigns an Entry and Eviction by a Stranger, *& ſic Conventionem ſuam* (in the Singular Number) *fregit*: This is well enough, for *Conventio eſt Nomen collectivum*; and if 20 Breaches are aſſigned, the Count is *de Placito, quod teneat ei Conventionem Trin.* 30 *Car.* 2. between *After* and *Mazeen*, 2 *Mod.* 311. adjudged upon Demurrer.

Covenant.

Breach.

(a) Aſſignment (b) thereof.

1. IF in Debt upon the Obligation, the Condition whereof is of Three Parts; Firſt, That he ſhall ſerve the Plaintiff well; Secondly, That he ſhall duly account; Thirdly, That within Three Months after Notice, he ſhall make Satisfaction for all Loſſes ſuſtained by his Apprentiſhip; the Defendant pleads Performance ſpecially, and the Plaintiff aſſigns for Breach, That upon Account he was found in Arrear 60 *l.* which he received, and converted to his own Uſe, and ſo had not ſerved the Plaintiff well: This is a good Replication, without alledging Notice; for though it might be alledged as a Breach of the Third Part of the Condition, yet the Converſion of the Money to his own Uſe may be alledged as an ill Service. *Mich.* 42 & 43 *Eliz.* between *Cutler* and *Brewſter*, *Cro. Eliz.* 230. adjudged; and ſeems to have been upon a Special Demurrer.

(a) In Covenant for not repairing, the Breach was generally alledged, without ſhewing in what. 1 Brownl. 23. adjudged, it was help'd after Verdict. So 2 Mod. 176. Et vid. 2 Jon. 125. where the Covenant was to repair all the Pales, except thoſe on the Weſt Side, and the Breach aſſigned was in not repairing the Pales, contra Formam Conventionis. (b) In an Action of Covenant ſeveral Breaches may be aſſigned. Otherways in Debt upon an Obligation conditioned to perform Covenants. Cro. Car. 176. —Per 8 & 9 Will. cap. 10. in Actions in the King's Courts of Record, upon Bond or Penalty for Non-performance of Covenants, the Plaintiff may aſſign as many Breaches as he pleaſes, and the Jury upon the Trial ſhall aſſeſs not only ſuch Damages and Coſts of Suit as uſual in ſuch Caſes, but Damages for ſuch of the Breaches as the Plaintiff ſhall prove to have been broken, and Judgment ſhall be enter'd upon ſuch Verdict as uſual; and if Judgment ſhall be for the Plaintiff, upon Demurrer, Confeſſion, or Nil dicit, the Plaintiff upon the Roll may ſuggeſt as many Breaches as he pleaſes, upon which a Writ ſhall iſſue to, &c. to ſummon a Jury to appear at the next Aſſiſes, &c. to aſſeſs Damages, &c. Vide.

2. If *A.* leaſes to *B.* for Years, and *B.* covenants to repair during the Term, and at the End of the Term to leave the Premiſſes well repaired: In an Action upon this Covenant it may be aſſigned for a Breach, That he did not leave them well repaired at the End of the Term; and if the Defendant pleads, That at the End of the Term he delivered them up well repaired, then if the Plaintiff will aſſign a Breach, he ought to ſhew particularly in what Part it was not repaired, ſo as the Defendant may give a particular Anſwer thereto. *Trin.* 5 *Jac.* between *Hancock* and *Field*, *Cro. Jac.* 171. adjudged; and it was ſaid to have been adjudged between *Boyle* and *Saxy*, That in a Declaration in Covenant, it ſufficeth to aſſign the Breach as (c) general as the Covenant is.

(c) Cro Jac. 661.

(d) 2 Mod. 229. S. P. adjudged.

3. (d) If a Breach of Covenant is ſufficiently alledged, the Plaintiff need not conclude *& ſic non tenuit Conventionem in hoc, &c.* for that is but Repetition. *Hill.* 9 *Jac.* between *Barwick* and *Gibſon*, *Cro Jac.* 298. adjudged.

(e) That he was not lawfully ſeiſed in Fee of an indefeaſible Eſtate. Cro. Jac. 369. Et vid. Raym. 14, 15.

4. If *A.* leaſes to *B.* for Years. and covenants, That he hath full Power and lawful Authority to leaſe, *&c.* and in an Action upon this Covenant, *B* ſays he had (e) not full Power and lawful Authority to leaſe, *&c.* The Breach is well aſſigned, for he hath well purſued the Words of the Covenant *negative*, and what Eſtate he had lies more in the Notice of the Leſſor, than of the Leſſee, and therefore he ought to ſhew what Eſtate he had at the Time of making the Leaſe, that it may appear that he had full Power, *&c.* *Trin.* 10 *Jac.* (f) between *Bradſhaw* and *Salmon.* 9 *Co.* 60. b. 61. a.

(f) Cro Jac. 304. S. C. adjudged; and that the Defendant muſt ſhew he was ſeiſed in Fee, and then the Plaintiff muſt ſhew a Special Title in ſome Body elſe; but the Covenant being general, the general Aſſignment of a Breach prima Facie is good.

5. If in an Action of Covenant the Plaintiff declares upon a Leaſe in *London*, of a Meſſuage in *D. in Com. S.* and that the Leſſee covenanted to repair, *&c.* and aſſigns for a Breach, that *apud London* he permitted the Houſes to decay, *&c.* This is naught, becauſe the Breach is in a Matter local, and not tranſitory. *Mich.* 15 *Jac.* between *Sheers* and *Britton*, *Cro. Jac.* 446. adjudged.

6. If in an Action of Covenant the Plaintiff declares upon a Covenant to find the Plaintiff with Meat, Drink, Apparel, and other Neceſſaries, and aſſigns the Breach as general as the Covenant, *viz.* that he did not find him with Meat, Drink, Apparel, and other Neceſſaries: This is naught, becauſe it is not ſhew'd in particular what other Things are neceſſary, ſo that the Court might adjudge whether they are neceſſary or not. *Trin.* 16 *Jac.* between (g) *Mills* and *Aſtel*, *Cro. Jac.* 486. adjudged, and the firſt Judgment reverſed accordingly.

(g) Procter and Burdet S. P. 3 Lev. 170. adjudged con. 3 Mod. 69, 70. adjudged con. and that the alia neceſſaria ſhall be intended ſmall Things, as Trimming, Waſhing, &c. which would be too long to inſert; and the Aſſignment is in the Words of the Covenant. — In Debt upon an Obligation, conditioned to ſatisfy for all Goods that an Apprentice ſhall waſt, in his Replication the Plaintiff aſſigned for Breach, that he had waſted diverſa bona, ad valentiam 100 l. French and Pierce, 1 Lev. 94. adjudged upon Demurrer, that it was good, without ſhewing in particular what the Goods were; for the Penalty of the Obligation is to be recovered upon any Breach: But per Curiam, it would be otherways in Covenant where there is to be a Recompence for the Damages.

7. If in Debt upon an Obligation, conditioned to ſave the Plaintiff harmleſs from all Charges and Troubles by reaſon of the Laſt Will of *A.* or any Thing therein mentioned touching one *B.* or any Legacy to her given, *&c.* the Defendant pleads *non damnificatus*, and the Plaintiff replies, that he paid 60 *l.* to *B.* for a Legacy, *&c.* This is no good Replication, for he ought to have ſhewed that a Legacy of 60 *l.* was given her by the Will; for though the Will is recited in the Date, againſt which Recital the Defendant cannot ſay he made no ſuch Will, yet the Legacy given to *B.* is not recited (h) but in general, againſt which the Defendant may take a Traverſe. *Mich.* 10 *Jac.* between (i) *Douty* and *Fane*, *Yelv.* 226. adjudged; but ſeems not to be ſo clearly reported as moſt Caſes in that Book are.

(h) But for this, vid. under Title Eſtoppel, 1 Rol. Abr. 872.

(i) 1 Brownl. 117. S. C. adjudged. 2 Bulſ. 19. S. C. adjudged: And for this, vid. Cro. Jac. 259.

8. If *A.* covenants to permit *B.* his Heirs and Aſſigns, to take and enjoy the Rents, Iſſues, and Profits of certain Lands, and in an Action upon this Covenant the Plaintiff aſſigns for Breach, that *A.* took the Profits, *&* (k) *non permiſit B.* to enjoy, *&c.* This Breach is well aſſigned, for the taking the Profits by *A.* is a Special Diſturbance. *Mich.* 5 *Car.* between (l) *Symons* and *Smith*, 1 *Jon.* 218, 219. adjudged upon Demurrer.

(k) But non permiſit alone is too general. 8 Co. 89. b. 91 b. Et vid. 1 And. 137. 2 Vent. 278.

(l) Cro. Car. 176. S. C. adjudged. Et vid. Hard. 132, 133.

9. If in an Action of Covenant the Plaintiff declares upon a Leaſe for 21 Years to the Defendant, and that he covenanted to pay 20 *l. per Annum*, by equal Portions, at *Michaelmas* and *Lady-Day*, and aſſigns for Breach, that he did not pay the Rent *debit' ad pred' ſeparalia Feſta durante Termino:* This Breach is ſufficiently aſſigned, for perhaps the Rent was not paid at any of the Days before. *Mich.* 14 *Car.* 2. between *Coniers* and *Smith*, 1 *Levinz* 78. after Judgment by Default in *Durham*, that Judgment upon a Writ of Error was affirmed in *B. R.*

(m) Needler and Gueſt S. P. Al. 9. adjudged after Verdict for the Plaintiff. Styl. 9. adjudged. Et vid. 1 Part 68.

10. (m) If *A.* covenants to pay 3 *l. per* Tun for Goods imported, and for Performance thereof binds himſelf in a Penalty, and in an Action thereupon the Plaintiff aſſigns for Breach the Non-payment for ſo many Tuns and a Hogſhead, which came to ſo much: This is naught, for (n) the Covenant is only to pay by the Tun. *Mich.* 26 *Car.* 2. 2 *Lev.* 124. adjudged; though it was ſaid *per Curiam* to be otherways if the Covenant had been to pay *ſecundum Ratam* 3 *l. per* Tun.

(n) But for this, vid. 1 Part 68. Pl. 1, 2.

11. If *A.* grants a Rent to *B.* and his Heirs for the Life of *C.* to the Uſe of *C.* and covenants with *B.* to pay the Rent *ad Opus & Uſum* of *C.* and in an Action upon this Covenant *B.* aſſigns the Breach in not paying the Rent to him *ad Opus & Uſum* of C. This Breach is well aſſigned in the Words of the Covenant, though a (o) Negative Pregnant. *Mich.* 28 *Car.* 2. (p) *Boſcawin & al'* and *Cook*, 1 *Mod.* 223. adjudged upon a Special Demurrer.

(o) Vid. 2 Leon. 197.

(p) 2 Mod. 138. S. C. adjudged; and ſaid, that if it was paid to C. which is a Performance in Subſtance, the Defendant ought to have pleaded it, otherways it ſhall not be intended.

12. If in an Action of Covenant the Plaintiff declares upon a Charter-Party, by which the Plaintiff, being Maſter of a Ship, was to pay Two Parts of the Port-Charges, and the Factor of the Defendant the other Part; and the Plaintiff ſhews, that he ſailed from *L.* to *C.* and there paid all the Port-Charges, *viz.* Two Parts for himſelf, and the other Part for the Defendant, and that the Defendant had not repaid him: This Breach is well aſſigned, for when the Plaintiff ſays he paid the Third Part, it ſhall not be intended the Defendant did, but that the Plaintiff was neceſſitated to pay it, or otherways his Ship would have been ſtay'd in the Port. *Hill.* 33 & 34 *Car.* 2. between *Bellamy* and *Ruſſel*, 2 *Jon.* 186. adjudged: And being alledged to be paid in the ſame Port whither the Voyage was to be made, it ſhall be intended in the ſame Voyage.

13. If in Debt upon an Obligation, conditioned to perform an Award, the Defendant pleads no Award made, and the Plaintiff replies an Award that the Defendant ſhall pay to the Plaintiff 15 *l. ad vel ante* 1 *Dec' prox' ſequent'*, and aſſigns a Breach, that the Defendant had not paid the 15 *l. ſup' pred'* 1 *Dec':* This is naught, for he might pay it before; and though Payment before the Day is a good Payment at the Day, where Payment at the Day is pleaded, yet in Pleading, the Words of the Condition ought to be purſued. *Mich.* 2 *Will. & Mar.* between (q) *Watnough* and *Holgate*, 3 *Lev.* 293. adjudged upon a General Demurrer.

(q) 2 Vent. 211. S. C. adjornatur.

(a) Covenant.

Plea in Bar.

1. IN an Action of Covenant for Non-payment of Rent, the Defendant cannot plead levied by Diſtreſs, for that is a Confeſſion it was not paid at the Day, for it could not be diſtrained for till after the Day. *Mich.* 7 *Jac.* between *Hare* and *Savil*, 2 *Brownl.* 273. adjudged: But it was agreed, That the Covenant alters not the Nature of the Rent; but that (b) Nothing behind, or Payment at the Day, is a good Plea.

(a) If Covenants perpetual are once broken, and an Action brought, and Recovery thereupon, upon a new Breach a Scire Facias ſhall be had upon that Judgment, and the Plaintiff need not bring a new Writ of Covenant. Cro. El. 3. ſaid to be adjudged. —By the firſt Judgment the Covenant is extinct. 3 Leon. 51. per Manwood. (b) But 1 Brownl. 19. per Curiam, it was held a bad Plea, for that by it the Defendant confeſſed the Covenant broke, and it tended but in Mitigation of Damages. —And whether nil habuit in Tenementis be a good Plea, vid. 2 Vent. 99.

2. In Debt upon a Bond, conditioned for the Performance of the Covenants in an Indenture, the (c) Defendant ought to ſhew the Indenture, and the Entry always ſuppoſes it to be brought into Court by him; though the Court will ſometimes (d) compel the Plaintiff to give a Copy thereof to the Defendant, if he ſwears he never had a Part thereof, or hath loſt it; but this is done *ex Gratia Curiæ*, and not *ex Debito Juſtitiæ*. *Mich.* 18 *Car.* between *Jevons* and *Harridge*, 1 *Saund.* 8, 9. *per Curiam.*

(c) He cannot plead Performance, &c. without ſhewing it. Al. 72. 1 Vent. 37. 1 Sid. 50. 1 Mod. 266. (d) Cro. Jac. 429 1 Sid. 50. 1 Mod. 266.

3. But in ſuch Action, after Oyer of the Bond and Condition, it was entered upon the Roll, that the Defendant prays Oyer of the Indenture, *& ei legitur*, This Indenture, *&c.* and the Defendant pleaded, *&c.* *Mich.* 18 *Car.* between (c) *Jevons* and *Harridge*, 1 *Saund.* 8, 9. adjudged upon a General Demurrer, and this Manner of Pleading was good in Subſtance, though not formal, for it ſhall be intended the true Indenture, and that it was in Court, though by the Record it did not appear to be ſo; but *per Curiam*, if it had been upon a Special Demurrer it had been naught.

(e) 1 Sid. 308. S. C. adjudged. 2 Keb. 102, 116, 118.

4. In Debt upon an Obligation, conditioned that if a Ship that was going ſuch a Voyage ſhould return, the Perils of the Sea excepted, the Defendant ſhould pay ſo much, but if the Ship ſhould be loſt, nothing, *&c.* the Defendant pleaded that the Ship did go on her Voyoge, and in her Return ſuch a Day *amiſſa fuit*. *Paſch.* 23 *Car.* 2. between *Watton* and *Weddington*, 2 *Lev.* 7. adjudged upon Demurrer, that this is a good Plea, though it was not ſaid, *quod amiſſa fuit per Pericula Maris*, and ſhe might be loſt by the Defendant's own Default, for the Plea is in the Words of the laſt Part of the Condition, which makes the Bond void, as well as if the Ship had returned, *&c.*

Covenant.

Performance.

(a) Kelw. 95. b. per Curiam. 1 Leon. 136.

1. (a) IF a Man is bound to perform all the (b) Covenants in an Indenture, if they are all in the Affirmative, he may plead Performance thereof generally. *Co. Lit.* 303. b.

Palm. 70. 1 Lev. 303. S. P. per Curiam. (b) But in Debt upon an Obligation, conditioned to do several Things in the Condition mentioned, the Defendant cannot plead Performance generally, but ought to plead to every Thing particularly by it self. Wimbleton and Holdrip, 1 Lev. 303. adjudged. Et vid. 1 Sid. 215. Kelw. 95. b. —Quod Conditio numquam infracta fuit is naught. 2 Vent 156.

(c) Moor 856. Pl. 1175. S. P. Cro. Eliz. 691. Palm. 70.

2. (c) But to (d) such as are in the (e) Negative he (f) must plead Specially, (for a Negative cannot be performed) and to the rest Generally. *Co. Lit.* 330. b.

(d) But if the Negative Covenants are all void and against Law, and the Affirmative good and lawful, he may plead Performance generally, and the Court shall take Notice, that the Negative Covenants are void and against Law. Norton and Sims, Moor 850. Pl. 1175. adjudged. Godb. 212, 213. adjornatur. Hob. 12, 13. with a tamen quære de eo. (e) Unless the Negative Covenant is only in Affirmance of the Affirmative Covenant precedent. 1 Sid. 87. vide. (f) But 'tis but Matter of Form, and help'd upon a General Demurrer. Oglethorp and Hide, Cro. Eliz. 232. adjudged. 1 Leon. 311. adjudged. Et vid. Al. 72. Styl. 63. which last Book seems to be misprinted.

(g) Sav. 120. S. P. arguen. Cro. El. 560.

3. (g) If any of them are in the Disjunctive, (h) he must shew which Part he hath performed. *Co. Lit.* 303. b.

S. P. Palm. 70. —And if Performance generally is pleaded, 'tis naught upon a General Demurrer, for that the Court cannot tell which Part he hath performed. Oglethorp and Hide, Cro. Eliz. 232, 233. adjudged. 1 Leon. 311. adjudged. (h) But if the Condition of an Obligation be to perform the Award of J. S. and he awards the Obligor to pay 100 l. or to procure a Stranger to be bound in 200 l. &c. the Defendant may plead Performance generally, because one Part is void, and it will be intended that he pleads Performance of that Part which he was bound to perform, and not the other Part. Sav. 120, 121. adjudged.

(i) As to levy a Fine. Lee and Luttrel, Cro. Jac. 560. adjudged. 2 Rol Rep. 159. adjudged. Palm. 70. adjudged and the Reason given, because the Record shall be tried by it self, and its Credit shall not be examined by the Country; and perhaps the Plaintiff will reply, that all the Lands are not comprized in the Fine, or other Matter upon which the Fine shall be examined.

4. If any of them are to be done (i) of Record, the Performance thereof must be shewed Specially, and it cannot be involved in the General Pleading. *Co. Lit.* 303. b.

(k) Cro. Jac. 363. like Point adjudged. 634. like Point adjudged. Winch. 9. like Point. March. 121. like Point adjudged.

5. (k) If in Debt upon an Obligation, conditioned that the Plaintiff shall enjoy certain Lands, (l) discharged or otherways saved harmless

(l) If the Condition be to acquit, discharge, and save harmless from such a Bond, non damnificatus is no good Plea. 1 Leon. 71, 72. adjudged. —But in an Action upon a Bond, conditioned to acquit, discharge, and save harmless a Parish from a Bastard Child, the Defendant pleaded non damnificat', and the Plaintiff demurred; and because it did not appear upon the whole Record that the Parish was damnified, it was adjudged for the Defendant. 3 Mod. 252. Vid. March 121. —But if in Debt upon a Bond, conditioned to save harmless J. S. and the mortgaged Premisses, and to pay the Interest for the principal Sum, the Defendant pleads J. S. non fuit damnificatus, for that the Defendant paid the principal Money, and all Interest due, at such a Day; this is no good Plea, because non damnificatus goes to the Person, and not to the Premisses. 2 Mod. 305. adjudged. —If the Condition be to save harmless the Obligee against another, non damnificatus is a good Plea. Kelw. 80. b. per Frowick. —But if to discharge the Obligee, it ought to be shewed in the Affirmative how. Kelw. 80. b. per Frowick.

(m) from all Incumbrances, the Defendant pleads, that the Plaintiff hath enjoyed the Lands discharged and kept indemnified from all Incumbrances: This Plea is naught, for being in the Affirmative, (n) it ought to have been shewed (o) how; but if he had pleaded in the Negative *non fuit damnificatus*, it had been otherwise. *Pasch.* 26 *Eliz. Manser's* Case, 2 *Co.* 4 a. adjudged.

(m) So if the Condition be to save harmless from all Bonds enter'd into, for the Obligor exoneravit & indemnem conservavit is no Plea, without shewing how. Cro. El. 619. adjudged; but that he need not shew from what Bonds he saved him harmless. And per Cro. El. 433. per Gaudy, there is a Diversity when the Condition is to discharge from a particular Thing, and when from a Multiplicity of Things, for in the last Case 'tis sufficient to plead generally. (n) Cro. Jac. 165. S. P. adjudged. Al. 72. like Point adjudged. Et vid Cro. El. 477. Cro. Jac. 503, 504. (o) But a Man may plead quod exoneravit, &c. from an Arrest, without shewing how, for that it may be done by Composition, &c. without Deed. Cro. El. 914. adjudged. —So in Debt upon a Bond, conditioned to perform the Award of J. S. if it is awarded that a Suit in Chancery by the Defendant against the Plaintiff shall cease, and the Plaintiff stand acquitted de qualibet Materia in eadem contenta, the Defendant may plead, quod stetit inde quietus, without shewing how, or that he in Facto discharged him, for it was not intended that an actual Discharge should be given, but that by the Arbitrament he should be acquitted. Freeman and Sheen, Cro. Jac. 339. adjudged. 1 Rol. Rep. 8. adjudged. 2 Bulst. 93, 94. adjudged. —Otherways if the Award had been that he should discharge and save him harmless from a certain Obligation. 1 Leon. 71. adjudged.

6. In Debt upon an Obligation, conditioned, That the Defendant shall repair, and do other Things, and also pay his Rent every Day of Payment; he cannot plead Performance generally, but must plead specially. *Mich.* 1 *H.* 7. *Kelw.* 95. b. adjudged.

7. But where the Condition refers to such a Generality, that by Intendment it is past the Remembrance of Man, as if the Under-Sheriff is bound to discharge his Master from all Accounts and Returns of Writs within the County, he may plead Performance of the Condition generally. *Mich.* 1 *H.* 7. *Kelw.* 95. b. *per Curiam.*

8. (p) In Debt upon a Bond, conditioned that the Defendant shall enfeoff the Plaintiff of all his Lands, the Defendant must plead Performance specially. *Kelw.* 95. b.

(p) Cro. El. 869, 870. S. P. per Curiam con. 1 Sid. 215. S. P. Lat. 16. S. P.

9. But if the Condition be, That a (q) Stranger shall enfeoff the Obligee, a general Performance may be pleaded. *Kelw.* 95. b.

(q) But by the Case of Lee and Luttrel, Cro. Jac. 559, 560. 2 Rol. Rep. 159. Palm. 70. 'tis otherways.

10. If the Condition of an Obligation be to make to the Obligee a lawful Estate in certain Lands, 'tis safe to plead that he hath (r) enfeoff'd him thereof, which is a lawful Estate, though in Strictness 'tis not necessary, because it appears to be a lawful Estate. *Kelw.* 95. b.

(r) If the Condition be to convey an Estate, in Pleading it must be shewed by what Manner of Conveyance it was done. 1 Leon. 72. 2 Leon. 39. 2 Mod. 240. Godb. 360. —So if the Condition be to shew a sufficient Discharge of an Annuity, in pleading Performance it must appear what Manner of Discharge it was, that the Court may adjudge whether sufficient or not. 9 Co. 25. a. Hob. 107. Bulst. 267. 2 Mod. 240.

11. But if the Condition be to build a sufficient House, the Defendant must say, that he hath built such an House, which is sufficient. *Kelw.* 95. b.

12. In Debt upon an Obligation, conditioned to deliver all Evidences concerning such Lands, the Defendant (s) must plead that he hath delivered such and such Charters, which are all the Charters concerning the Land. *Kelw.* 95. b.

(s) But per Cro. El. 869, 870 per Curiam, he may plead that he hath delivered all, &c. and the contrary in some Particular ought to be shewed on the other Side.

(t) Cro. El. 916. like Point adjudged.

12. (t) In Debt upon Obligation, conditioned, that the Defendant at all Times upon Requeſt ſhould deliver to the Plaintiff all the Fat and Tallow of all Beaſts which ſhould be killed or dreſſed by the Defendant, his Servants or Aſſigns, before ſuch a Day; the Defendant may plead, that upon every Requeſt to him made, he did deliver to the Plaintiff all the Fat and Tallow of all Beaſts, *&c.* without ſhewing how many Beaſts were killed or dreſſed, or what Quantity of Fat he delivered; for when Matters tend to Infinity and Multiplicity, whereby the Rolls ſhould be incumbred with Length, the Law allows of ſuch general Pleading. *Hill.* 42 *Eliz.* between *Mints* and *Bethel*, *Cro. El.* 749. adjudged upon Demurrer; though a Caſe was cited between *Sands* and *Maleverer*, (u) where the Condition was, That the Obligor being Bailiff of the Manor of the Obligee, ſhould (w) render an Account before ſuch a Day of all Rents by him received; and the Defendant pleaded, That before the Day he had rendered an Account of all the Rents by him received, and becauſe he did not ſhew what Rents he received, it was adjudged an ill Plea: But *Popham* ſaid, he doubted of the Caſe of *Sands*; but that it might ſtand with Reaſon, becauſe the Rents of the Manor are certain, and may be collected into a ſhort Sum.

(u) 1 Sid. 215. like Point adjudged: But vid. Kelw. 95. b.

(w) But 1 Sid. 334. in a like Caſe, where the Condition was to pay from Time to Time a Moiety of all ſuch Money as he ſhould receive, and to account, &c. a general Plea of Payment, &c. without ſhewing the particular Sums, was adjudged good.

14. In Debt upon an Obligation, conditioned for the Payment of 60 *l. viz.* 30 *l.* at one Day, and 30 *l.* at another Day, the Defendant may plead Payment of the 60 *l. ſecundum Formam & Effectum Conditionis pred'*, for *reddendo ſingula ſidgulis*, 'tis as if he had pleaded the ſeveral Payments at the ſeveral (x) Days. *Trin.* 33 *Eliz.* between *Fox* and *Lee*. *Cro. El.* 281. adjudged after Verdict for the Plaintiff.

(x) But ſuch general Pleading is not good, where a certain Day of Payment is not mentioned in the Condition. 2 Bulſ. 267. —In Debt upon an Obligation, conditioned to deliver ſuch Goods ſuch a Day, the Defendant pleads, That he delivered them ſecundum Formam Conditionis pred'. 2 Levin. 145. upon Demurrer adjornatur.

15. If in Debt upon an Obligation, conditioned, That if the Obligee ſhall enjoy ſuch Lands till the full Age of *J. S.* and if *J. S.* within one Month after his full Age makes an Aſſurance thereof to the Obligee, then, *&c.* the Defendant pleads, That *J. S.* is not of full Age; this Plea is not good, without ſhewing the Obligee hath enjoyed the Lands in the mean Time, for the Condition is in the Copulative. *Trin* 43 *Eliz.* between *Waller* and *Croot*, *Cro. Eliz.* 870. adjudged.

(y) 1 Bu'ſ. 43. S. P. adjudged.

16. (y) If in Debt upon an Obligation, conditioned to pay 30 *l.* to *A. B.* and C. *tam cito* as they ſhall come to the Age of 21 Years, the Defendant pleads, That he paid thoſe Sums *tam cito* as they came of Age; this is no good Plea, for the (z) Time, Place, and Manner of Performance, ought to be ſhewed in certain, ſo that a certain Iſſue might be taken upon it. *Mich.* 12 *Jac.* between (a) *Halſey* and *Carpenter*, *Cro. Jac.* 359. adjudged, but it ſeems to have been upon a Special Demurrer.

(z) If the Condition be to ſurrender a Copyhold, the Defendant muſt not plead generally that he hath ſurrendzed it, but muſt ſhew when the Court was held, &c. Winch. 11. adjudged. —If the Condition be, That the Obligee ſhall enjoy an Office accozding to Letters Patents, the Defendant muſt not plead in hæc Verba, but ſhew the Effect of the Letters Patents and the Enjoyment accozdingly. Hob. 295. (a) 2 Bulſt. 267. S. C. adjudged upon a ſpecial Demurrer.

17. If in Debt upon an Obligation, conditioned to perform Covenants, one of which was for the Payment of Money upon the making an Aſſurance, the Defendant pleads, That he paid the Money ſuch a Day, but ſaith not when the Aſſurance was made; this is naught, for that it ought to appear thar the Money was immediately paid, purſuant

ſuant to the Covenant. *Paſch.* 27 *Car.* 2. between *Duck* and *Vincent*, 2 *Mod.* 33. adjudged.

18. In an Action of Covenant the Plaintiff declared, That his Father was ſeiſed in Fee of a Meſſuage, and leaſed to the Defendant for 21 Years, and that the Defendant covenanted to repair, ſupport, and amend the ſame during the Term, and that his Father died, *&c.* and that the Meſſuage was *totaliter dirut' & ruinos'*, and the Defendant pleaded, That before the Houſe was ruinous, *&c.* he aſſigned to *J. S.* and that after the Houſe was burnt *quodq; in convenienti Tempore poſt Deſtructionem Domus pred'*, and before the Action brought, *Meſſuagium pred' cum Pertinentiis ſufficienter reedificat', &c. fuit, & adhuc in bona Reparatione exiſtit. Paſch.* 24 *Car.* 2. between *Walton* and *Waterhouſe*, 2 *Saund.* 420. adjudged upon a Special Demurrer, that this Plea was naught, becauſe it was not ſhewed by whom it was rebuilt; though it was objected, that (b) it was not material by whom it was rebuilt; and if by a Stranger, it could not be built again by the Defendant; and he having aſſigned all his Intereſt before, it lay not in his Notice by whom it was built, but that it could not be preſumed to be built by the Plaintiff, for that he could not intermeddle with the Poſſeſſion during the Term: But by the Report, it being alledged, That the Plaintiff had rebuilt it at his own Charge, *Hale* refuſed to hear the Reaſons, and *quaſi* in a Paſſion, without conſidering the Matter in Law, gave Judgment for the Plaintiff.

(b) 1 Vent. 38. S. P. dubitatur.

Court.

(a) Court.

Fol. 523.

(a) Vid. the Preface to the 9th. Report.

(A) (b) Office (c) of the (d) Court.

(b) Where the Court ex Officio may abate a Writ. Cro. El. 121, 185, 198, 330. Gouldſ. 106, 107. 2 Leon. 162. 3 Leon. 39. 1 Rol. Rep. 176. Palm. 311. Hob. 37, 162, 279, 281. Godb. 119. Styl. 477. Vaugh. 95. Yelv. 56. 3 Co. 85. a.—They muſt adjudge upon the whole Record. Hob. 36. (c) Where the Court ex Officio ought to award, that the Parol demur, though the Tenant would anſwer. 1 Part 269. Pl. 1. (d) Of what Acts of Parliament the Court muſt take notice. Vid. 2 Rol. Abr. 465. (e) Cro. Jac. 204. S. P. appears. Webb and Paternoſter. S. P. appears. Godb. 282. 2 Rol. Rep. 143, 152. Poph. 151. Palm. 71, 73. Et vid. Hob. 174. 1 Mod. 139.

1. (e) **What ſhall be ſaid a reaſonable Time, ſhall be adjudged by the Diſcretion of the Juſtices before whom the Cauſe depends.** Co. Lit. 56. b.

(f) 2 Rol. Abr. 578. Pl. 7. S. P.

2. (f) **What ſhall be be ſaid a reaſonable Fine, Cuſtom or Service, ſhall be adjudged by the Diſcretion of the Juſtices before whom the Cauſe depends upon the true State of the Caſe depending before them; for Reaſonableneſs in theſe Caſes appertains to the Conuſance of the Law, and therefore to be decided by the Juſtices.** Co. Lit. 56. b. 59. b.

3. **If the Jury find a Special Verdict, that A.** mutuo dedit 500 l. **to B. for which B. enfeoffed A. of certain Lands, upon Condition that if he paid to him 650 l. at a certain Day three Years after, that it ſhould be lawful for him to re-enter; and ſo leaves it to the Court, whether this be Uſury or not; though it appears here to the Court, that more than 10 l. for 100 l. is reſerved, having regard to the Profits which the Feoffee is to have by the Feoffment, which are found to a certain Value: Yet becauſe the Jury hath not found it to be Uſury, the Court ſhall not adjudge it to to be Uſury, for there ought to be an uſurious and corrupt Contract, of which the Court cannot have Conuſance** (g) **without the finding of the Jury.** Mic. 15 Jac. B. R. **between** (h) Web and Worfield, **adjudged in a Writ of Error upon a Judgment** in Banco, **where it was ſo alſo adjudged.**

(g) But yet in Cro. Jac. 508. where the Jury found all the Circumſtances, ſo that it was apparent to the Court that there was an uſurious Contract, the Court adjudged it ſo accordingly. (h) Bridg. 110, 111. S. C. adjudged upon a Writ of Error, and the firſt Judgment affirmed accordingly; but the Report in the State of the Caſe is miſprinted.

(i) Smith and Wheeler. S. P. 1 Vent. 128. agreed per Curiam. 1 Mod. 16, 38, 39. agreed per Curiam.

4. (i) **So if the Jury find** (k) **ſpecial Matter, Preſumptions and Circumſtances, that a Feoffment was made by Fraud, yet the Court cannot adjudge it to be fraudulent, without the finding of the Jury that there was Fraud, becauſe that was Matter of Fact, and but Evidence of Fraud.** Co. 10. Chancellor of Oxford, 57. b. **reſolved.**

3 Lev. 279. Et vid. Hard. 397. (k) So if in Trover the Jury find a Demand and Denial, but no expreſs Converſion. 10 Co. 56. b. per Coke; but for this, vid. 1 Part 21 Pl. 2. 22. Pl. 3.

(l) Frier and Littleton. like Point. 1 Brownl. 36. 2 Brownl. 187, 188.

5. (l) **If a Jury find, that J. S. with his own Money procured Lands to be ſettled upon himſelf and B. his Son, being of the Age of five Years, and find other Badges of Fraud, and after becomes Bankrupt; but is is not found that this was done**

adjudged. Bridg. 112. cited. Et vid. Dyer 193. Pl. 27. Cro. El. 292.

by Fraud, or in Truſt for himſelf, the Court ſhall not intend it; and therefore the Sale of ſuch Lands are not lawful. Trin. 15 Car. B. R. between (m) Criſpe and Pratt, per Curiam, agreed upon a Special Verdict.

(m) Cro. Car. 549, 550. S. C. adjudged. 1 Jon. 437, 438. S. C. But this Point does not plainly appear. March 34, 35, &c. S. C. adjudged.

6. If a Commiſſion iſſues out of the *Exchequer*, upon the Statute of Fugitives made the 13 *Eliz.* and thereupon an Inquiſition is returned, by which it is found, that *J. S* was ſeiſed in Fee of ſeveral Manors, *&c.* and covenanted to ſtand ſeiſed to the Uſe of *A.* &c. during the Life of *J. S.* and after to ſeveral other Uſes, provided to be void upon Tender of a Ring; and it is further found, that *J. S.* at all Times after, till his flying beyond Sea, took the Profits, and that his Flight was without Licence, and that he did not return upon Proclamation made, but no Covin is expreſly found, (n) yet the Court may award a Seiſure, for the Jury have found ſufficient ſpecial Matter to inform the Court of the Covin apparent. *Trin.* 26 *Eliz.* the Lord *Paget's* Caſe. *Moor* 193. *pl.* 343. a Seiſure awarded accordingly for this Reaſon *inter alia.*

(n) A. by Licence of the King, went beyond Sea, but after by Privy Seal delivered to him, was commanded to return, &c. which he not doing, a Commiſſion iſſued to enquire of his Lands; and the Jury found, that before he went beyond Sea, he bargained and ſold, &c. with Power of Revocation, and other Badges of Fraud, but found no Fraud expreſly; upon which the King exhibited his Bill in the Exchequer againſt the Bargainees, who confeſſed the Special Matter. Et Lane 42, 48. it was decreed for the King; for a Court of Equity, upon the Circumſtances, may adjudge of the Fraud, though in a Court of Law the Fraud is a Matter of Fact, and muſt be found by the Jury.

(B) Of what Things the Court ſhall take Conuſance *ex Officio.*

Office.

1. IN an Action upon the Caſe upon a Reſcous, if the Plaintiff declares, that A. was indebted to him by Obligation in 20 l. and that he ſued a Writ againſt him, directed to the Sheriff of Cornwal to take A. &c. and that the Sheriff thereupon, 1 Octob. 6 Car. arreſted him apud Launceſton' in Comitatu Cornubiæ, and after the Defendant apud Weſtmonaſterium reſcued him out of the Cuſtody of the Sheriff, bringing him towards Weſtminſter the ſaid 1 Octob. 6 Car. Upon Not Guilty pleaded, if a Verdict and Judgment be given againſt the Plaintiff, and he brings a Writ of Error and aſſigns it for Error, that it was (*) impoſſible he could be arreſted at Launceſton, and the ſame Day be reſcued at Weſtminſter, averring, That Launceſton' is diſtant from Weſtminſter 200 Miles at leaſt; and thereupon in nullo eſt erratum is pleaded, by which it is acknowledged, that Launceſton is ſo many Miles diſtant from Weſtminſter, yet the Court will not intend it be impoſſible for him to be reſcued at Weſtminſter the ſame Day. P. 9 Car. between Kendall and Kendall, adjudged in Camera Scaccarii in a Writ of Error upon a Judgment given in Banco Regis.

* Fol. 524.

2. (a) Every Court of Weſtminſter ought to take notice of the

(a) Bounſon and Bourn. 1 Jon. S. P. 417. 418, per Cur' Cro. Car. 527, 528. per Curiam. 2 Rol. Abr. 182. Pl. 3. S. P. But for this, vid. Cro. Car. 513. Yelv. 42. Cro. Jac. 3. Cro. Jac. 68. Palm. 30. 2 Rol. Rep. 292.

(b) So of the Courts of Wales, and they may inform themſelves thereof by Precedents, and by Certificate from the Judges there. Cro. El. 503. Cro. Car. 179, 445. 1 Sid. 331. 1 Saund. 72. Et vid. Godb. 436, 437. —If a Judgment is given in London, and it comes in B. R. by Error, the King's Bench muſt take notice of the Cuſtoms of London; for that in their Court the Cuſtom need not be alledged; and if the King's Bench ſhould not take notice thereof, they might reverſe a Judgment where there was no Cauſe for it. 1 Rol. Rep. 106.

Cuſtoms of other Courts of (b) Weſtminſter. Co. 2. Lane 16. b. 2 R. 3. 9. b.

3. **But otherwiſe it is of inferior Courts.** Co. 2. Lan. 17. 2 R. 39. b.

4. **If a Leaſe be pleaded to be made by the King under the Exchequer Seal, though this is not good by the Common Law, but by the Cuſtom of the Court of Exchequer, yet it is not neceſſary to plead or aver the Cuſtom of a Court,** (c) **for the Cuſtoms and Courſes of every of the King's Courts are as a Law, and the Common Law takes notice of them without pleading.** Co. 2. (d) Lane 16. b. **adjudged.**

(c) Pl. Com. 320. b. 4 Co. 93. b.

(d) 1 Leon. 170. S. C. adjudged. 1 And. 191. S. P. appears. Goulſ. 34. S. C. but S. P. does not appear. 2 Roll. Abr. 18. Pl. 3. &c.

(C) Of what things the Court ought to take Conuſance, without Averment thereof.

1. **If a Man be indicted, that he killed a Serjeant of London in the Execution of the King's Proceſs,** 18 die Novembris inter horas quintam & ſextam; **though, in truth, this Time being in November, is Part of the Night, yet the Court is not bound, ex Officio, to take notice thereof, no more than in the Caſe of Burglary, without theſe Words,** in nocte ejuſdem diei, **or** noctanter. Co. 9. Machally 66. **reſolved.**

2. **In an Indictment of Burglary, the Court is not bound to take notice that it was done in the Night, though the Time alledged ought to be in the Night, without the Words** in nocte ejuſdem diei, **or** noctanter. Co. 9. Machally 66. b.

3. **If upon the Pleading it appears to the Court, that a Proclamation of a Fine levied upon the Statute of the** 4 H 7. **was made** Termino Trinitatis 7 Junii, &c. **Though this ſeventh Day of** June **was** dies Dominicus, **and ſo not** dies Juridicus, **yet the Court will not take notice that it was** dies Dominicus, **without an expreſs Averment thereof.** D. 2 El. 182. 52, 55. Fiſh **and** Broket. Com. 265. **the ſame Caſe,**

4. **If upon the pleading of a Fine it appears to the Court, that one of the Proclamations was made** Termino Paſchæ 31 Junii, **when there is not, nor ever was ſo many Days in this Month, the Court will take notice of this without any Averment;** for it **is impoſſible.** D. 2 El. 182. 52. 55. Fiſh and Broket. Com. 265.

5. **If upon pleading a Fine it appears to the Court, that one of the Proclamations was made the** 25 Junii Termino Paſchæ, where all June **was out of the Term,** (a) **yet the Court ſhall not take notice thereof, without Averment; as by Averment, that the** (b) **Feaſt of Eaſter commenced the ſame Year the** 1 Maii, & finivit ultimo Maii. D. 2 El. 182. 52. Com. 266. b. Fiſh **and** Broket **averred there.**

(a) The Court quaſhed a Mandamus dated out of Term. 1 Sid. 304. Et vid. 1 Saund. 299.

(b) 'Tis ſo in the Original, but ſeems to be miſprinted, and that it ſhould be Term.

6. (c) In an Action upon the Case, if the Plaintiff declares, that in Consideration of 20 l. the Defendant assumed to deliver to the Plaintiff 20 Cumbos tritici, which he had not delivered; though it is not averred by an Anglice quid est Cumbus, yet the Court ought to take notice thereof, (d) being the Phrase of the Country of Norfolk and Suffolk, and other Places, and there well known. (*) Mich. 11 Ja. B. R. between Cock and Thoroughgood, per Curiam my Reports. 11 Ja.

(c) Palm. 398. like Point, by two Judges in an Action of Covenant.

* Fol. 525.

(d) So an Actions lies for Words of Slander, according to the Phrase of the Country where spoke, without any Averment of the Meaning. 1 Part 161. Et vid. 1 Bulst. 175, 176.

7. In an Action upon the Case, if the Plaintiff declares, that the Defendant sold to him quasdam Carrucas signatas, Anglice Car-rooms, and that the Defendant promised firmam facere prædictas Carrucas signatas, Anglice Car-rooms; though it is not averred what is intended by the Word Car-rooms, nor what it signifies, yet the Declaration is good; for it is a Phrase in London well known, of which the Court ought to take notice, this being a Phrase of the Country. Tr. 21 Jac. B. R. Rot. 1416. entred. By Car-rooms is intended a Mark which the Lord Mayor puts upon a Cart.

8. (e) In a Writ of Error upon a Judgment in an inferior Court, if any Error be assigned, that the Record is quod quædam Curia tenta fuit die Mercurii, viz. 3 Martii, &c. where Monday was the third Day, and not Wednesday. This is Error, (e) of which the Court is to take notice. (f) 1 H. 7. 12. b. adjudged.

(e) So where it is assigned for Error, that the Day upon which the Court was held, was upon a Sunday. Paye and Faucet. Cro. El. 227. adjudged, and that it should be tried by Examination of the Almanack of that Year; and though it was an Error in Fact, yet that such Examination was sufficient, and there was no Occasion for a Trial per Pais. 1 Leon. 242. adjudged, though not assigned for Error upon Record, but at the Bar only, and the Judgment reversed. (f) Br. Error 134. S. C.

9. In a Writ of Error upon an Indictment of Trespass, supposing the Trespass to be done die Jovis prox' post diem Pentecostes, if it be assigned for Error that dies Pentecostes is every Day of the Week, so that it is uncertain whether he intends diem Jovis in the same Week or next Week, yet the Court ought to take Conusance of the Feast, scilicet, that Pentecoste dicitur a Penta, quod est quinque, & Coste, quod est decem, & hoc est quinque decem dies post Pascham, and this Day is dies Dominicus, the first Day of Pentecost, and so over-ruled the Error without more Proof. (g) 7 H. 6. 39. adjudged. Com. 122. b.

(g) Fitz. Error 17. S. C. Br. 27. S. C. Br. Jour 27. S. C.

10. In Account, if the Plaintiff declares, that the Defendant was his Bailiff, &c. from such a Day in such an Year, &c. till the Feast of St. Michael, &c. though in the Declaration 'tis not St. Michael the Archangel, or St. Michael in Monte Tumba, yet the Court shall intend it to be St. Michael the Archangel, because this is the most famous St. Michael, and therefore the Declaration is certain enough. (h) 20 H. 6. 23. adjudged.

(h) Fitz. Count 31. S. C. Br. 13. S. C. Br. Exposition 20. S. C. Br. Jour. 5. S. C.

11. But if he had declared from such a Day, &c. usque ad Fest' beatæ Mariæ Virginis, this had not been good, because it is uncertain what Feast he intends, there being two. (i) 20 H. 6. 23. per Newton.

(i) Fitz. Count 31. S. C. Br. Jour. 5. S. C.

12. In a Writ of Error to reverse an Outlawry, if it appears that the Exigent was returnable at the Utas of the Holy Trinity, and that the fifth County was held the 11th of July, though in truth the Utas of Trinity was the 10th of July, and so the Return

turn of the Writ before the fifth County was held, (k) yet the Court shall not take Conuſance thereof without Averment. (l) 21 H. 6. 13. an Averment there made.

(k) Biſhop and Harecourt. like Point.

1 And. 240. adjudged. Cro. El. 210. adjudged. Et vid. Cro. Jac. 116, 548. Yelv. 35. Cro. Car. 53. Al. 87. Styl. 98. 2 Mod. 228. 1 Sid. 308. (l) This is miſprinted in the Original, and I ſuppoſe ſhould be 31 H. 5. which vid. Fitz. Error 32. S. C. Br. Jour. 84. S. C.

13. If a Man pleads a Thing to be done at ſuch a Feaſt, or before ſuch a Feaſt, this is well enough without Averment of the Month when this Feaſt was. 15 H. 7. 2. b. admit. (m) 20 H. 6. 23.

(m) Fitz. Count 31. S. C. Br. 13. S. C.

14. If in Treſpaſs the Defendant juſtifies for an Amercement in the Sheriff's Turn, which by the Statute of the (n) 31 E. 3. is to be held infra menſem poſt Feſtum Paſchæ & Michaelis; and the Defendant ſays the Plaintiff was amerced at a Court held the 18th of April infra menſem Paſchæ, and does not ſay infra menſem poſt Feſtum Paſchæ, and therefore adjudged not to be a good Plea; for that though it appears by the Almanack that the 18th of April was infra menſem after the Feaſt of Easter, yet the Court is not bound to take Notice thereof without an Averment thereof, nor to inſpect an Almanack for it; but (*) it was ſaid by Juſtice Jones, that they are bound to take notice of immoveable Feaſts, and not of moveable Feaſts, as this is. Mich. 8 Car. Br. (o) between Griffin and Bedle adjudged upon Demurrer. Intratur Hill. 5 Rot 43.

(n) Cap. 15.

* Fol. 526.

(o) Cro. Car. 275. S. C. adjudged. 1 Jon. 300. S. C. adjudged, and the Diverſity taken between moveable and immoveable Feaſts. Et vid. 1 And. 240. Cro. El. 210. Lat. 118. Cro. Jac. 548. Yelv. 35. Cro. Car. 53. Al. 87.

(15) If in Debt upon an Obligation dated the 14th of *June*, conditioned to appear *die Veneris in tres Trin.* &c. The Defendant pleads the Statute of 23 *H.* 6. and that the Party was arreſted the 13th of *June*, and detained in Priſon till the 19th, and that *dies Veneris in tres Trin.* that Year, was the 14th of *June*, and that after the 14th of *June*, viz. the 19th of *June* he delivered the Obligation, *abſque hoc* that he delivered it the 14th of *June*, or at any Time before; the Traverſe is naught, for it ought to be *abſque hoc* that he delivered it before the Day of the Writ, for the Court is not obliged to take notice of the Day of the Month upon which a moveable Feaſt falls. *Mich.* 18 *Car.* 2. between (p) *Courtny* and *Philips*. 1 *Lev.* 196. adjudged upon Demurrer.

(p) 1 Sid. 300. S. C. adjudged;

for if this Traverſe ſhould be good, the Plaintiff would be excluded from an Anſwer to the Time of the Return alledged, though falſe; and by Twyſden, though the Statutes ſay, That the two moveable Terms ſhall commence within ſo many Days from ſuch a Feaſt, and ſo they are bound to take notice thereof, yet they are not bound to take notice upon what Day of the Month this Day is.

(D) In what Caſes the Court ought to take notice (a) of the (b) Eccleſiaſtical Law.

(a) If the Eccleſiaſtical Court gives Sentence in a Matter of which they have Conuſance, though againſt the Reaſon of the Common Law, yet the Judges of the Common Law ought to give Credit thereto, and believe it conſonant with the Law of Holy Church. 4 Co. 29 a. 7 Co. 42. b. Mid. 1 Rol. Abr. 530. Pl. 12. and the Notes there. (b) Yelv. 17. (c) This is miſprinted in the Original, for there 'tis 16.

1. If Adminiſtration be granted to B of the Goods of A. durante minore ætate of C. and it appears in pleading, that C. is of the Age of (c) Seventeen, the Court ought to take notice of the Eccleſiaſtical Law, that the Adminiſtration is void, and deter-

mined Mich. 14 Car. B. R. between (d) Damporte and Pincent, per Jones, Croke and Berkly, but Brampston econtra. (d) Cro. Car. 516. S. C. adjornatur.

1 Roll. Abr. 910. Pl. 2. which vid. with the Notes there.

(E) What Things the Court may do.

1. If upon Examination the Court find, That the Tenant in a Formedon hath acknowledged the Action of the Demandant, where the Demandant had before brought such Writ against another, where the Parol was put without Day by Nonage, so that there appears an apparent Deceit; the Court may refuse (a) to give Judgment thereupon. 39 Ed. 3. 35. (a) Where they may cause a Ma- cat to be entered upon a Judgment given. Vid. 2 Rol. Abr. 724. Pl. 1. and the Notes there.

(F) What Things shall be incident to a Court.

1. If the King grants a Court by Letters-Patents to a Corporation of a Town to hold Pleas, &c. in this Case, though there is not any Clause in the Patent to make a Bailiff or Serjeant to execute the Process of the Court, and to return Juries, &c. (a) yet it is incident to their Grant to do it, for otherways they cannot hold a Court. Mich. 14 Car. B. R. in Metcalfe and Worsely's Case, per Curiam agreed. (a) Where Conusance is granted, tho' no Process is limited, yet the proper Process shall issue as incident. 1 Rol. Abr. 491. Pl. 1.

2. But upon such Grant of a Court, if there be not any Clause in the Patent to make a Bailiff to execute Writs of Enquiry of Damages, if a Judgment is given by which a Writ of Enquiry of Damages is to be granted, this ought to be returnable in Court, and there the Enquiry ought to be made; for the Bailiff cannot execute it, inasmuch as he cannot execute it without giving an Oath to the Jury and Witnesses, which the Letters do not give him Power to do; for this is not necessarily implied in the Grant of the Court, inasmuch as it may be done in Court. Mich. 14 Car. B. R. between (*) Metcalf and Worsely, per Curiam, in a Writ of Error out of an inferior Court, and the first Judgment reversed accordingly. (*) 797. Pl. 5. S. C.

(G) (a) At what (b) Time the Court ought to be held.

(a) For this, vide under each respective Court.

(b) Where the Steward came after Sun-set, and held a Court-Baron, and the Judgment

1. If the King grants a Court to be held die Jovis every Week, it may be held in one Week, and be thence adjourned for two Weeks after, leaving a Week mean. Mich. 4 Jac. B. R. between Coa and Clerk.

there given was held good. Ow. 63. by three Judges. Moor 68. Pl. 185. by three Judges. Dal. 70. by three Judges.

2. **But it would be otherways, if the Words in the Patent ſhould be,** Et non aliter, vel alio modo. Tr. 4 Jac. B. R. between Coa and Clerk.

Fol. 527.

3. 3 Hill. 4 Ed. 1. B. Rot. 29. Comes Glouceſtriæ calumniat quod ſecundum legem & conſuetudinem Regni nullus jurare debet in Aſſiſa poſt clauſum Alleluya.

4. **If a Leet hath been held at a certain Day, and this is changed, and held at another Day, this is void.** (c) 38 H. 6. 7.

(c) Fitz. Leet 2. & S. C. Br. Court-Baron. 17 S C.

5. **But if a** (d) **Court-Baron hath been held at a certain Day, this may be held at another Day.** (e) 38 H. 6. 7.

(d) It may be held from three Weeks to three Weeks. Co. Lit. 58. a. (e) Fitz. Leet 2. S. C. Br. Court-Baron 17. S. C.

6. By the Statute of *Magna Charta*, *cap.* 35. it is enacted, That from (f) thenceforth the County-Court ſhall not be holden but from Month to Month, (g) and where greater Time hath been uſed, there ſhall be greater.

(f) Yet this was only in Affirmance of the Common Law. 2 Inſt. 70. (g) But by 2 Ed 3. cap. 15. no County-Court ſhall be longer deferred than one Month from Court to Court. —They are not to be accounted according to the Kalendar, but 28 Days. 2 Inſt. 71. —And to be taken excluſively. Cro. Jac. 167.

7. By the ſame Statute the Sheriff or his Bailiff ſhall keep his Tourn in the (h) Hundred but twice in the Year, *viz.* after *Eaſter* and *Michaelmas*, and the (i) View of Frankpledge ſhall be at *Michaelmas*; (k) ſo that every Man may have the Liberties which he had.

(h) That Sheriffs had uſed to keep their Tourns in every Hundred. 2 Inſt. 122. (i) This Article concerning the View of Frankpledge, being underſtood in a particular Senſe, ſhall be dealt withal by the Sheriff but once in the Year, viz. at the Tourn after Michaelmas; but this Clauſe extends only to the Leet of the Tourn, and not other Leets. 2 Inſt. 72. (k) Therefore this Act extends to the Sheriff's Tourn, but not to the Leets of Subjects. 2 Inſt. 71. 2 Leon. 74. —However being only in Affirmance of the Common Law, a Man may preſcribe to hold a Leet oftner, and at other Times. Co. Lit. 115. a. Cro. El. 125, 245.

8. And by 31 *Ed.* 3. *cap.* 15. The Tourn muſt be held within the Months (l) after *Eaſter* and *Michaelmas*.

(l) The Pleading that it was held infra menſem Paſchæ, naught. Griffith and Bedle. Cro. Car. 275. adjudged. 1 Jon. 300, 301. adjudged. —Infra menſem poſt Feſtum Sancti Michaelis, ſcilicet, 12 Nov. though the ſcilicet being contrary to the Matter precedent, is void, yet the Pleading is naught, becauſe the Day does not appear, and then it might be upon a Sunday. Dakin's Caſe. 2 Saund. 290. 1 Vent. 107.

(H) In what Places the Court may be held.

(m) Ow. 35. S. P. Dal. 61. S. P.

1. (m) **A Court-Baron ought to be held upon ſome Part of the Manor, for if it be held out of the Manor, it is void.** Co. Lit. 58.

2. **But if the Lord, being ſeiſed of two or three Manors, hath uſually, Time out of Mind, held Courts Baron at one of the Manors for all the Manors; then by the Cuſtom ſuch Courts are well held, though they be not held within the ſeveral Manors.** Co. Lit. 58.

3. **A Cuſtomary Copyhold Court cannot be held out of the Manor.** Co. 4. between Melwich and Luter. 26. b. reſolved. Co. 4. 27. between Clifton and Molineux; reſolved, (n) **that the Steward cannot make Grants or Admittances at any Court held out of the Manor.**

(n) 1 Leon. 289. S P. per Cur' con. —And by 1 Rol. Abr. 50. Pl. 4. the Steward may make an Admittance out of Court.

4. A Court-Leet may be held at any Place within the Liberty or Franchiſe. (c) *Mich.* 13 & 14 *Eliz. Ow.* 35.

5. By the Statute of *Magna Charta*, *cap.* 35. the Sheriff ſhall keep his Tourn no where but in the due Place and accuſtomed, *&c.*

(c) Dalt. 61. S. P. and ſeems to be S. C. though 6 Eliz.

(I) What ſhall be ſaid Courts of Record.

1. THE Court of Admiralty is not any Court of Record, and therefore no Recognizance can be taken there. Tr. 8 Jac. B. ſaid to be adjudged.

2. The Engliſh Court of Chancery proceeding upon a Subpœna, and by way of Decree, (*) is no Court of Record. 37 H. 6. 14. b. per Priſot.

(*) 1 Part 748. Pl. 1. vide the Notes there.

3. (a) The County-Court is (b) no Court of Record. Co. Lit. 117. b.

(a) Co. Lit. 117. b. 2 Inſt. 380. S. P.

4 Inſt. 264. S. P. Co. Lit. 117. b. (b) Though Plea held there by Juſticies. 2 Inſt. 140, 312. 6 Co. 11. b.

4. (c) The Hundred Court is no Court of Record. Co. Lit. 117. b.

(c) Co. Lit. 117. b. 2 Inſt. 143. S. P. 4 Inſt. 264. S. P.

5. (d) A Court-Baron is no Court of Record. Co. Lit. 117. b.

(d) Co. Lit. 117. b. 2 Inſt. 143. S. P. 4 Inſt. 264. S. P.

6. (e) The Leets and Tourns are the (f) King's Courts, and of Record. 2 Inſt. 143.

(e) 4 Inſt. 263. S. P. Hetl. 62.

(f) Every Court of Record is the King's Court. Co. Lit. 117. b.

(K) (a) The Court of (b) Conſtable and (c) Marſhal.

(a) 4 Inſt. 123.

(b) This Office was held by the Tenure of the Manor of Hatfield, &c. by Grand Serjeantry in the Line of the Bohuns, Earls of Hereford and Eſſex, and after in the Lines of the Staffords, and Dukes of Buckingham, as Heirs general to them; and after it deſcended to Edward Duke of Buckingham, who was attainted of Treaſon in 13 H. 8. whereby this Office was forfeited to the Crown, and ſince that Time, in reſpect of the Amplitude of the Authority both in War and Peace, and of the Charge, it hath been grantted only hac vice. 4 Inſt. 127. (c) This Office was always grantable by the King, and never belonged to any Subject by reaſon of a Tenure. 4 Inſt. 127. —And for ſeveral Grants of both theſe Offices, vid. 4 Inſt. 127, 128. (d) This is miſprinted in the Original, for there 'tis Paroll.

1. ROT' (d) Parl. 22 Ed. 3. numero 4. Fifteenths granted upon divers Conditions to be entered in the Rolls of Parliament, ſcilicet, among others, that there be no Mareſchalcy in England, except the Mareſchalcy of the King, and of the Guardian of England, when the King ſhall be out of England.

2. H. 4. numero 79. the Commons pray againſt the Court of the Conſtable and Marſhal; but no Aſſent thereto, Simile ibid. numero 99. for holding Pleas of Matters triable by the Juſtices, according to the Common Law; but no Aſſent thereto.

3. By the 8 *R.* 2. *cap.* 5. Pleas which ought to be diſcuſſed at Common Law, ſhall not be holden before the Conſtable and Marſhal.

4. By

4. By the 13 *R.* 2. *Stat.* 1. *cap.* 2. Upon Complaint of Incroachments, *&c.* 'tis declared, that to the Conſtable pertaineth Cogniſance of Contracts (e) touching Deeds of Arms and War (f) out of the Realm, and of Things that touch War within the Realm (g) which (h) cannot be determined by the Common Law, (i) with other Uſages and Cuſtoms thereunto pertaining heretofore duly uſed; but every Plaintiff ſhall declare plainly his Matter in his Petition before any Man be ſent for to anſwer thereto, and upon Complaint that a Plea commenced before the Conſtable and Marſhal, might be tried by Common Law, the Complainant ſhall have a (k) Privy Seal to the Conſtable and Marſhal to ſurceaſe till diſcuſſed by the King's Council, whether triable there or at Common Law.

(e) 1 Inſ. 261. a. 391. b.

(f) Upon Land, for upon the Sea the Admiral hath Juriſdiction; and as he cannot meddle with any thing done upon the Land beyond Sea, ſo cannot the Conſtable and Marſhal with any Thing done upon the Sea. 4 Inſ. 124. — If one Subject of the King kills another in a foreign Country, his Wife or Heir may have an Appeal before the Conſtable and Marſhal, whoſe Sentence is upon Teſtimony of Witneſſes or Combat, and ſo it was reſolved in the Reign of Queen Eliz. in Sir Francis Drake's Caſe, who ſtruck off the Head of D. Down partibus tranſmarinis, ſed Regina noluit conſtituere Conſtabularium Angliæ, & ideo dormivit Appellum. Co. Lit. 74. a. 2 Inſ. 51. 3 Inſ. 48. Hut. 3. — Though by ſeveral Statutes temp. H. 8. Treaſon committed out of the Realm may be tried in B. R. or by Commiſſion, &c. yet they take not away the Juriſdiction of the Conſtable and Marſhal. 4 Inſ. 124. Caſ. in Parl. 63. (g) As if one mortally wounded in France, dies in England; for it is not puniſhable by the Common Law. Co. Lit. 74. b. 3 Inſ. 48. — So if one be ſtricken at Sea, and dies at Land, for the Common Law cannot inquire, becauſe no Viſne can ariſe where the Stroke was given; and the Admiral hach no Juriſdiction, becauſe he died at Land, nor is it within 28 H. 8. becauſe the Murder cannot be ſaid to be done at Sea. 3 Inſ. 48. (h) Where the Cauſe of Action done out of the Realm is tranſitory, an Action lies at Common Law, or the Party grieved may take his Remedy before the Juſtices beyond Sea where the Fact was done. 12 Co. 104. (i) This Court hath the abſolute Determination of Matters of Honour. 1 Sid. 353. Hob. 121. Caſes in Parl. 61. — Its Precedency. 1 Rol. Rep. 87. Et vid. Caſes in Parl. 64. — Whether they may puniſh one for taking upon him to paint Arms and marſhal Funerals, &c. belonging to the Office of Heralds. Parker's Caſe. 1 Lev. 230. 1 Sid. 352. Caſes in Parl. 64. (k) Or he may have a Prohibition. Caſes in Parl. 58, 59. debated.

5. By 1 *H.* 4 *cap.* 14. All (l) Appeals of Things done within the Realm ſhall be tried by the good Laws thereof, and thoſe out of the Realm by the Conſtable and Marſhal, *&c.*

(l) But whether there is any Remedy there for the King by Indictment, or Information at the Proſecution of the Attorney General. Hut. 3. dub.

6. The Lord Conſtable and Earl Marſhal of *England*, are the (m) Judges of this Court, which is called *Curia Militaris*, and is the Fountain of the Martial Law, and the Earl Marſhal, though one of the Judges, is to ſee Execution done. (n) 4 *Inſ.* 123.

(m) The Heralds are Attendants upon the Court, and manage the Combat. 4 Inſ. 126. — By the Law of Arms the Appellant being vanquiſhed, ſhall incur the ſame Puniſhment as the Defendant ſhould have done. 4 Inſ. 124. (n) Caſes in Parl. 60. S. P. cited.

7. Their (o) Proceedings are according to the Cuſtom and Uſages of the Court, and in Caſes omitted according to the Civil Law, *ſecundum Legem Armorum*. 4 *Inſ.* 125.

(o) In a ſummary Way by Petition. Caſ. in Parl. 62. — The Party grieved by the Sentence may appeal to the King. Co. Lit. 261. 4 Inſ. 125, 341. Caſ. in Parl. 62. — But no Writ of Error or Falſe Judgment lies thereupon.

8. (p) As to Matters touching Arms and Honour, the Court is held before the Earl Marſhal only; but as to Matters (q) touching Life and Member, before the Conſtable and Marſhal. *Hill.* 19 & 20 *Car.* 2. *Parker's* Caſe. 1 *Lev.* 230 agreed *per Cur.*

(p) Caſ. in Parl. 65, 66.

(q) For per 1 H. 4. all Appeals are to be before both by Name. Caſ. in Parl. 61.

9. The Earl Marſhal being a Lunatick, the Court was held before Commiſſioners deputed to exerciſe the Office of Earl Marſhal. *Hill.* 19 & 20 *Car.* 2. (r) *Parker's* Caſe. 1 *Lev.* 230.

(r) 1 Sid. 353. S. C. and per Cur' held a good Commiſſion. Con. Twyſden, who held ſuch Commiſſion illegal, and againſt the Petition of Right. 3 Car. 1.

(a) The Court of (b) Admiralty.

Fol 528.

1. HOrne Miror de Juſtices 2. b. **Among the Conſtitutions of King** Alfred, **one is, That the Sovereignty of all the Land to** (*) **the middle of the Sea about the Land belongs to the King in the Right of his Crown.**

2. **Maſter** Selden **told me, there was a** (c) **Record** in Turri Londinenſi **in** 34 E. 1. **that it was agreed by all the Princes of the Chriſtian World, that the** (d) **narrow Sea, and the Sea which is about** England, **belongs to, and is within the Juriſdiction of the King of** England.

3. 34 E. 1. Rot. par. Membrana 21. **An Admiral made of** Dover, verſus partes Occidentales uſque Scotiam, **and another Admiral of the** Thames, verſus partes Boreales uſque Berwick.

4. Rot. Scotiæ 7 E. 2. M. 5. Sciatis quod (e) aſſignavimus, &c. J. E. Admirallum & Capitaneum Flotæ noſtr° Navium, &c.

5. Rot. Scotiæ 7 E. 2. M. 7. de Capitaneo & Admirallo Flotæ Regis Navium Occidentalium conſtituto.

6. Rot. Scotiæ 8 E. 2. Membrana 2. Willielmus de Gray Capitaneus & Admirallus Flotæ Regis verſus Partes Occidentales Angliæ. Ibidem **in another Place another Admiral.**

7. 2 H. 4. Rot. Parl. numero 9. **the Commons pray againſt the Court of the Admiral for holding Plea of Matters triable before Juſtices, according to the Common Law. But no Aſſent to this.**

8. 4 H. 4. numero 47. **In a Petition by the Commons againſt the Admiral, among other Things, 'tis prayed, That the Admirals uſe their Laws only by the Law of** (f) Oleron **and the ancient Laws of the Sea, and by the Law of** England, **and not by Cuſtom, or by other manner.** Vide **the Anſwer.**

9. 4 H 4. numero 63. **Another Petition, that the Admiral hold his Courts upon the Sea, or upon the Sea-Coaſts, and not within a Franchiſe or Vill; and that Suits commenced be determined before Adjournment to another Place. But no Aſſent to this.**

10. By 2 *H* 5. *Stat.* 1. *cap.* 6. In every Port there ſhall be a Conſervator of the Truce worth 40 *l. per Annum* in Land, who by the King's Patent, and the Admiral's Commiſſion, (g) ſhall inquire of Offences againſt Truce and Safe Conduct, *&c.* as the Admirals have done, *&c.* ſaving the Determination of the Death of a Man, and the Execution thereupon to the Admiral, *&c.*

11. At (h) Common Law none but the King only could erect Beacons, Light-houſes and Sea-marks, but of later Times by Letters-Patents granted to the Lord Admiral, he hath Power to erect (i) Beacons, Sea-marks and Signs for the Sea, 4 *Inſ.* 148, 149.

(a) 4 Inſ. 134, 135, &c.

(*) In the Original it is au milieu file de la mere.

(b) The Derivation of the Word. 12 Co. 80.

(c) For ancient Records touching the Court of Admiralty, vid. 4 Inſ. 142, 143, &c.

(d) 4 Inſ. 142.

(e) For ſeveral Grants thereof, vid. 4 Inſ. 145, 146. 12 Co. 80. —And that there have been Admirals Time out of Mind, vid. Co. Lit. 260. b. 12 Co. 79, 80.

(f) So called, for that they were made by King Rich 1. when he was there. Co. Lit. 11. b. 260. b.

(g) 4 Inſ. 152.

(h) But by 8 El. cap. 13. the Maſter, Wardens, Aſſiſtants of the Trinity-Houſe at Deptford Strond had Power given them to erect Beacons, Marks and Signs for the Sea, &c. Vid. 4 Inſt. 149. A Suit for the Profits of the Beaconage of a Rock in the Sea near in Cornwal, may be in the Court of Admiralty. Croſs and Digs. 1 Sid. 158. adjudged, and it was ſaid, as the Profits of the Beacons belong to the Admiral, ſo the Suit for them ought to be in his Court, though the Rock be the Freehold of another, and Part of his Inheritance.

(k) This Jurisdiction is saved to him in several Acts of Parliament, as 2 H. 5. Stat. 1. cap. 6. 27 H. 8. cap. 4. 28 H. 8. cap. 15. 5 El. cap. 5. 11 & 12 Will. cap. 7. Et vid. 2 Jon. 66, 67. Cas. in Chan. 305, 306.

12. The Lord Warden of the Cinque-Ports is also Admiral there, and (k) hath the Jurisdiction of the Admiralty, exempt from the Admiralty of *England*. 4 *Inst.* 223.

(A) Of what Things they may hold Plea in respect (a) of the (b) Place where they arise.

(a) If a Ship lying at Anchor wants Victuals, and sends to Land to J. S. to bring Victuals, and so the Contract is made in the Ship, the Admiralty shall have Cognizance; secus, if the Contract is made intirely at Land, and the Victuals after sent to the Ship. Lat. 11. per Wod. (b) Though in the Libel the Fact is supposed to be done super altum mare, yet it may be surmised that it was done in corpore Com', &c. and thereupon a Prohibition, &c. for the Surmise is traversable. Moor 891. Pl. 1225. Lat. 11. (c) This is misprinted in the Original, as here, and should be Cap. 6.

1. 2 H. 5. cap. (c) 16. **IT is enacted, That the Conservator of the Truce and Safe Conducts by the King assigned, shall have Power to enquire of Offences done against the Truce and Safe Conduct of the King upon the high Seas, out of the Body of Counties, and out of the Franchises of the Five Ports, as the Admirals of the Kings of** England **before this Time reasonably after the old Custom, and late upon the main Sea used, have done or used; and so to make Process, Judgment and Execution,** &c.

(d) 4 Inst. 139, 140. 12 Co. 103. (e) Hob. fol. 79. S. C. (f) Hob. fol. 79. 212. S. C. (g) Hob. fol. 79. 212. S. C. (h) 3 Inst. 113. S. P. (i) For this, vid. 2 Rol. Abr. 170. Pl. 12. and the Notes there. (k) 1 And. 89, 90. S. C.

2. **The Court of Admiralty cannot hold Plea of any Contract made** (d) **upon the Land beyond Sea, but only of Things done upon the Sea.** Hobart's Reports 107. **between the** (e) Spanish **Ambassador and Sir** Richard Bingly **a Prohibition granted; and** 109. **between** (f) Palmer **and** Pope **a Prohibition granted.**

Fol. 529.

3. **If a Contract be made upon the Sea, but it is afterwards sealed upon Land, the Court of Admiralty cannot hold Plea thereof.** Hobart's Reports **between** (g) Palmer **and** Pope.

4. (h) Between the High and Low-Water-Mark the Common Law and Admiralty have *imperium divisum, scilicet*, the one when it is not, and the other when it is covered with Water, and the Soil upon which the Sea flows and reflows (i) may be Parcel of a Manor. *Pasch.* 43 El. (k) Sir *Henry Constable*'s Case. 5 Co. 107 resolved.

(l) Flemming and Yates. 3 Bulf. 205. 1 Rol. Rep. 203. (m) This must be intended of holding Pleas, and not of awarding Execution; for notwithstanding this Statute, the Judge of the Admiralty may do Execution in the Body of the County. 13 Co. 52. (n) Such Place as is covered with Salt Water, is altum mare, per Ow. 123. (o) But it is no Part of the Sea where one may see what is done of the other Side the Water. 4 Inst. 140, 141. 12 Co. 80. Moor 892. Ow. 122.

5. By the 13 *Rich.* 2. *cap.* 5. Upon Complaint of Incroachments made by the Admirals and their Deputies, 'tis enacted, That the Admirals and their (l) Deputies shall (m) meddle with nothing done within the Realm, but only with Things done upon (n) the (o) Sea.

(p) All Rivers and Havens are within the Body of the County. 4 Inst. 137, 138, 139, 140, 141. 12 Co. 129. Moor 892. Godb. 261. 2 Sid. 81. (q) What is within the Body of the County is no Part of the Sea. 4 Inst. 140.

6. By the 15 *Rich.* 2 *cap.* 3. Upon the like Complaint, 'tis declared, That of all Contracts, Pleas and Quarrels, and other Things done (p) within the (q) Bodies of Counties by Land or Water, and of

(r) Wreck, the Admiral ſhall have no Cognizance, but they ſhall be tried, *&c* by the Law of the Land; but (s) of the Death of a Man, and of a Mayhem done in great Ships, being in the main Stream of great Rivers beneath the (t) Bridges near the Sea, and in no other Place of the ſame River, the Admiral ſhall have Cognizance, and alſo to arreſt Ships in great Flotes for the great Voyages of the King and the Realm, ſaving to the King his Forfeitures, and he ſhall have Juriſdiction in ſuch Fleets during ſuch Voyages, only ſaving to Lords, *&c.* their Liberties.

(r) 4 Inſ. 154. 2 Inſ. 168 —Yet they ſhall have Cognizance of Flotſam, Jetſam and Ligam. 5 Co. 106. b. Palm. 96. 1 Sid 178. 1. Rol. Abr. 531. Pl. 6. (s) The Admiral hath Cognizance in theſe Caſes only, for all Contracts, &c. made or done in any River, Haven or Creek within any County, are triable, &c. by the Common Law, and not in the Admiralty. 4 Inſ. 136, 138. Moor 122. But by the Reſolution of the Judges in Cro. Car. 297. by the Equity of this Statute he may redreſs all Annoyances and Obſtructions in thoſe Rivers, which are an Impediment to Navigation, and may try Contracts and Injuries done there, which concern Navigation at Sea; but Q (t) Ow. 122. per Cur', it is ſaid the Tranſlator miſtook Bridges for Points, as the Land's End.

7. By the 2 *H.* 4. *cap* 11. reciting the 13 *R.* 2. *cap.* 13. 'tis enacted, That he that finds himſelf aggrieved (u) againſt the Form of the Statute, ſhall have his Action by Writ grounded upon the Caſe againſt (w) him that ſo purſues in the Admiralty, and recover his double Damages againſt him, and he ſhall incur the Pain of 10 *l.* if he be attainted.

(u) If upon Petition to the Judge of the Admiralty, a Ship is ſtopped in the Harbour till Caution given not to trade within the Limits of the East-India Company; this is a Proſecution within the Act, though there is no formal Plaintiff and Defendant; and in many Caſes the Suits there are againſt the Ship it ſelf, 3 Lev. 353. (w) Though the Proſecution be by the Command of the King, and in the Name of his Proctor, yet if it was upon the Solicitation, and by the Procuration of the Parties, and they pay the Fees, they purſue within the Intention of the Act. 3 Lev. 353.

8. By 27 *H.* 8. *cap.* 4. Murder and Robberies upon the Sea, or in any Haven, (x) River or Creek where the Admiral (y) pretends Juriſdiction, ſhall be (z) inquired, tried, *&c.* in ſuch Places or Counties as ſhall be limited in the King's Commiſſion, as if done at Land; and ſuch Commiſſions under the Great Seal ſhall be directed to the Lord Admiral or his Deputy, and to three or four others, as the Lord (a) Chancellor ſhall name, *&c.* to hear and determine ſuch Offences after the Courſe of the Law uſed for Felony done within the Land.

(x) Yet vid. 3 Bulſ. 28. (y) But if done in ſuch Creek or Haven where the Admiral hath no Juriſdiction, the Commiſſioners cannot meddle with it. Ow 122. By Croke and Foſter. (z) They may proceed without View of the Body by any Coroner. Moor 122. Pl. 265. (a) Hob. 146.

9. By 28 *H.* 8. *cap.* 15 in like Words 'tis enacted, That (b) Treaſons, Murders, (c) (d) (e) Robberies and Confederacies upon the Sea, *&c.* where the Admiral hath, or (f) pretends Juriſdiction, *&c.* ſhall

(b) The Force of the Act is not taken away by 35 H. 1. cap 2. nor 5 Ed. 6. cap. 11. concerning the Trial of Treaſons done beyond Sea. 4 Inſ. 124. 3 Inſ. 111, 112. (c) How, and before whom Pirates may be tried beyond Sea, according to the Civil Law, by Commiſſion under the Great Seal of England. Vid. 11 & 12 Will. cap. 7. (d) A Captain, Maſter or Mariner wilfully caſting away, &c. the Ship to which he belongs, to the Prejudice of the Owner, is a Felon, and to be tried, &c. 1 Ann. cap. 9. (e) If there be an Acceſſory upon the Sea to a Piracy, that Acceſſory may be puniſhed by the Civil Law before the Admiral; but this Statute extends not to Acceſſories, nor makes the Offence Felony. 3 Inſ. 112. But where a Pirate was after received and comforted at Land by one knowing thereof, 13 Co. 51. dubitatur what Offence it was, and referred to the Conſideration of the Three Chiefs, and it was reſolved he could not be puniſhed as an Acceſſory by the Common Law, becauſe that could take no Cognizance of the Original Offence. —But Yelv. 134, 135. per tot' Cur', if one at Land aſſiſts a Pirate with Ropes, &c. to make his Eſcape, he is quaſi an Acceſſory, and may be puniſhed in the Admiralty, becauſe it depends upon that Piracy at Sea, with which the Temporal Judges have nothing to do. But vid. 11 & 12 Will. cap. 5. by which their Aiders and Comforters, and the Receivers of their Goods, are made Acceſſories, and to be tried as Pirates, per 28 H. 8. cap. 15. (f) This muſt be intended between the High-water Mark and Low-Water Mark, where there is diviſum imperium at ſeveral Times. 3 Inſ. 113.

be

(g) If a Pirate upon his Arraignment ſtands mute, he ſhall have Judgment de peyne fort & dure. Dyer 241. b. by Three Judges, and Judgment given accordingly. 2 Inſ. 114. For it is within this general Branch, though out of the latter part of the Act which mentions a Conviction by Verdict, Confeſſion or Proceſs.

be inquired, &c. after the (g) Courſe of the Law uſed for Treaſons, &c. done upon the Land within the Realm.

10. By the 5 *El cap.* 5. *Par.* 30. ſeveral Offences in the Act mentioned, if done on the main Sea, or Coaſts of the Sea, being no Part of the Body of any County, and out of any Haven and Pier, ſhall be tried before the Admiral or his Deputy, and other Juſtices of *Oyer* and *Terminer*, according to the Statute of 28 *H.* 8.

(B) (a) Of what (b) Things they may hold Plea.

(a) 2 Brownl. 13. 1 Leon. 103. Raym. 481. to 496.

(b) 16 Car. 2. cap 6. 22, 23 Car. 2. cap. 11. Styl. 470.

1. If a Man makes an Agreement with another ſuper altum mare to carry Goods to Parts beyond Sea, and after this Agreement is put in Writing, and ſealed in a Place beyond the Seas, upon the Land; the Court of Admiralty ſhall not hold Plea upon this Agreement; for by the putting this into a Deed, the Agreement is taken away, and the Juriſdiction changed thereby. Hobart's Reports 287. C. 268. between (c) Palmer and Pope.

(c) Hob. fol. 79. 212. S. C.

2. But it had been otherwiſe, if the Agreement had been put in Writing without ſealing thereof. Hobart's Reports (d) 287.

(d) Hob. fol. 212. S. C.

3. If an Agreement be made upon Land to carry ſome Goods beyond Sea, and after the Goods by Negligence are damaged with Salt Water upon the high Seas, yet the Court of Admiralty cannot hold Plea of this; for though the Breach was upon the Sea, yet there ought to be another Act alſo to concur to make a Suit, ſcilicet the Contract, which Suit is intire, and therefore the Common Law ſhall prevail. Hobart's Reports 287. c. 268. between (e) Palmer and Pope.

(e) Hob. fol. 79. 212. S. C. adjudged.

4. If an Agreement be made in Malaga, or other Place beyond the Seas, the Court of Admiralty ſhall not hold Plea thereof. Hobart's Reports 287. between (f) Audely and Jennings Caſe 269.

(f) Hob. fol. 213. S. C.] cited.

5. (g) They cannot hold Plea of Wreck, for this is expreſly prohibited by the Statute. Mich. 15 Car. B. R. between the Lord Admiral and Stidſon, per Curiam reſolved, and a Prohibition granted where it was ſuppoſed to be Flotſam; and the Plaintiff and Defendant there ſurmiſed it was Wreck, and thereupon a Prohibition granted.

(g) 4 Inſ 134. S. P. 1 Rol. Abr. 531. Pl. 6. S. P. Et vid. 2 Rol. Rep. 157.

6. If a Subject of the King of Spain commit certain Crimes againſt his King, for which all his Goods are confiſcated, and after he comes into England with his Goods, and ſells them here to a Subject of our King; the Ambaſſador of the King of Spain cannot ſue in the Admiralty Court for the Goods againſt a Subject of our King; for though the Goods were confiſcated, yet now the Property ſhall not be queſtioned but at Common Law. Hobart's Reports 286. (h) Don Alphonſo the Ambaſſador of the King of Spain, againſt Cornero; and the like between Don Pedro and another. Hill. 9. Jac.

(h) 2 Brownl. 29. S. C. adjudged, tho' the Goods were forfeited upon the high Sea. Hob. fol. 212. S. C. adjudged, and a Prohibition granted at the Prayer of the Vendee, tho' no Defendant in the Court of Admiralty, becauſe the Goods were attached in his Hands by the Proceſs of the Court. Hob. fol. 79. S. C. cited. 1 Rol. Abr. 532. Pl. 9. S. C.

7. (i) Cremer querens against Toakly Defendant: The Case was entred, Mich. 2 Car. Regis, B. R. Rot. 421.

(i) Godb. 385. S C. adjornatur.

8. (k) Special Actions brought upon the Statutes of the 13 R. 2. cap. 15. and 2 H. 4. cap. 4. for prosecuting of a Suit in the Court of Admiralty, where they had no Jurisdiction to hold Plea; and if one who prosecutes there as Attorney for another (as the Case was) shall be an Offender against the said Statutes; and where the Statutes give an Action by way of Writ, and an Action is brought here (as the Case was) by way of Bill, if this be good or not.

(k) This and the following, Pl. 9, 10. 11. seems all to belong to Pl. 7. and that they should not have been made distinct Sections of themselves; but this is printed according to the Original.

(l) For this, vid. 1 Rol. Abr. 537. Pl. 7.

9. Upon this Action brought, and Special Verdict found, Two Points were moved.

10. First Point upon the Jurisdiction of the Admiralty, though the Contract be beyond Sea, because it is to be performed in London, the Freight being to be paid in London, if the Admiral here ought to have Jurisdiction?

11. Second, (m) If he that prosecutes only as an Attorney there, shall be punished within the Statutes for this Offence?

(m) Sands qui tam, &c. and Sir Joseph Child' & al'. 3 Lev. 352. adjudged, that he should; for he shall not be excused by his Warrant of Attorney in the doing of an illegal Act; for as the Commanders are Trespassers, so are those that do the Act.

12. If a Man of Frizeland sues an Englishman in Frizeland before the Governor there, and there recovers against him a certain Sum; upon which the Englishman, not having sufficient to satisfie it, comes into England, (n) upon which the Governor sends his Letters missive into England, omnes Magistratus infra Regnum Angliæ rogans, to make Execution of the said Judgment. The Judge of the Admiralty may execute this Judgment by Imprisonment of the Party, and he shall not be delivered by the Common Law; for this is by the Law of Nations, that the Justice of one Nation shall be aiding to the Justice of another Nation, and for one to execute the Judgment of the other; and the Law of England (o) takes notice of this Law, and the Judge of the Admiralty is the proper Magistrate for this Purpose; for he only hath the Execution of the Civil Law within the Realm. Pasch. 5 Jac. B. R. (p) Wier's Case, resolved upon an Habeas Corpus, and remanded.

Fol. 530.

(n) So upon a Judgment given in our Court of Admiralty, Execution may be sued in Foreign Parts. Godb. 260. arguendo.

(o) If a Ship is sold by Vertue of a Sentence in the Court of Admiralty of France (being then in Amity with England) the Sentence shall not be examined in an Action at Common Law; for we ought to give Credit to their Sentences, else they will not give Credit to the Sentences of our Court of Admiralty; but the Way to be relieved, is to petition the King, who will examine the Case: and if finds Cause of Complaint, send to his Ambassador residing there; and upon Failure of Redress, will grant Letters of Marque and Reprisal. Raym. 473. Et vid. 1 Vent. 32. —But where the Court said, they would give no Regard to a Sentence in the Court of Admiralty of Scotland. Vid. Radly and Egglesfield. 2 Saund. 259, 260. 1 Vent. 174. —But it was agreed the Sentence in Scotland was pleadable in the Court of Admiralty here. 1 Vent. 174. 2 Lev. 25. and 1 Saund. 260. The Validity of the Sentence of the Admiralty in Scotland is determinable by the Law of the Admiralty here, and not by the Common Law. (p) Molloy 449.

13. If a Merchant of Holland brings Trespass against J. S. for a Ship laden with Merchandizes, & quia non liquet quæ bona fuerunt in navi prædicta, quando de partibus Hollandiæ versus Regnum istud iter suum cepit, Mandatum est Comiti Hollandiæ, quod per probos & legales homines & mercatores terræ suæ, ubi prædictus querens se in mari posuit inquirat diligenter quæ mercimonia carcata fuerunt, &c. & inquisitionem aperte & fideliter factam remandet Domino Regi, &c. 22 Ed. 1. Liber Parliamentorum 65. b.

(C) (a (b) Admiral (c) (d) Law.

(a) Where by the Civil Law an Appeal lies, as well where the Sentence is given as to the Poſſeſſion only, as where the Right and Intereſt is determined thereby. Moor 814. P. 1102. Yet vid. 1 Vent. 174 Con.

1. If the Owner of a Ship victuals it, and furniſhes it to Sea with Letters of Reprizal, and the Maſter and Mariners, when they are at Sea, commit Piracy upon a Friend of the King, without the Notice or Aſſent of the Owner, yet by this the Owner ſhall loſe his Ship by the Admiral Law, and our Law ought to take notice thereof. Trin. (e) 3 Jac. B. R. per Popham. Trin. 12 Jac. B. per Winch. ſaid that he had known it to be ſo allowed. (f) Hill. 13 Jac. B. R. 22 Jac. held by Coke in the inferiour Houſe of Parliament.

(b) Vid. 16 Car. 2. cap. 6. 22 & 23 Car. 2. cap. 11. (c) Average is not due unleſs the Goods are loſt in ſuch a manner, that thereby the Reſidue in the Ship are ſaved; as if Goods are thrown over-board to lighten the Ship, or by Compoſition Part is given to a Pirate to ſave the reſt; but if a Pirate takes Part by Violence, Average ſhall not be paid for them. Moor 297. Pl. 442. ſaid by Dr. Dale Maſter of the Requeſts; yet it was decreed, becauſe the Merchants had conſented to pay Average after the Ship was robbed. But vid. Molloy 246. (d) If the Ship periſh through the Mariners Default, they loſe their Wages. 1 Vent. 146. per Cur'. —If a Mariner or Ship Carpenter runs away, he loſes his Wages due. 1 Mod 93. per Twyſden and Hale. —So per 22 & 23 Car. 2. cap. 11. if they refuſe to fight when commanded by the Maſter. (e) Moor 776. Pl. 1076. ſeems to be S. C. but S. P. does not appear; but the Point there was, Whether the Owner ſhould anſwer for the Goods, &c. taken? But Hoph. Chief Juſtice ſaid, That where a Maſter ſends his Servant to do an unlawful Act, and he miſtakes in the doing of it, the Maſter ſhall anſwer for his Miſtake; otherways where he ſends him to do a lawful Act, &c. (f) 1 Rol. Abr. 532. Pl. 14. ſeems to be the S. C. 1 Rol. Rep. 285. ſeems to be the S. C. but S. P. per Coke con.

(g) 2 Sid. 161. S. P. dub. but ſaid by Newdigate, Juſtice, that the Ship, or Perſon of the Owner might be attached, as had lately been agreed.

2. (g) If the (h) Maſter of a Ship pawns the Ship (i) ſuper altum mare (ſcilicet hipothecando) (k) for Tackling and Victuals, without the Aſſent of the Owner, yet this ſhall bind the Owner by the Admiral Law; for this is allowed (l) for the Neceſſity, and our Law ought to take notice thereof. Tr. 12 Jac. B. between Barnard and Bridgeman, per Curiam. Hobart's Reports 17. the ſame Caſe. But it was there reſolved that it had been otherwiſe, if the Maſter had pawned it for his own Debt.

(h) Or he that is reputed Maſter. Noy 95. (i) But not in any Port, 3 Mod. 244, 245. no Judgment. (k) So if he Borrows Money for the Neceſſaries of the Ship, though in Fact it be not imployed accordingly, and the Owner muſt take his Remedy againſt the Maſter. Noy 95. (l) But yet the Maſter cannot ſell the Ship and broken Tackle, though there is no Probability of its being ſaved partly in reſpect of the Tempeſt, and partly in reſpect of the Barbarity of the Inhabitants who took away every Thing that was caſt upon the Shore. 1 Sid. 453. per Hale, Chief Baron. (m) Hob. fol. 11. S. C. adjudged. Moor. 918. Pl. 1308. S. C. adjudged.

3. If an Infant, being a Maſter of a Ship at St. Chriſtophers beyond Sea, by Contract with another, undertakes to carry certain Goods from St. Chriſtophers to England, and there to deliver them, but does not afterwards deliver them according to the Agreement, but waſtes and conſumes them; he may be ſued for the Goods in the Court of Admiralty, though he be an Infant; for this Suit is but in Nature of a Detinue, or Trover and Converſion at the Common Law. Paſch. 11 Car. B. R. between Furnes and Smith, per Curiam a Prohibition denied for the Cauſe aforeſaid.

4. If a Man commits Piracy upon the Subjects of another King, who is in League with us, and brings the Goods into England, and ſells them here in a Market-Overt; though by the Admiral Law this Sale ſhall not bind, but that the Owner may retake them; yet by the Common Law this Sale ſhall bind him, and the Law of the Admiralty ought to take notice of this. Mich 13 Jac. B. in (n) Sir Richard Bingley's Caſe, per Curiam, and there

(n) 2 Rol. Abr. 531. Pl. 8. S. C.

there said per Warburton. that this was the Case of the Merchants of Barnstaple ruled.

5. If a Merchant's Ship is taken by an (o) Enemy, and a Month after is retaken by an *English* Ship, (p) the first Owner (q) shall not have Restitution, for the Ship was gained by Battle with an Enemy. *Mich.* 8 *Jac. Weston's* Case. 2 *Brownl.* 11.

(o) Otherways if by a Pirate. 1 Vent. 174. (p) Where the Property is not altered, until the Prize is brought infra præsidia of that King by whose Subject 'tis taken. March. 110, 111. (q) Where they shall be restored to the Owner, paying Salvage, and what shall be paid for Salvage, per 4 & 5 Will. & Mar. cap. 25.

6. If two Ships meet at Sea together, though they went not forth Consorts, and one of the Ships in the Presence of the other takes a Prize, the other Ship which was present shall have the Moiety; for the Presence of this Ship was a Terror to the Ship taken. 32 *Eliz.* 2 *Leon* 182. *per Curiam.*

(D) (a) How they may (b) (c) proceed there.

Fol. 531.

(a) Though they cannot hold Plea of any Thing done at Land, yet they may serve Execution upon the Land. 4 Inst. 141. 13 Co. 52, 53. 2 Brownl. 26.

1. If a Libel be in the Court of Admiralty touching Goods, supposed to come to the Defendant by Depredation, and the (d) Defendant obliges himself, his Goods and his Heirs, to answer the Action, and after the Defendant does not obey the Court, there they (e) may take his Body; for every Court hath his several Course of Proceeding, and this is the Usage there. (f) Mich. 10 Jac. B. dubitatur.

Yelv. 135. (b) When a Provisionate Decree, as they call it, or primum Decretum, is given for the Possession of a Ship, and she is seised, upon Security given, by the Course of the Admiralty, she may be hired out. 1 Vent. 174.—Upon such Interlocutory Decree no Appeal lies to the Delegates. 1 Vent. 174. Yet vid. Moor 814. Pl. 1102. Con'. (c) Though no Court of Record, yet they may fine and imprison for a Contempt in the Face of the Court. 1 Vent. 1. per Cur'. (d) For this, vid. Cro. El. 685. Noy 24. Hard. 473, 474. (e) For this, vid. 13 Co. 52. 2 Brownl. 26. 2 Inst. 51. Yelv. 135. (f) Godb. 193, 260. S. C. adjorn', but S. P. seems to be agreed by Coke Chief Justice, but it was said by him, That they could in no Case take Land in Execution.

2. So in the said Case, if (g) the Defendant found Fide-jussores, and after Sentence passed for the Plaintiff, the Bodies of the Fide-jussores, by the Law of the Admiralty, may be taken in Execution; for this is the Usage there. Hill. 10 Jac. between Legiere and Greeneway Plaintiffs, and Baker Defendant, and Prohition denied.

(g) Raym. 78. adjudged that such Stipulation was good. —But being no Court of Record, they cannot take a Recognizance. 4 Inst. 135, 137.

3. Though the Court of Admiralty is no Court of Record, because they proceed there according to the Civil Law, yet by the Custom of the Court they may (h) amerce the Defendant for (i) his Default, by their Discretion, and may make Execution for the same of the Goods of the Defendant *in Corpore Com'*, and if he hath no Goods, take his Body. *Trin.* 7 *Jac.* 13 *Co.* 53. adjudged.

(h) But not fine as Judges of a Court of Record may do. 12 Co. 104. (i) They may punish one that resists the Execution of the Process of the Court, but not give Damages to the Party. 1 Vent. 1. But because they had no Cognizance of the original Matter upon which the Process was grounded, a Prohibition was granted, &c. Styl. 171, 340.

4. By

(k) For in such Case no Writ of Error lies.

4. By the 8 *El. cap.* 5. a definitive Sentence in a Civil or Marine Cause by Delegates by Commission upon an (k) Appeal in *Chancery*, shall be final.

4 Inst. 135, 339. 341. — But for Appeals to the Delegates, vid. 2 Rol. Abr. 232, 233.

(E) Of what Things, in respect of the Place where it arises, they may hold Plea.

(a) 13 Co. 52. b. S. P.

1. BRook, Judgment 123. (a) **A Judgment in the Court of Admiralty** de re facta super terram **is void**, & coram non Judice.

(b) 4 Inst. 139, 140. 3 Leon. 232. S. P. adjudged con. But for this vid. 2 Rol. Rep. 492, 497. 2 Brownl. 10. 34.

2. (b) **They cannot hold Plea upon a Bill, or other Thing done beyond Sea upon the Land, because the Statute is, that he shall hold Plea of Things done only upon the Sea.** Mich. 14 B. R. **between** Coulston **and** Baptist Metaxa, **resolved where the Bill was made** apud Zante, **which is in** Italy. Mich. 7 Ja. B. (c) Leigh's Case, per Curiam. Hill. 7 Ja. B. **between** Hickman **and** Skinner, **adjudged.** Hill. 9 Jac. B. per Curiam, **between** Davison **and** Burneby. Hobart's Reports, Case 268, 269.

(c) Ow. 122. S. C. and S. P. seems to be admitted per Curiam. 2 Brownl. 37. S. C. and S. P. cited to have been adjudged.

(d) 2 Bulst. 322. S. C. adjudged. 1 Rol. Rep. 133.

3. **They cannot hold Plea of a Suit by the King of** Spain, **for cutting down of Brasil Wood in** Brasilia, **because it is upon the Land.** Hill. 12 Ja. B. R. **between** (d) **the King of** Spain **and** Pounter, **resolved, and a Prohibition granted, and it was after tried at Common Law in a Trover and Conversion.**

S. C. adjudged, and by two Judges the King of Spain might have an Action for it at Common Law.

(e) Ow. 122. S. C. adjudged. 2 Brownl. 37. S. C. adjudged.

4. **They cannot hold Plea of a Thing done upon the Land in** England. Mich. 7 Ja. B. (e) Leigh's Case, per Curiam.

(f) 1 Leon. 106. S. P. adjudged. Moor 916. Pl. 1302. S. P. adjudged. 2 Rol. Rep. 413. S. P. adjudged.

5. (f) **They cannot hold Plea of a Thing done** (g) **upon the** Thames, (h) **because this is within the Body of the County.** Mich. 7 Ja. B. (i) Leigh's Case, per Curiam, **and a Prohibition granted accordingly.** Mich. 5 Ja. B. **between** Tomkins **and** Goodwin, per Curiam, **and a Prohibition granted where the Suit was for Anchorage.** Hill. 8 Ja. B. Bereman's Case **resolved, and a Prohibition granted.**

(g) At Limehouse. Violet and Blague, Cro. Jac. 514. adjudged. 2 Rol. Rep. 49. adjudged. Moor 891. Pl. 1255. adjudged. (h) 4 Inst. 134, 139. (i) Ow. 122. S. C. adjudged. 2 Brownl. 37. S. C. adjudged.

(k) So of Jetsam and Ligam. 5 Co. 106. b. Palm. 96. 1 Sid. 178.

6. **They cannot hold Plea for the taking of certain Goods floating** super mare, & eject' super litora maris; **for though they may hold Plea** de (k) (l) Flotsam, (m) **yet they cannot hold Plea of Wreck; and** (n) **this is** (o) **Wreck when it is thrown upon the Land.** Tr. 5 Ja. B. **a Prohibition granted accordingly, and a Consultation denied.**

(l) But if Flotsam comes to Land, and is taken by one that hath no Title, an Action lies at Common Law; but there shall be no Proceedings thereon in the Admiralty; for it need not be condemned as Prize. 2 Mod. 294. The Book seems to be so intended, though misprinted. 1 Rol. Abr. 533. Pl. 17. (m) 1 Rol. Abr. 529. Pl. 5. S. P. (n) Quæ naufragio ad terram appelluntur. 5 Co. 106. a. b. (o) Of which, by the express Words of 15 R. 2 cap. 3. they have no Cognizance.

7. They

7. (o) They cannot hold Plea of a Contract made in Portu Middleburgh, because this is not upon the Sea. Hill. 8 Ja. B. Vanheg's Case, per Curiam præter Warburton: Coke said, that there is a Precedent in 25 H. 6. and 36 H. 6. where there was a Ship riding in a Port, and a Contract was there made, and a Suit for it in the Court of Admiralty; and therefore an Action was brought at Common Law, and 13000 l. Damages recovered, the Duke of Exeter then being Admiral.

(o) 1 Rol. Rep. 250. like Point, con'. But Coke said, That if the Port was in the Body of the Land, the Admiral could not hold Plea thereof.

8. (p) If Pirates take Goods upon the Sea from a Subject of Spain, and bring them within a Port of Ireland, and there sell them to J. S. no Suit for these Goods can be against J. S. in the Court of Admiralty; for that J. S. came to them by Purchase within the Body of the County. Mich. 13 * Jac. B. between (r) Don Diego the Ambassador, and Sir Richard Bingly, resolved, and a Prohibition granted; for the Owner of the Goods may have an Action of Trover for the Goods at the Common Law.

(p) Radly and Eggleſfield S. P. con. 2 Saund. * Fol. 532. 259, 260. adjudged. 1 Vent. 173, 174. adjudged. 2 Lev. 25. adjudged. Cro. El. 685. like Point, adjudged, con. unless the Sale had been in a Market-overt; for tho' the Admiralty hath no Authority to meddle with Things upon the Land, yet when the original Cause arises upon the Sea, and other Matters happen upon the Land depending thereupon, yet the Trial shall be in the Court of Admiralty. Et vid. 1 Sid. 320. March. 110. 3 Mod. 194. (r) Hob. 78. S. C. 2 Saund. 260. S. C. cited, and said per Cur' not to be Law; and that when a Spoliation at Sea is the original Foundation of the Suit in the Admiralty, that Court shall proceed to try it notwithstanding another claims Property by Sale at Land, after the Spoliation supposed to be made. 1 Vent. 172, 173. cited, and said per Cur' not to be Law. 1 Roll. Abr. 530. Pl. 4. S.C. —If a Ship be taken by Pirates, and carried to Tunis, and there sold, it being originally within the Jurisdiction of the Admiral, it so continues notwithstanding the Sale after upon the Land; otherways when taken by Enemies, &c. 1 Vent. 308.

9. If a Subject of the King of Spain commits certain Offences in Spain, for which his Goods are confiscated, and after comes into England, and brings with him some of the Goods, and sells them to J. S. a Subject of this Realm; and after the Ambassador of Spain sues in the Admiralty Court upon this Matter, and there attaches the Goods in the Hands of J. S. a Prohibition lies, for the Property of the Goods shall not be questioned in any Court, but at Common Law. Hobart's Reports, Case 265. (s) Don Alphonso and Cornero.

(s) 2 Brownl. 29. S. C. adjudged, tho' the Goods were forfeited upon the high Sea. Hob. fol. 212. S. C. 1 Roll. Abr. 529. Pl. 6. S. C.

10. If a Contract or (t) Obligation be made upon the Sea, yet if it be not for a Marine Cause, the Suit upon this Contract or Obligation shall be at Common Law, and not in the Admiralty Court; for if a Man makes an Obligation for the Security of a Debt growing before upon the Land, or if he makes a Promise to pay it, this cannot be sued in the Court of Admiralty, but at Common Law. Hobart's Reports 17. (u) Bridgman's Case.

(t) It must bear Date super altum Mare, else it cannot be sued there, per 1 Brownl. 42.

(u) Hob. fol. 12. S. C.

11. If a Contract be made upon the Sea for the bringing over certain Sugars, and after this Agreement is put in Writing upon the Land, and after the Sugars in bringing over are spoiled upon the Sea; yet the Suit for this does not lie in the Admiralty Court, because the putting the Agreement in Writing upon the Land, changes the Jurisdiction as to this; and then when the Contract is upon the Land, though the Breach be upon the Sea, yet the Common Law shall have the Jurisdiction, and not the Admiralty Court. Hobart's Reports, between (x) Palmer and Pope, Case 268.

(x) Hob. 79. 212. S. C. adjudged.

12. If a Contract be made upon the Sea, and the Cauſe of the Suit maritime, and a Suit is had upon this in the Admiralty Court, (y) it ſeems it is ſufficient to alledge it to be made within the Juriſdiction of the Court, without ſaying it was made ſuper altum Mare; for this may be alledged of the other Part to have a Prohibition, if it was not made ſuper altum Mare. Contra Hobart's Reports, Caſe (z) 269.

(y) In the Original 'tis ſemble.

(z) Hob. fol. 213. S. C. and S. P. per Hobart, but laying it infra jurisdictionem, where upon the Face of the Libel it appears not to be ſo, is naught without Queſtion. Hob. 79, 80. 1 Vent. 308. 1 Rol. Rep. 80.

13. (a) If a Man contracts with me in London, in Conſideration of 100 l. to tranſport certain Commodities into Turkey, if he does not perform it, I cannot ſue him in the Court of Admiralty, becauſe the Contract was here, and nothing done upon the Sea. P. 1 Ja. B. in Banning's Caſe ſo held (b) 1 R. 3. 4.

(a) 4 Inſ. 139. like Point. Et vid. Co. Lit. 261. b.

(b) Fitz. Trial 29. S. C.

14. If the Owner of the Ship ſends it to the Indies to merchandize, and upon the high Seas the Mariners and the reſt in the Ship commit Piracy, when the Ship after returns here upon the Thames, the Admiral ſeizes the Ship and all in her as Bona Piratarum, claiming them by Grant of the King; for by the Law of the Sea (c) the Owner in ſuch caſe ſhall loſe the Ship, and after the Seizure the Owner of the Ship takes the Sails and Tackling out of the Ship, for which the Admiral ſues in the Admiralty Court; a Prohibition ſhall be granted, becauſe if it be forfeited he may have an Action at the Common Law for the Taking, and not there, they being taken infra Corpus Comitatus. H. 13 Ja. B. R. (d) Hildebrand's & alii Caſe reſolved, and a Prohibition granted.

(c) For this, vid. 1 Roll. Abr. 530. Pl. 9.

(d) 1 Roll. Rep. 285. S. C. adjudged. 3 Bulſ. 148.

15. If a Contract be made in London for Things which lie upon the Sea-Coaſts, and there is a Suit for this in the Court of Admiralty, a Prohibition lies. H. 7 Ja. B. adjudged between Sarah Selden and others.

16. (e) If a Charter-party be made in England to do certain Things in ſeveral Places upon the Sea, tho' no Act is to be done in England; (*) but all upon the Sea, yet no Suit can be in the Admiralty Court for the Nonperformance of the Agreement; for the Contract is the Original, (f) without which no Cauſe of Suit can be, and this Contract is out of their Juriſdiction; and where Part is triable by the Common Law, and Part by the Admiral Law, the Common Law ſhall be preferred. Mich. 22 Ja. B. R. between (g) Maldonado and Slany, reſolved, and a Prohibition granted upon Debate.

(e) 4 Inſ. 135.

* Fol. 533.

S. P. 139. S. P. 142. S. P. Moor 450. Pl. 612. like Point, adjudged.

(f) Both the Contract and Breach muſt concur to make the Cauſe of Suit, which is intire, therefore, &c. Hob. 212.

(g) 2 Rol. Rep. 486, 487. S. C. but obſcurely reported.

17. (h) If a Man takes a Maſt floating upon the Sea, and draws it upon the Shore, where J. S. takes it, claiming there Admiralty Juriſdiction; an Action does not lie againſt him for this in the Court of Admiralty, but at Common Law, becauſe the Tort was done upon the Land. Mich. 10 Ja. B. Mayor of Harwich's Caſe, per Curiam.

(h) 2 Mod. 294. S. P. ſeems to be intended, but the Book is miſprinted.

18. (i) But if a Man takes a Thing upon the Sea, and brings it to Land, and carries it away, the Suit for this ſhall be in the Admiralty Court, for this is a continued Act. Mich. 10 Ja. B. Mayor of Harwich's Caſe, per Curiam.

(i) 4 Inſ. 130. like Point, con. 12 Co. 79. like Point, con.

19. If a Shipwright ſues in the Admiralty Court for the (k) making a Ship for Navigation upon the Sea, a Prohibition does not lie. P. 9 Car. B. R. between Tasker and Gale, per Curiam agreed.

(k) So if for the amending, ſaving, or neceſſary victualling of a Ship, if againſt the Ship it ſelf, and not againſt any Party by Name, but ſuch as for his Intereſt makes himſelf a Party. Cro. Car. 296.

20. But if a Suit be in the Admiralty Court for making a Lighter for the Carriage of Mud, or the like, within the Body of the County upon the Thames, and not for Navigation, a Prohibition lies. P. 9 Car. B. R. between Tasker and Gale, per Curiam agreed.

21. (l) If the Suit be in the Admiralty Court upon a (m) Charter-party for Demurrage, or (n) for Mariners Wages, but not for any Penalty within the Charter, (o) but only for the Wages contracted for, or for Demurrage, according to the Contract, no Prohibition lies. P. 9 Car. B. R. said per Curiam to be so lately resolved by all the Judges of England.

(l) 4 Inst. 141. S. P. con. Et vid. Cro. Car. 296.

(m) If sealed and delivered. Q.

(n) Cro. Car. 296. S. P. resolved by all the Judges of both Benches; But Raym. 3. the Resolution in Cro. is cited and denied by two Judges, who said it had several Times been denied by others, and renounced even by several of those Judges, who are said to have subscribed to it. 3 Lev. 60. S. P. adjudged: For the Charter-party upon the Land is only to ascertain the Wages. (o) Winch. 8. S. P. For they may join in a Libel, but not at Common Law; but for this, vid. 3 Mod. 244, 245. and there said the Reason was, because the Ship is liable as well as the Master, who may be poor, and not able to answer the Seamen. 1 Vent. 346. S. P. adjudged. For if the Ship perish by the Mariners Default, they are to lose their Wages. 1 Vent. 143. S. P. adjudged. Though there was a joint Bargain made with all the Seamen, so that they might have joined in an Action at Law. —So though the Suit in the Admiralty be by part of the Mariners only, and some of them Officers of the Ship, as Pursers, Boatswains, &c. —But the Master cannot sue in the Admiralty for his Wages. Raym. 3. adjudged.

22. If A. a Merchant in London writes to his Factor in France to buy Wines for him there, and to send them to him to London, and to charge him for the Payment thereof with Bills of Exchange to be paid in London, and the Factor does accordingly; and after A. hath received the Wines in London, and accepted the Bills in London, he dies before the Day of Payment of the Money by the Bills; and after the Bills for Non-payment are protested in London, and after sent into France, where the Factor is compelled to pay them. In this Case no Suit can be upon this Matter against the Executor of A. in the Court of Admiralty, for that this Contract had its Original in London, scilicet, the writing the Letter, and the Acceptance of the Goods and Bills of Exchange in London makes the Contract compleat, and therefore this Contract is to be tried at Common Law. Hill. 14 Car. B. R. between Heywood and Anne Davyes, a Prohibition granted per Curiam; and upon Complaint thereof to the King by some of the Admiralty Court, a Meeting and Conference and Debate thereof was at Serjeants-Inn, between Sir Henry Mertyn and the Judges of the King's-Bench, where Counsel was heard for Anne Davyes, and Dr. Zouch for the other side; and the Court inclined clearly, that the Prohibition lies, but ordered, that the Prohibition should not issue, if in the Admiralty they would deliver Anne Davyes upon Bail for her Appearance the next Term; but if they would not deliver her, then the Prohibition should issue.

23. If a Ship is taken by the Pirates upon the Sea, and the Master, to redeem the Ship, contracts with the Pirates to pay them 50 *l.* and pawns his Person for it, and the Pirates carry him to the Isle of *S.* and there he pays it with Money borrowed, and gives Bond for the Money; he may sue in the Admiralty for the 50 *l. Pasch.* 13 *Car.* 2. between *Spark* and *Stafford. Hard.* 183. adjudged, because the original Cause arose upon the Sea, and what followed was but accessory and consequential.

24. If there be Wars with the *Dutch*, and one having Letters of Marque, takes an *Offender* for a *Dutch* Ship, and brings it into a Haven, and libels against it to have it condemned as Prize, but Sentence is given, that it was no Prize, the *Offender* may libel in the Admiralty against the Captain for the Damage the Ship received while it lay in the Port; for the original Taking being at Sea, the bringing it into the Port,

Port, in order to have it condemned, is but a Conſequence thereof. *Trin.* 20 *Car.* 2. between (p) *Turner*, &c. and *Neal.* 1 *Lev.* 243. adjudged.

(p) 1 Sid. 367. S. C. adjudged.

25. If a Contract is made at *Malaga* concerning the Lading of a Ship, and for Breach thereof upon the Sea, *viz.* That he would not receive 40 Butts of Wine into the Ship according to Agreement; there is a Libel in a Foreign Admiralty, and Sentence, That the Wine ſhall be received into the Ship, which is refuſed; yet there can be no Suit in the Admiralty here, reciting the former Sentence, and charging the Defendant with the Breach thereof; for though one may libel here upon a Sentence in a Foreign Admiralty for the Execution of it, yet there being no compleat Sentence in the Foreign Admiralty, but an Award only, that the Wine ſhould be received; this Suit for Breach thereof, is in Nature of an original Suit, which ought not to be, though the Breach was at Sea, becauſe upon a Contract made at Land. *Trin.* 21 *Car.* 2. between (q) *Jurado* and *Gregory.* 1 *Vent.* 32. adjudged, and a Prohibition granted accordingly.

(q) 1 Sid. 418. S. C. adjudged, becauſe the Foreign Sentence was not definitive. 1 Lev. 267. S. C. and becauſe the Sentence was not definitive, and the Suit for Damages only, it was ordered that the Plaintiff ſhould declare upon his Suggeſtion, ſo that upon the Pleadings the Matter might come judicially in Queſtion.

26. Three-Part Owners of a Ship being for having her go a Voyage, the Fourth (r) would not agree, and upon a Petition to the Judge of the Admiralty, he would not compel his Aſſent, but took a Stipulation of 200 *l.* Penalty to the Uſe of the Fourth, conditioned that the Ship ſhould return from the intended Voyage in 18 Months, or elſe the Owners of the Three Parts ſhould pay to the Fourth the Value of his Fourth Part, and the Ship never returning, Whether a Suit might be in the Admiralty upon this Stipulation? *Hill.* 19 & 20 *Car.* 2. between *Juſtice* and Sir *Henry Brown & al. Hard.* 473. *dubitatur.*

(r) By the Marine Law, he that will not join in ſetting the Ship out, ſhall have no Share of the Freight. 2 Chan. Caſ. 36. The Courſe of the Admiral is certified by Sir Lionel Jenkins to be accordingly.

(F) (a) Court (b) of the (c) Foreſt. Juſtice (d) Seat.

In (e) what Places it may be held.

(a) By 9 H. 3. cap. 16. no Conſtable, Caſtellain or Bailiff ſhall hold Plea of Foreſt for Green Hue or Hunting.

1. A Juſtice Seat may be ſummoned to be held within the Foreſt, and after the (f) Chief Juſtice in Eyre, upon his coming there at the Time appointed, * may adjourn it (g) to any Place within the County, though it be out of the Foreſt. Tr. 11 Car. B. R. between the (h) King and Sir Baſil Brook and Maſter George Mynne, adjudged upon Demurrer where the Caſe was, that a Scire Facias was brought againſt them to ſhew Cauſe

* Fol. 534.

(b) The Court of Regard, or Survey of Dogs, is held every third Year for the Lawing of Dogs. 4 Inſt. 289. —By the 9 Hen. 3. 6. the Inquiry for Lawing of Dogs ſhall be when the Range is made, viz. from three Years to three Years, &c. (c) 2 Rol. Ab. 33. *vide.* (d) There are three Courts incident to the Foreſt; the Court of Attachments, Swainimote, and Juſtice-Seat. Poph. 150. 2 Rol. Rep. 191. (e) By 9 H. 3. cap. 8. Swainimotes ſhall not be kept but within the Counties where uſed to be kept. (f) He was anciently created by Writ, as other Juſtices in Eyre were, but by 27 H. 8. cap. 24. par. 2. he is to be created by Patent, and for the Form of his Patent, *vid.* 4 Inſ. 291. —And by 32 H. 8. cap. 35. he may make one or more Deputies, yet all Writs of Summons, ancient and late, are coram the Chief Juſtice, aut ejus Deputato. (g) But per 7 Rich. 3. cap. 3. 'tis enacted, No Jury ſhall be compelled by any Officer of the Foreſt or other Perſon, to travel from Place to Place out of the Place where the Charge is given, but ſhall give their Verdict in the Place where their Charge is given them (h) Cro Car. 409. S. C. and S. P. per tot Cur', and by this Book it was adjudged accordingly; but vid. & Quer' if the Book is not miſprinted at the End of the Caſe in my Edition.

why Execution ſhould not be granted againſt them for ſeveral Fines adjudged againſt them at the Juſtice-Seat for the Foreſt of Dean, which was ſummoned within the Foreſt, and from thence adjourned to the Caſtle of Glouceſter, and there held, and they there indicted and fined; and the Defendants pleaded, that the ſaid Caſtle of Glouceſter, where it was held, was out of the Foreſt; and upon this the Attorney-General demurred. But after the Defendants ſubmitted themſelves to the King, and therefore would not any further defend; but upon Oyer of the Record the Court inclined, that it was well held at Glouceſter, and therefore gave Judgment for the King and Attorney; and the Court ſaid, there were many Precedents accordingly.

2. Mich. 11 Car. B. R. A Scire Facias was brought againſt Rowles upon Recognizance taken by the Chief Juſtice at the ſaid Juſtice-Seat (i) held in the ſaid Caſtle as aforeſaid; and it was pleaded in Bar thereof by my ſelf, that the ſaid Caſtle was out of the Foreſt; upon which it was demurred by the Attorney-General, and now adjudged for the King, for the Reaſon aforeſaid; and the Court alſo ſaid, that the Chief Juſtice may take a Recognizance in any Place, though it be not at any Juſtice-Seat.

(i) 1 Jon. 347.

(a) Juſtice (b) Seat.

The Juriſdiction.

(a) There cannot be a Foreſt without it. 2 Bulſ. 298. per Cur.

(b) It cannot be kept oftner than every third Year. 4 Inſ. 290.

1. BY 9 *Hen.* 3. *cap.* 2. Dwellers out of Foreſts ſhall not come before Juſtices of the Foreſt by common Summons, unleſs impleaded there, or Sureties for others attached for the Foreſt.

2. By 34 *Edw.* 1. *Stat.* 5. *cap.* 6. the Juſtice of the Foreſt, or his Lieutenant, in Preſence, or by Aſſent of the Treaſurer, may take Fines and Amerciaments of Indictees for Treſpaſſes done there, and not tarry for the Eyre of the Juſtice.

3. This Court may inquire, hear and determine all Treſpaſſes within the Foreſt, according to the Law of the Foreſt, and all Claims of Franchiſes, *&c.* within the Foreſt. 4 *Inſ.* 291.

4. A Felony commited within the Foreſt, muſt be inquired of, *&c.* before the Judges of the Common Law, and it belongs not to the Conuſance of the Chief Juſtice of the Foreſt. 4 *Inſ.* 315.

5. A Receipt of an Offender in Hunting, *&c.* or of the King's Veniſon out of the Foreſt, cannot be puniſhed by the Law of the Foreſt, becauſe the Juriſdiction is local. 4 *Inſ.* 317.

Juſtice Seat.

(a) How they (b) proceed (c) there.

(a) Whether a Man may be impriſoned for Nonpayment of a Fine ſet there. Web's Caſe. 2 Rol. Rep. 411. Dub. 2 Bulſ. 213. Dub.

1. IT muſt be ſummoned at leaſt Forty Days before the Sitting, and one Writ of Summons ſhall be directed to the Sheriff, *&c.* the other *Cuſtodi Foreſtæ, vel ejus locum tenenti,* to ſummon all Officers, *&c.*

(b) Their Proceedings are de Hora in Horam, and therefore the Defendant muſt plead to an Indictment there preſently. 1 Jon. 268. —Where the Indictment was removed in B. R. and the Defendant there put to anſwer. 4 Inſt. 295. (c) How the Regard is to be made by Force of the King's Writ before a Juſtice Seat is held. 4 Inſ. 291, 292.

and all Perſons that claim Liberties within the Foreſt, to ſhew how they claim them. 4 *Inſ.* 291.

(d) By 9 H. 3. cap. 16. the Preſentments of the Foreſters, when inrolled and enclosed under the Seals of the Verderors, ſhall be preſented to the Chief Juſtices, &c. and be determined before them. —How the Truth of ſuch Preſentment ſhall be inquired of, and after by Aſſent of the Foreſters, Verderors, Regardors, &c. and confirmed and ſealed with their Seals, Vid. 34 Edw. 1. Stat. 5. cap. 1. and Indictments taken in other manner, ſhall be void. —And by 34 Edw. 1. Stat. 5. cap. 2. If any Officer is dead or ſick, ſo that he cannot be at the Swanimote, the Juſtice of the Foreſt ſhall put another in his Place, ſo that the Indictment may be by all in Form. —If ſealed with the Seal of one Officer only by Aſſent of the Verderors, &c. 'tis well enough. 1 Jon. 268.

2. It may proceed upon the (d) Preſentments or Verdicts in the Swainmote. 4 *Inſ.* 290.

3. If upon the firſt Sitting of the Juſtice Seat the Four Men and Reeve of any Town make Default, the whole Vill ſhall be amerced; but if after Appearance may make Default upon an Adjourment, the Defaulters only ſhall be amerced. 1 *Jon.* 279.

4. If at the Swainmote the Preſentment of the Foreſters concerning Vert and Veniſon is found true, the Offender is convict in Law, and (e) cannot traverſe, but a Preſentment at the Juſtice Seat (f) not found in the Swainmote, may be traverſed, becauſe preſented but by one Jury. 4 *Inſ.* 290.

(e) 1 Jon. 347.

(f) Nothing can be done, but upon their Preſentments. 2 Bulſ. 297. per Coke.

5. If the King pardons a Treſpaſs in a Foreſt, and an Offender at a Juſtice Seat pleads it by the Law of the Foreſt, before any Allowance thereof, the Juſtices muſt charge the Miniſters of the Foreſt to inquire, Whether the Delinquent hath done any Treſpaſs in Vert or Veniſon ſince the Date of the Pardon? 4 *Inſ.* 313. And when the Pardon is allowed, the Entry is *quod invenit manucaptores quodammodo non foriſfac'*, &c.

6. If an Offender be convicted for a Treſpaſs in the Foreſt in Hunting, *&c.* and adjudged to be fined or impriſoned, though he pays the Fine, yet he muſt find Sureties for his good Abearing, *&c.* 4 *Inſt.* 313.

Allowance of Claims there.

(g) How the Chief Juſtice may inquire of the Truth of ſuch Claims per Miniſtros Foreſtæ, or tam per Miniſtros quam per alios, at his Diſcretion. 4 Inſ. 294, 295.

1. IF a Claim is allowed there, which (g) ought not, the Party grieved may by *Certiorari* remove the Record in *B. R.* and thereupon have a *Scire Facias*, &c. 4 *Inſ.* 294.

2. But if refuſed to be allowed where it ought, the Party ſhall have a Writ *de Libertatibus allocandis* to the Juſtices of the Foreſt. 4 *Inſ.* 297.

3. But if upon ſuch Claim a Difficulty ariſes, or a Demurrer is joined, the Chief Juſtice may adjourn it in *B. R.* &c. 4 *Inſ.* 295.

The Swanimote Court.

1. THE Swanimote is holden by the Steward before the Verderors as Judges (a) thrice in the Year, and the (b) Foresters are to present their Attachments at the next Swanimote, where the Freeholders within the Forest are to appear to serve on Juries. 4 *Inst.* 289.

(a) And at what Time, and who bound to appear there.

Vid. 9 Hen. 3. cap. 8. (b) 9 Hen. 3. cap. 16.

2. This Court may inquire (c) *de Superoneratione Forestariorum, & aliorum Ministrorum Forestæ, & de eorum Oppressionibus Populo illatis.* 4 *Inf.* 289.

(c) 34 Ed. 1. Stat. 5. cap. 4.

3. This Court may not only inquire, but convict, but (d) not give Judgment. 4 *Inf.* 289.

(d) A Swanimote without a Justice Seat, is of no Force at all. 2 Bulf. 298. per Coke.

The Court of Attachments.

1. THE Court of Attachments, or Woodmote Court, is to be held before the Verderors every Forty Days, and at this Court the Foresters bring in their Attachments *de Viridi & Venatione*, and the Presentments thereof, and the Verderors receive and enroll them; but no Man (e) ought to be attached by his Body for Vert or Venison, unless taken with the Manner within the Forest, else the Attachment must be by his Goods. 4. *Inf.* 289.

(e) By the 7 Rich. 2. cap. 4. No Man shall be taken or imprisoned by any Officer of a Forest, without due Indictment, or being taken with the Manner, &c.

(G) Courts.

(a) King's Bench.

(a) 4 Inf. 70. 71, &c.

1. IF a Petition be endorsed, that the Chancery shall send a Verdict returned there in B. R. where the Justices shall do right, the Verdict it self ought to be sent, and not a Tenor only. (b) 22 E. 3. 5. 38 E. 3. B. R. Rot. 16. It was shewed to the Parliament, that a Manor was held of a Barony of a common Person, and after the Manor was forfeited to the King, and he granted it to another to hold of himself per Servitium militare, ubi per Legem deberet dici tenendum de capitalibus Dominis feodi illius, &c. Et petit, that the said Charter be amended in the said Clause; upon which was a Plea in Chancery, and found by Escheater, & per Jurata' here to be true. Et quia Judicium super Verdicto prædicto, & Executio Judicii pertinent ad Officium Cancellarii facienda, ideo mittatur in Cancellariam, & datus est dies usque, &c.

(b) Fitz. Petition 5. S C.

2. (c) If a (d) Record be once (e) come in B. R. this can (f) never be remanded. (g) 22 E. 3. 6. b. (h) 29 Ass. 43. per Sharde (i) 40 Ass. 29. 19 Ass. 4.

(c) 4 Inst. 73. S. P. Et vid. 1 Part 789. Pl 4, 5. 1 Rol. Rep. 85. (d) But the Court may grant a Nisi Prius for the Trial of Indictments of Treason, Felonies, and other Pleas; for there they send only the Transcaipt, and not the Record it self. 4 Inst. 47. Raym. 367. But for this, vid. Nisi Prius under Title Trial. (e) But if the Court perceives that an Indictment is removed into this Court by Practice, or for Delay, they may refuse to receive it; and before it is entered of Record, remand it. 4 Inst. 74. (f) But by 6 Hen. 8. cap. 6. Indictments of Felony removed in B. R. may be remanded, as also the Bodies of such Felons and Murderers. —But this Statute extends not to Treason. Raym. 367. (g) Fitz. Record 11. S. C. (h) Br. Record 44. S. C. (i) Br. Record 46. S. C.

3. If it be found by Inquisition in Chancery, that a Copyhold was granted to J. S. in Fee, in Trust for J. D. who was an Alien Amy, for which the Copyhold was seised into the King's Hands; upon which Charge of the Inquisition, J. S. comes and traverses the Trust, and prays to be restored to the Possession, and Issue is joined in Chancery upon the Trust, and thereupon the Record is delivered over by the Hands of the Commissioners of the Great Seal to B. R. to be tried, and there a Verdict is found for the King, and after moved in Arrest of Judgment, that there is not any Cause for the King to seise the (*) Copyhold, and so by Consequence the Inquisition void; for it was conceived, that the Trust of a Copyhold of Inheritance in an Alien, is not given to the King: But it was resolved per Curiam, that though it should be admitted, that the King shall have this Trust, yet he cannot seise the Copyhold, and by this have the (k) Possession, but ought to be relieved in a Court of Equity; and that the King's Bench is not only to try the Issue, but ought to give the same Judgment upon the Record, which the Chancery ought to have given there; though it was objected, that the Record remained in filaciis of the Chancery as this Record transmitted mentions; yet because this Record shall never be remanded in Chancery, (l) but Judgment is to be given here, (m) the Court here shall give Judgment according to the Law upon the Record here, according to the Case upon the Record made between the King and the Party; and therefore the Judgment ought here to be given against the King, and that J. S. shall be restored to his Possession. P. 24 Car. B. R. between the (n) King and Holland, adjudged. Intratur, Tr. 21 Car. Rot 20.

* Fol. 535.

(k) In the Original 'tis et per eo aver le Franktenement, and therefore seems to be misprinted.

(l) Vid. 1 Part 776. 2 Rol. Rep. 247, 273. 2 Cro. 4. Godb. 357.

(m) After Trial Judgment was arrested, and a Repleader awarded in this Court. 1 Rol. Rep. 287. Et vid. 2 Rol. Rep. 85, 292, 295.

(n) Styl. 20, 40, 75, 84, 90, 94. S. C. adjorn'. Al. 14, 15, &c. S. C. adjudged.

(H) The Court of (a) King's Bench.

In General.

1. Hill. 2 Hen. 5. B. R. Rot. 65. Proclamation that none should should carry Arms within the Court, exceptis Domino vel Militi secundum eorum utriusque Gradum & Statum, solum Gladium.

(a) Where in Pleading it must be shewed at what Place the King's Bench and Chancery (being moveable Courts) were. Moor 176. Pl. 310. Cro. El. 504. Yelv. 227. —Otherways of the Common Pleas being held in certo loco. Moor 176. Pl. 310. 2 Leon. 102.

2. (b) Hen. 3. set in Person (c) with the Justices in Banco Regis, at the Arraignment of Peter de Rivallis. Speed 521.

(b) In the Original 'tis Hill, and so appears to be misprinted. (c) The King had used to sit in the high Bench, and the Judges on the lower Bench at his Feet, but Jurisdicature belonged only to the Judges of the Court, and in his Presence they answered all Motions. 4 Inst. 73. Co. Lit. 71. b.

3. At another Time the ſame King ſat there in Perſon at the Arraignment of Hubert Earl of Kent. Speed 524.

4. Hill. 19 Ed. 3. B. R. Rot. 35. The King granted the Cuſtody of the Seal to ſeal Writs de B. R. to Matthew Conaceem for Sixteen Years, in ſatisfactionem decem mille librarum domino Regi præ manibus ſolutarum, and a Seal delivered to the Chief Juſtice by the Chancellor to ſeal the ſaid Writs, who delivered one Part to the Deputy of Matthew, and reſerved the other Part to himſelf.

5. Otto de Holland was brought to the Bar coram Rege aſſidentibus Cancellario, Theſaurario, Comitibus Arundeliæ & Huntingdoniæ, & aliis & Juſticiariis de Banco. His Offence was, That he ſuffered the Count of Ewe, Marſhal of France, to go armed to Calais againſt the Command of the King, the ſaid Count being a Priſoner of the King, and committed to the Cuſtody of the ſaid Otto, & Otto non potuit dedicere, ideo committitur Mareſchallo.

(I) The general (a) Juriſdiction of the Court.

(a) Where the Juriſdiction of this Court ſhall not be ouſted without ſpecial Words. 11 Co. 64. b. 1 Mod. 45.

1. If A. be elected Conſtable in a Leet, and before he is ſworn the Juſtices of Peace at a Seſſions diſcharge him, becauſe he is a Maſter of Arts, and elect and ſwear B. to be Conſtable there; a Writ in this Caſe may be granted out of the King's Bench to the Juſtices to diſcharge B. and to ſwear A. becauſe the proper Place to elect a Conſtable is the Leet, and this was no Cauſe to diſcharge his Election. Hill. 10 Car. B. R. Herſon's Caſe, who was elected in the Leet of the Biſhop of Winton in Waltham Wolbeck in Comitatu Southampton', per Curiam, ſuch a Writ granted, Trin. 6 Car. B. Regis. Arundel's Caſe in Comitatu Dorſet', (b) like Writ alſo granted.

(b) In Bulſ. 174. it is ſaid by Williams, Juſtice, there was no Precedent of ſuch a Writ of Reſtitution for a Conſtable; and in that Caſe there was an Order by Rule of Court for reſtoring, &c. a Conſtable choſe and ſworn at the Leet, &c. Et vid. 2 Rol. Rep. 82, 85.

2. If A a Conſtable of a Hundred, ſerves in the Office for one Year, and at the End of the Year the Court-Leet for the Hundred, according to Cuſtom (*) preſent B. to be Conſtable, and the Steward and Jury refuſe to ſwear B. but continue A. for another Year; a Writ may be awarded out of B. R. directed to the Steward to ſwear B. and if there be good Cauſe to refuſe him, this may be returned to the Court. P. 14 Car. B. R. ſo done in the Caſe of one Braine, the Conſtable of the Hundred of Kenſham in Comitatu Somerſet'.

* Fol. 536.

3. If a Man, by the Cuſtom of a Town, is to ſerve in the Office of Tythingman for one Year in his Turn, by the Cuſtom of the Town, and he ſerves in the Office for two Years, and after the Homage there continue him for a third Year; a Writ may be awarded out of this Court to diſcharge him, and to elect another. Mich. 15 Car. B. R. Bradburn's Caſe, per Curiam. Such Writ granted to the Town of Penton in Comitatu Devoniæ.

4 (c) This Court may not only correct Errors in Judicial Proceedings, but other Errors and Miſdemeanors Extrajudicial tending to the Breach of the Peace, Oppreſſion of the Subject, or raiſing Faction,

(c) 4 Inſt. 71. S. P.

Controverſy, Debate, or other Miſgovernment, ſo that no Wrong or Injury, either publick or private, can be done, but it ſhall be reformed or puniſhed by due Courſe of Law. 11 *Co.* 98.

(d) 9 Cd. 111. S. P. adjudged. 2 Inſ. 27. S.P.

5. (d) When this Court ſits in any County, Juſtices in (e) Eyre, (f) Oyer and Terminer, Goal-Delivery, and thoſe that have Conuſance, *&c.* ceaſe without writing to them: 4 *Inſ.* 73.

(e) 2 Inſ. 166. S. P. for in preſentia majoris ceſſat poteſtas minoris. (f) If a Commiſſion of Oyer and Terminer is diſcontinued or expired, the Indictments ſhall be removed in B. R. as in their proper Center. 2 Inſ. 419, 550.

6. But if an Indictment in a Foreign County be removed before Commiſſioners of Oyer and Terminer into the County where the *King's-Beneh* ſits, they may proceed; for that the *King's-Bench* not having the Indictment before them, cannot proceed for this Offence. 4 *Inſ.* 73.

(g) 3 Inſ. 27.

7. (g) But if an Indictment is found in the Vacation-time, in the ſame County in which the *King's-Bench* ſits, and in Term-time, the *King's-Bench* is adjourned, there may be a (h) Special Commiſſion to hear and determine it. 4 *Inſ.* 73.

(h) 'Tis better if dated after the Term begins. 3 Inſ. 27.

(K) How and in what Manner the Court (a) may proceed.

(a) 1 Rol. Abr. 581. Letter B.

1. IN an Appeal of Murder, or other Offence, if the Plaintiff appeal him in Cuſtodia Mareſchalli, and the Defendant is arraigned, and pleads the ſame Term, and the ſame Term alſo is tried; this may be well done, without any Bill filed, but only upon the Declaration. 43 El. (b) Brayne's Caſe adjudged. Hill. 14 Car. B. R. (c) Pigot's Caſe, per Curiam agreed.

(b) Cro. Eliz. 690. 778 S. C. but S. P. does not appear. 1 Jon. 485. S. C. cited; & vid. 2 Rol. Rep. 478.

(c) Cro. Car. 531, 532. S. C. & S. P. per Curiam; but it was ſaid, That if the Plea had been any other than Not guilty, and thereupon there had been an Adjournment to another Term, the Declaration ought to have been filed.

2. So if the Defendant is arraigned, and pleads the ſame Term, but is not tried till another Term, yet this may be well done upon a Declaration without any Bill filed. Hill. 14 Car. B. R. between (d) Pigot and Pigot, per Curiam adjudged, this being moved in Arreſt of Judgment, after the Defendant was found guilty at the Bar of Petit-Treaſon for killing her Husband, and ſhe adjudged thereupon to be burnt. Intratur, Trin. 14 Car. Rot. 685. and ſaid to be the Practice of the Court.

(d) Cro. Car. 531, 532. S. C. adjudged 1 Jon. 425. S. C. adjudged.

3. But in an Appeal, if the Defendant be arraigned in another Term, then the Defendant appears, there ought to be a Bill filed, in the ſaid Caſe of (e) Pigot ſaid to be the Courſe.

(e) Cro. Car. 532. S. C. & S. P. ſaid per Hoddeſden to be the Practice.

(f) 2 Inſ. 550, 568. So in Caſe of the Venire. 9 Co. 118. So in Caſe of the Venire reſolved.

4. (f) If the Offence be committed in another County than where the *King's Bench* ſits, and the Indictment removed thither by *Certiorari*, there muſt be 15 Days between every Proceſs and the Return thereof. *Co. Lit.* 134. b.

5. (g) But if the Offence be committed in the ſame County where the *King's-Bench* ſits, they may proceed *de die in Diem*; but ſo they will rarely do. *Co. Lit.* 134. b.

(g) 2 Inſ. 568. So in Caſe of the Venire, and the Entry may be ideo immediate venit inde jurata.

6. (h) *R.* offered himſelf to be Bail before a Judge of the Court, and upon his Oath affirmed himſelf to be a Subſidy-Man, *&c.* and being further examined what he paid, *&c.* he confeſſed he was no Subſidy-Man, and thereupon he was committed; and the next Day being brought by the Marſhal into Court, and being examined of this Miſdemeanor, he ſubmitted himſelf to the Court, and confeſſed he had been Bail in other Actions, and had ſworn he was a Subſidy-Man, whereas he now confeſſed in Court he was not, and therefore upon his Confeſſion recorded in Court, (i) without other Proceeding againſt him, he was adjudged to be committed to Priſon, and to ſtand upon the Pillory, with a Paper, *&c.* *Mich.* 4 *Car.* 1. *Rayſon's* Caſe, *Cro. Car.* 146. adjudged.

(h) 1 Levin. 155. like Caſe.

(i) In Cro. Jac. 297. a Precedent was ſhewed by Noy, 2 H 4. Rot. 2. where L. was indicted before Juſtices of Peace for feloniouſly entring the Houſe of J. S. and ſtealing 18 d. &c. and the Jury found a Special Virdict, That L. M. and N. were common Players at Dice, and that they uſed to play with falſe Dice, and cozen the King's Subjects, and that they entered the Houſe of J. S. and deſired him to play with them, and with falſe Dice they won of him 12 d. and if this was Felony, they prayed the Judgment of the Court: and this Indictment and Verdict being removed in B. R. Judgment was therenpon entered, That though it was not an Offence for which he ſhould loſe Life or Member, yet becauſe it was found that he was a common Cozener of the King's People, it was ordered he ſhould be ſet upon the Pillory, &c. And Montague commanded a Copy thereof to be taken, as a good Precedent for the Juriſdiction of the Court, and Government of the Commonwealth. Q.

(L) The *King's-Bench.* (a) Juriſdiction.

(a) The Judges in this Court are the Sovereign Juſtices of Oyer and Terminer, Gaol-Delivery, Conſervators of the Peace, &c. 4 Inſ. 73. 9 Co. 118. b. —They are the Sovereign Coroners, and therefore where the Sheriff and Coroners may receive Appeals by Bill, a fortiori they may. 4 Inſ. 73. —They have no Commiſſion, Letters-Patents, or other Means to hold Plea, &c. but their Power is original and ordinary. (b) Fitz. Quare incumbravit 1. S. C.

Of what Action they may hold Plea originally.

1. AN Action which is a Common Plea does not lie in Banco Regis. (b) 17 Ed. 3. 50. b.

2. As (c) a Quare Impedit does not lie in the King's-Bench, becauſe it is a Common-Plea. 17 Ed. 3. 50. b.

(c) But vid. 4 Inſ. 71.

3. So a Quare Incumbravit does not lie in the King's-Bench becauſe this is a Common-Plea. (d) 17 Ed. 3. 50.

(d) Fitz. Quare incumbravit 1. S. C.

4. An Action upon the Statute of Winchester, of Robbery, does not lie by Original in Banco Regis. Mich. 37 Eliz. B. R. between Sadler and Morſe admitted, becauſe it is a Common-Plea; but Paſch. 15 Car. B. R. between (e) Sir John Compton and the Hundred of Woking in the County of Surrey, admitted, and a Trial and Verdict thereupon at Bar, and Judgment accordingly, but no Exception taken to it.

(e) March 10, 11. S. C. but S. P. does not appear.

5. (f) An Action of Debt lies in Banco Regis againſt a Sheriff or Gaoler in Cuſtodia Mareſchalli, for an Eſcape upon the Statute of Weſtminſter 2. & 1 R. 2. though the Statutes limit the Action to be brought by Writ of Debt, which is by Original, for this is within the Equity of the Statutes. Mich. 7 Car. B. R. between Brightwait and Taylor, and others Sheriffs of Briſtol, adjudged in a Writ

(f) 2 Inſ. 382. S. P.

(g) Pl. Com. 38. Kelw, 214. N. Benl. 238.

a Writ of Error in Cam' Scac', where this Error was assigned, and there said, that (g) there were many Precedents accordingly. Pl. 267. Dyer 275. Pl. 46. 278. Pl. 5. 306. Pl. 62.

Fol. 537.

(h) 3 Inst. 125. S. P. Et vid. Godb. 390. Kelw. 214. Moor 248.

(i) 27 Ed. 3. cap. 1.

6. (h) A Bill in Nature of a Premunire lies in Banco Regis in Custodia Mareschalli, &c. upon the Statute of (i) Ed. 3. c. tho' the Statute be, That he shall have Day containing the Space of Two Months by Garnishment, which implies that it should be by Original. 2 R. 3. 17. b.

(k) Ball and Trelawny, Cro. Car. 603. S. C. adjudged. Et vid. 1 Rol. Abr. 529. Pl. 8.

7. An Action upon the Statute of 2 H. 4. cap. 11. lies by Bill in Banco Regis, for suing in the Court of Admiralty against the Statutes of 13 R. 2. and the said 2 H. 4. though the Statute of 2 H. 4. says, That he shall sue by Writ super Casum. Tr. 17 Car. B. R. between (k) Babb and Trelawny, adjudged. Intratur, P. 17 Car. Rot. 137.

8. An Action by a common Informer upon the Statute of 7 Ed. 6. c. 5. for selling Wines in his House against the Statute, by which he forfeited 10 l. for every Time, may be brought in Banco Regis by Bill of Debt; though by the Statute of 18 El. c. 5. it is enacted, That no Person shall be permitted or received to sue against any Person or Persons, upon any penal Statute, but by Way of Information, or Original Action, and not otherwise; for by the Statute of the 7 Ed. 6. c. 5. the Penalty may be recovered by Action of Debt, Bill, Plaint, or Information, in any of the King's Courts of Record; and it was not the Intent of the Statute to oust the Court of King's-Bench of Jurisdiction against the Statute of 7 Ed. 6. but this extends only to Plaints in inferior Courts, and removed afterwards; and the Words of the Statute of 18 El. are not by original Writ, but by original Action: And this Bill of Debt is an Original Action within the Words.

(l) Styl. 381, 382. S. C. adjudged.

Tr. 1653. between (l) Hill and Pierce de Chaier, adjudged per Curiam, this Matter being moved in Arrest of Judgment. Intratur, P. 1653. Rot. 90. and it was said there were many Precedents accordingly.

9. If a Mayor or Sheriff after an Arrest refuses sufficient Bail against the Statute of 23 H. 6. of Sheriffs, by which the Penalty of 40 l. is given, one Moiety to the King, and the other Moiety to the Party that will sue: In this Case no Action of Debt lies by Bill in Banco Regis, because the Statute of the 18 El. is, That no Person shall be permitted to sue upon any penal Statute, but by Way of Information or original Action, and not otherwise. But note, it is not limited by the Statute of 23 H. 6. how the Penalty shall be recovered, but generally that he shall forfeit 40 l. of which the King shall have one Moiety, and he that will sue, the other Moiety. Co. 3 Institutes 194. & Co. 6. 19. b. Gregory's Case, where it is cited. M. 29 & 30 El. coram Rege, between (m) Widiston and Clerk adjudged.

(m) Widow and Clerk, Cro. El. 76, 77. S. C. adjudged. Moor 247. Pl. 390. 412. Pl. 565. S. C. cited.

(n) 9 Hen. 3. for the Exposition of which, and what shall be said a Common Plea, vid. 2 Inst. 21. 22.

10. By the Statute of (n) *Magna Charta*, *cap.* 11. it is (o) enacted, That (p) Common-Pleas shall not follow (q) our Court, (r) but be held in a certain Place.

(o) But before this Act they might have been held there, and all Originals made returnable there. 2 Inst. 21. 22. (p) But these general Words bind not the King, for he may bring an Action there for a Common-Plea. 2 Inst. 23. 2 Rol. Rep. 290. —So any Action vi & armis, where the King is to have a Fine, as Ejectment, Trespass, Forcible Entry, &c. may be brought in B. R. 2 Inst. 23. —So a Replevin may be removed in B. R. because the King is to have a Fine. 2 Inst. 23. 4 Inst. 71. —So an Assise upon a Disseisin in the County where the King's-Bench sits. 2 Inst. 23. (q) This extends both to the King's-Bench and Court of Exchequer. 2 Inst. 550. 23, But vid. 4 Inst. 113, 114. (r) But one in Custodia Mar', or any Officer or Minister of the Court entitled to the Privilege thereof, may be there sued by Bill in Debt, Covenant, or other personal Action, for the Act takes not away the Privilege of the Court. 2 Inst. 23. 4 Inst. 71. 2 Bulst. 123.

11. (s) By the Statute of (t) *Glouceſter*, *cap.* 8 none ſhall have (u) Writs of Treſpaſs before (w) Juſtices, (x) unleſs he ſwear by his Faith, that the Goods taken away were worth (y) (z) 40 *s.*

(s) It was a Maxim of the Common Law, quod Placita de Catallis debitis, &c. quæ Summam 40 s. attingunt, vel eam excedunt, ſecundum Legem & Conſuetudinem Angliæ, ſine Brevi Regis placitare non debent. 2 Inſ. 312. (t) 6 Ed. 1. for Expoſition whereof, vid. 2 Inſ. 310, 311. &c. (u) Put but for an Example, for ſo 'tis in Debt, Detinue, Covenant, &c. 2 Inſ. 391. —Secus in Treſpaſs vi & Armis, where the King is to have a Fine, for a Fine cannot be aſſeſſed but by a Court of Record. 2 Inſ. 391. F. N. B. 47. 3 Mod. 275. adjudged. —So in Treſpaſs for taking Charters concerning a Freehold, for 'tis a Maxim in Law, that ſuch Pleas ſhall not be in any Court but of Record. 2 Inſ. 391. F. N. B. 47. B. (w) Raym. 293. (x) This Courſe of making an Affidavit by Experience was ſo dangerous and troubleſome, that it was forborn, and the Defendant left to take ſuch Exceptions as the Common Law gave him. 2 Inſ. 391. (y) If upon a Nonſuit in an Inferior Court, 16 s. is given for Coſts, by 23 H. 8. Debt lies for it in B R. becauſe given by a ſubſequent Statute. Harwood and Farborne, Cro. El. 96. adjudged. 1 Leon. 316. adjudged. (z) For as the inferior Courts, which are not of Record regularly, cannot hold Plea of Debt, &c. or Damage, unleſs under 40 s. ſo the Superior, which are of Record, cannot unleſs above 40 s. 2 Inſ. 391.

12. (a) If in a real Action the Writ is abated by Judgment in the (b) *Common-Pleas*, and upon a Writ of Error in *B. R.* this Judgment is reverſed, and the Writ adjudged good, this Court ſhall proceed upon the Writ as the *Common-Pleas* ſhould have done. 2 *Inſ.* 23.

(a) 4 Inſ. 72. S. P. Et vid. 2 Saund 256. Caſe in Parliament 57. But for this, vid. under Error, how the Judgment ſhall be given upon the Reverſal of the Firſt Judgment. (b) So of a quod ei deforceat in Wales, &c. Griffith and Lewis, Cro. Car. 444. adjudged. 1 Jon. 380. adjudged.

(M) Of what Actions they may hold Plea for a collateral Reſpect.

1. If a Man recovers in a Quare impedit in Banco, and after this is removed in Banco Regis by Writ of Error, a Quare incumbravit does not lie there, though this does not lie without a Judgment, becauſe this is a new Original, and a Common Plea in it ſelf. (a) 17 E. 3. 50. b.

(a) Fitz Quare incumbravit 1. S. C.

2. An Action de Valore Maritagii by the Lord lies againſt an Heir in Cuſtodia Mareſchalli. Mich. 14 Car. B. R. between (b) Arundell and Saunders, adjudged upon a Demurrer to a Declaration, but this was not moved; but Maſter Hoddeſdon ſaid to me, That he had divers Precedents accordingly, that it lies in Banco Regis. Intratur H. 13 Car. Rot. 1266.

(b) Cro. Car. 502. S. C. but appears to hve been an Action upon the Caſe.

3. If a Man ſues a (c) Latitat out de B. R. to the Intent to declare againſt the Defendant after Arreſt in Cuſtodia Mareſchalli, in an Action of Debt, and the Sheriff arreſts him, and ſuffers him to eſcape, an Action lies againſt the Sheriff, ſhewing this ſpecial Matter, and he ſhall recover his Damages, having Regard to the Loſs of his Debt. Tr. 14 Ja. B. R.

(c) By that he is brought in Cuſtodia Mar', and

Fol. 538.

4. If after an Arreſt upon a Latitat the Defendant tenders Amends after the Arreſt, for an involuntary Treſpaſs, according to the Statute 22 Jac. c. 16. this is not good, upon an Averment that the Latitat was ſued out to the Intent to declare in Cuſtodia Mareſchalli for this Treſpaſs, for otherwiſe a Man ſhall be defeated of his Coſt by ſuch Tender. Tr. 8 Car. B. R. between (d) Wats and Baker, adjudged upon Demurrer.

the Plaintiff may declare againſt him in another Action. Cro. Car. 330. (d) Cro. Car. 264. S. C. adjudged.

5. This Court may hold Plea by Bill for Debt, Detinue, Covenant, Promiſe, and in all other perſonal Actions, Ejectment, *&c.* againſt any that are *in Cuſtodia Mar'*, or any Officer, Miniſter, or Clerk of the Court. 4 *Inſ.* 71.

(N) In what Actions they may hold Plea by Privilege for a collateral Reſpect.

In Reſpect of the Defendant.

1. AN Action upon the Statute of Wincheſter, of Robbery, againſt the Inhabitants of an Hundred, lies by Bill in B. R. though it is ſuppoſed by the Bill, that they are in Cuſtodia Mareſchalli, &c. for the Inhabitans of an Hundred may be impriſoned, and it may be intended that they all were impriſoned. P. 7 Car. B. R. between (a) Hellier and the Inhabitants of the Hundred of Bemerſh alias Benhurſt in Comitatu Berks Defendants, adjudged upon a Special Verdict by Admittance, this not being moved. Contra, 37 El. B. R. between Sadler and Morſe adjudged.

(a) Cro. Car. 211. S. C. 1 Jon. 239. S. C. But vid. Goulſ. 148.

(O) (a) Court (b) of (c) *Exchequer*.

(a) 4 Inſ. 103.

(b) Sav. 48. ſaid by Manwood that it is the moſt ancient Court.

(c) For the ſeveral Officers of this Court, and their Duty, vid. 4 Inſ. 104, 105. &c.

1. ROtulo Parliamenti, 2 H. 4. Numero 112. the Commons petition againſt Writs, called Quia datum eſt nobis intelligi, iſſuing out of the Exchequer, without any Inqueſt found or other Record; but no Aſſent thereto. Vide ſuch Petition againſt this Writ, 4 H. 4. Numero 78. Simile, 3 H. 5. Numero. 46.

(*) Its Inſtitution and Juriſdiction was only for the King's Buſineſs, Profit, &c. 4 Inſ. 112, 113.

2. 'Tis an ancient Court of Record (*) for the King's Affairs concerning his Rights and the Revenues of his Crown, and for Debts and Duties to the King in the Right of his Crown. 2 *Inſ.* 551.

(d) The Court of Firſt Fruits and Tenths, erected Tempore H. 8. was diſſolved by Queen Mary, Parl. 1. Seſ. 2. cap. 10. and the Clergy diſcharged thereof by 2 & 3 Ph. & Mar. cap. 4. but by the 1 Eliz. cap. 4. the Firſt Fruits and Tenths are reunited to the Crown, but no Court is revived, but the ſame to be within the Rule, Survey, and Government of the Exchequer, &c. 4 Inſ. 120. (e) The Court of Augmentations was erected by 33 H. 8. cap. 19. But Queen Mary, according to the Power to her given by the Statute 1 Mar. cap. 10. by Letters Patents dated 23 Jan. in the ſame Year, diſſolved the ſame Court, and the next Day, by other Letters-Patents, united the ſame to the Exchequer, which was utterly void, becauſe ſhe had diſſolved the ſame before. 4 Inſ. 118, 122. Moor 289. (f) This is the true Center into which all the King's Revenue and Profit ought to fall. 2 Inſ. 197. (g) When Cauſes are to be adjourned thither, and what Method there, as to the arguing of the Judges, 2 Bulſ. 146, 147. 1 Levin. 7. Pleas of the Crown, as well as Civil, may be adjourned thither. 1 Sid. 346. 1 Lev. 66. (h) 4 Inſ. 68, 110. (i) Erected by 31 Edw. 3. Stat. 1. cap. 12. for which, vide Title Error. (k) Erected by 27 Eliz. cap. 8. for which, vide Title Error. (l) The Lord Treaſurer, Chancellor, and Barons of the Exchequer, are the Judges of this Court, and their Juriſdiction is as large for Matters of Equity, as that of the Barons in the Court of Exchequer, for the Benefit of the King by the Common Law. 4 Inſ 118.

3. In the (d) (e) *Exchequer* there are Seven Courts: 1. The Court of Pleas. 2. The Court of Accounts. 3. The Court of (f) Receipt. 4. The Court of *Exchequer* (g) Chamber, (h) being the Aſſembly of all the Judges in *England* for Matters in Law. 5. (i) The Court of *Exchequer*-Chamber, for Errors in the Court of *Exchequer*. 6. (k) The Court of *Exchequer*-Chamber, for Errors in the *King's-Bench*. 7. (l) The Court of Equity in the *Exchequer*-Chamber. 4 *Inſ.* 119.

4. An

4. An Information for the Queen and Party, upon the Statute of Liveries, 8 *Edw.* 4. *cap.* 2. was brought in the *Exchequer*, though by the expreſs Words of the Statute it ought to be in the *King's-Bench*, *Common-Pleas*, before Juſtices of Peace, *&c.* but the *Exchequer* is not mentioned: And (m) between *Agard* and *Cavendiſh*, *Sav.* 134. adjudged, it lay in this Court, becauſe the Queen was Party, and there was no negative Words, without which, (n) this being a Superior Court, ſhall have Juriſdiction.

(m) Cro. Eliz. 326. S. C. adjornatur. Moor 564. Pl. 776. S. C. upon

a Writ of Error in Cam' Scac' reverſed, as to the Inforwer, for the Penalty was only that informed in the Courts ſpecially named. 2 And. 127, 128. S. C. reverſed (n) Pl. Com. 208, 209.

given to him accordingly.

(P) (a) What Perſons ſhall have the Privilege of Suit.

(a) For this, vid. Title Privilege.

1. THE King's (b) Farmer may ſue one that detains from him Part of the Poſſeſſions that he hath from the King, out of which the Farm is to be paid, by which he cannot pay his Farm to the King. (c) 38 Aſſ. 20. adjudged.

(b) So of his Debtor. 2 Inſ. 551.

2. The Debtor of the King's Debtor may ſue here by *quo minus*. 4 *Inſ.* 112.

(c) Br. Juriſdiction 70. S. C. 90. S. C.

(Q) of what (a) Things they ſhall have the Privilege of Suit.

(a) Whatever belongs to the Juriſdiction of the Dutchy may be determined here. Hard. 171. per Curiam.

1. IF the King's Farmer ſues in the Exchequer againſt a Perſon for detaining of Tythes, Parcel of the Poſſeſſions to him leaſed in Farm by the King: Though the Right of Tythes comes in Debate between them, yet the Court ſhall not be ouſted of Juriſdiction. (b) 38 Aſſ. 20. adjudged. My Reports ſaid quod mirum.

(b) Br. Juriſdiction 70. S. C. 90. S. C.

2. If J. S. be Parſon impropriate of D. and B. Vicar there, and the King Patron of the Vicarage, and there is a Debate between the Parſon and Vicar for Tythes; the Suit for theſe Tythes ought to be in the Exchequer. Hill. (c) 8 Ja. Scaccario, per Curiam.

(c) Lan. 100. S. C.

3. 10 E. 1. Rotulo clauſorum membrana 2 in dorſo. Breve Theſaurario & Baronibus Scaccarii, quod non teneant communia Placita, niſi tangant Regem, vel Miniſtros Scaccarii, Statutum novum de Scaccario aliter dictum Statutum de Roteland' in Magna Charta, 2 Part, Fol. 66. niſi ſpecialiter contingit nos vel Miniſtros noſtros.

4. 13 E. 1. Rotulo clauſorum Membrana 7. de debitis Regis in Scaccario atterminandis.

5. Among the Ordinances of the 5 E. 2. 22. there is ſuch Ordinance, That no Plea be in the Exchequer but ſuch that touch the King, and his Miniſters who are anſwerable there by Reaſon of their Offices, and the Miniſters of the ſaid Place, and their Servants, who for the moſt part inhabit with them in the Place where the Exchequer is held; and if any other be ſuffered to ſue them, let the Impleaded be aided by Parliament.

Fol. 539.

6. If

(d) So of the King's Farmer. Lit. Rep. 525.

6. If a (d) Copyholder of the King's Manor be ſued in the Eccleſiaſtical Court for Tythes, upon a Suggeſtion in Scaccario, that he preſcribes to pay a certain Modus Decimandi, he ſhall have a Prohibition (e) there, and this Modus ſhall be tried there. (f) Trin. 7 Ja. Scaccario, adjudged.

(e) For this, vid. the Diviſion, By whom it ſhall be granted, under Title Prohibition. (f) Lane 39. S. C.

7. If a Man be amerced in the King's Leet, and upon Proceſs out of the Exchequer the Bailiff diſtrains him for the Amercement, and he brings Treſpaſs, he ought to bring this Action of Treſpaſs in the Office of Pleas of the Exchequer, for the Bailiff levied it as an Officer of this Court. Paſch. (g) 8 Jac. in Camera Scaccarii, per Curiam.

(g) Lane 55, 56. S. C.

8. If an erroneous Judgment be given in a Formedon in a Copyhold Court in the Country where the King is Lord, the Party againſt whom the Judgment is given may ſue by Bill or Petition to the King in the Exchequer-Chamber, in the Nature of a Writ of falſe Judgment for the Reverſal of this Judgment; for as in the Court of a common Perſon the proper Suit for Reverſal thereof is to the Lord by Petition, ſo it is here to the King; and the Exchequer-Chamber is the more proper to ſue to the King by Petition than the Chancery, becauſe it concerns the King's Manor. Hill. 8 Jac. Scaccario. Edward's Caſe.

(h) Lane 98. S. C. adjornatur.

But for this, vid. the Diviſion Where and how to be ſued for, Title Copyhold.

9. An Action of falſe Impriſonment, or other Action, may be brought againſt the Under-Sheriff in the Exchequer, though the Sheriff be the Officer of the Court, for the Court takes Notice of the Under-Sheriff alſo. Hill. 7 Jac. Scaccario, between (i) Doyley and Jolliſe, adjudged per Curiam, and ſaid that it is the common Courſe of the Court.

(i) Lane 48, 53. S. C. & S. P. per totam Curiam, and all the Clerks, except one Baron.

10. If *A.* holds Lands of the King by Fealty and Rent, and makes a Leaſe thereof for Years to *B.* and C. pretends a prior Leaſe to him by *A.* Though there is a Rent iſſuing out of theſe Lands to the King, yet neither *B.* nor *C.* can ſue in this Court by any Privilege in Reſpect of the Rent, for that the King can have no Prejudice or Benefit thereby, for whether *B.* or C. prevails, the Rent muſt be paid. 4 *Inſ.* 118.

11. But if the King extends Lands as the Lands of *A.* for the Debt of *A.* and leaſes the ſame to *B.* for Years, reſerving a Rent, and *C.* pretends that *A.* had nothing in the Land, but that he was ſeiſed thereof, *&c.* This is within the Privilege of the Court, (k) for if C. prevails, the King loſes his Rent. 4 *Inſ.* 118, 119.

(k) The King brought Debt againſt a Prior Alien, and the Prior had Proceſs againſt A. who detained Goods from him, without which he could not anſwer the King, and A. came and claimed the Goods as his Tythe as Parſon of B. and thereupon Iſſue was taken for the King, triable in the Exchequer. 4 Inſ. 111.

12. If the King leaſes to *A.* for Years, rendring Rent, the King may diſtrain in all other the Lands of *A.* for his Rent, yet *A.* hath no Privilege for his other Lands to bring them within the Juriſdiction of this Court. 4 *Inſ.* 119.

13. By the (l) Statute of *Rutland*, made 10 *Edw.* 1. (m) no Plea ſhall be held in the *Exchequer*, unleſs it ſpecially concern the King or his Miniſters.

(l) It hath been doubted whether this is an Act of Parliament, or an Ordinance only made by the King, for the better Order of this Court. Pl. Com. 209. 4 Inſ. 113. —But 2 Inſ 551. it is ſaid there is a Writ in the Regiſter, under Title Brevia de Statut', which recites the Words of the Statute, and in the Margin of the Writ, Statut' de Rutland is quoted; ſo that without Queſtion this Act was made by Authority of Parliament. And 4 Inſ. 113. it is ſaid it is entered in the Parliament-Rolls. Et vid 8 Co. 20. —But 4 Inſ. 114. it is ſaid the Writ is founded upon the Common Law and Cuſtom of the Realm.

(m) This is only in Affirmance of the Common Law. 4 Inſ. 114.

14. By (n) *Artic. ſuper Chartas*, made 28. 1 *Edw.* 1. *cap.* 4. (o) no Common-Plea ſhall be held in the *Exchequer* againſt the Form of the Great Charter.

(n) For the Expoſition hereof, vid. 2 Inſ. 550, 551. (o) But this takes not away the Privilege of the Court, but that Accountants, &c. ought to be ſued there. 2 Inſ. 551. Sav. 134.

15. If a Man files a croſs Bill in this Court, he need not entitle himſelf to the Juriſdiction of the Court, becauſe the croſs Bill is grounded upon another Bill in Court. *Trin.* 1659. between *Doble* and *Portman* *Hard.* 160. adjudged.

16. So if a Man be ſued in the Office of Pleas, he may have an *Engliſh* Bill to be relieved againſt that Suit, without ſetting forth Matter of Juriſdiction. *Trin.* 1659. *Hard.* 160. *per Curiam.*

17. If *A.* is outlawed at the Suit of *B.* and Lands in the Poſſeſſion of *A.* extended, and *C.* claims Title to them, and pleads to the Inquiſition: If *C.* will bring an Ejectment for them, it muſt be in this Court, becauſe the King's Revenue is concerned. *Hill.* 12 & 13 *Car.* 2. *Hammond's* Caſe. *Hard.* 176. adjudged; and, upon Motion, ordered, That the Plea upon the Inquiſition ſhould be tried firſt, and the Ejectment brought in this Court.

18. If *A.* hath Title to Lands, under an Extent out of the *Exchequer*, for Debts in Aid, he muſt bring his Ejectment for them in this Court. *Trin.* 13 *Car.* 2. between Sir *Ralph Banks* and Sir *Thomas Bennet*, *Hard.* 193. And having brought his Ejectment for them in the *Common Pleas*, upon Motion, he was ordered to proſecute here.

Exchequer.

(a) How (b) that (c) Court (d) proceeds.

(a) Their Power, and how they compoun Recognizances forfeited. Sav. 22. Hard. 314.

1. IF prohibited Goods are ſeized, and Proclamation made according to the Courſe of the Court, the Owner ſhall not have them (e) delivered unto him upon Security, without putting in a (f) Plea, ſhewing Cauſe why he ſhould have them. *Sav.* 10.

—But will not diſcharge them without the Special Matter pleaded, which the Attorney General may confeſs, or take Iſſue upon. Sav. 53. (b) If not poſſeſſed of any Thing to entitle the King by Inquiſition or otherways, this Court will not grant an Inquiſition to examine the Circumſtances of a Feoffment ſuppoſed to be made, to avoid a Forfeiture for Treaſon. Sav. 8, 9. (c) Before the 5 R. 2. ſo great Care was taken of the King's Revenue, that no Man might ſue or plead for their Diſcharge of any Debt, Account, or Demand, in this Court, without expreſs Command, or Letter of the Great Seal. 4 Inſ. 110. —But by 5 R. 2. cap. 9. this Practice was declared illegal, and ordained, That the Barons ſhould have Power to hear every Anſwer of every Demand in this Court; ſo that every Perſon, &c. may plead, ſue, &c. without ſuing any Writ or other Commandment. (d) In Caſe of an Outlawry, 'tis the Courſe of the Exchequer to prefer an Information in Nature of a Trover and Converſion againſt him that hath the Goods of the Party outlawed. 1 Mod. 90. per Hale. (f) By 13 & 14 Car. 2. cap. 11. par. 30. no Writ of Delivery ſhall be granted but upon good Security, and for Goods periſhable, or where the Informer ſhall delay the Trial. (f) Upon a Bill in Equity, to diſcover the Value of Cordage ſeized to the Kings Uſe, the Defendant in his Anſwer made Title to it as his own, and upon giving Security, had a Writ of Delivery, though the King claimed the Property as his own Goods, and not as Goods forfeited. Hard 191. But it was ſaid it would have been otherways if the King's Title had appeared by Inquiſition or other Record.

(R) Courts.

(a) (b) (c) (d) (e) Dutchy.

(a) 4 Inſ. 204.

(b) It doth not appear how this Court of Equity began; but it would be inconvenient now to examine the Power thereof, after ſo long Continuance, &c. 2 Levin. 24. per Hale and Twyſden. (c) Whatever belongs to the Juriſdiction of the Dutchy, may be determined in the Exchequer. Hard. 171. per Curiam. (d) The Proceedings of this Court at Weſtminſter are as in a Court of Chancery, for Lands, &c. within the Survey of the Court, by Engliſh Bill, &c. and Decree. 4 Inſ. 206. —The Proceſs by Privy-Seal, Attachment, &c. as in Chancery. 4 Inſ. 206. —But it is not a mix'd Court, as the Chancery of England is, partly of the Common Law, and partly of Equity. 4 Inſ. 206. (e) They cannot try the Validity of Letters Patents, or other Matter properly triable at Law. 1 Rol. Rep. 42. 3 Bulſ. 119. 1 Rol. Rep. 252. 12 Co. 114. (f) Q. if not intended of the Court of Equity within the County Palatine. Vid. 2 Leon. 24. (g) 2 Lev. 24. S. C. cited.

1. **If Lands, Parcel of the Dutchy, lie within the County-Palatine, a Suit in Equity for this may be in the (f) Dutchy-Court.** Mich. 13 Jac. B. (g) Holt's Caſe, per Warburton, **to be the common Practice in his Time.**

2. **But otherwiſe it is for Lands held of the Dutchy lying out of the County-Palatine.** Mich. 13 Jac. B. Holt's Caſe, per Warburton, **to be common Practice, for the Juriſdiction is local.**

3. **If a Man enters into an Obligation concerning Lands lying in the County-Palatine, and he is ſued upon this at Common Law, he cannot ſue in Equity in the Dutchy-Court to be relieved againſt this Bond, for the Juriſdiction being local, it cannot be extended to this collateral Matter.** Mich. 13 Ja. B. (h) Holt's Caſe per Curiam.

(h) Hob. 77, 78. S. C. adjudged, and a Prohibition awarded, becauſe the Dutchy hath no Juriſdiction in Reſpect of the Perſon, as becauſe the Suitors dwell within the County-Palatine, nor upon the Lands of the Subject any where, but upon the King's own Land, and his own Revenue, and perhaps upon Bonds and Aſſurances given for his Revenue of the Dutchy.

4. It was granted by Patent, That this Court might make Ordinances for the Hoſpital of *W.* how they *ſe gererent, converſabantur, & eligerentur*, and this Patent was confirmed by the Statute of the 14 *Eliz.* yet the Court hath no Power hereby to determine the Right of their Poſſeſſions. *Trin.* 12 *Jac.* 1 *Rol. Rep.* 42. between Sir *Thomas Beamont* and the Hoſpital of *Wigſton* adjudged; and the Hoſpital having exhibited a Bill in this Court, to avoid a Leaſe by them made of Lands lying out of the Dutchy, a Prohibition was granted.

5. By the Statute of the 16 *Car.* 1. *cap.* 10. reciting, That the Proceedings, Cenſures, and Decrees, of the Court of *Star-chamber*, were found an intolerable Burthen to the Subject, *&c.* it is enacted, That the Court of *Star-chamber*, and all its Power, Juriſdiction, and Authority, ſhall be diſſolved, and the like Juriſdiction then uſed and exerciſed in the Court of the Dutchy of *Lancaſter, &c.* is repealed, revoked, and made void.

(S) County.

(S) (a) County-Palatine.

Fol. 540.

(a) For this, vid. Title Palatine.

To what Place the Jurisdiction shall extend.

Durham.

1. THE Jurisdiction of the Bishop of Durham extends to all Places (b) between Tine and Tese. (c My Reports, 14 Jac. the Bishoprick of Durham.

(b) 17 Ed 2. cap. 1.

(c) 1 Rol. Rep. 397, 398. S. C. 3 Bulst. 156. S. C.

2. The Jurisdiction extends as well to the Manors of other Men, as to the Demesns of the Bishop. (d) My Reports, 14 Jac.

(d) 1 Rol. Rep. 397, 398. S. C. 3. Bulst. 156, 157. S. C.

3. In this County-Palatine there is a Court of *Chancery*, which is a mix'd Court, both of Law and Equity, as the *Chancery* at *Westminster*. 4 *Inst.* 218.

(T) The Court of the (a) Council of *York*, and (b) the (c) Marches.

(a) This Court is neither warranted by Act of Parliament, nor by Prescription, but raised by King H. 8.

1. THey shall not hold Plea upon a penal Statute. Mich. 12 Jac. B. per Coke said to be resolved.

by Commission. 4 Inst. 245. —Their Authority was expressed in their Commission, without Reference to any Instructions; but for that their Commission was against Law: And that their Authority might not be known, they procured the First Institution to be ex diametro altered, viz. that their Commission should give no express Authority, but wholly refer to certain Instructions, which they kept themselves in private: But King James being acquainted therewith, gave Order that they should be enrolled. 4 Inst. 246. —And 'tis not to be doubted but there is a President and Council de Facto; but what Jurisdiction they have, is the Question. 4 Inst. 246. —For their Jurisdiction, &c. vid. Lit. Rep. 20, 33. Palm. 527. 1 Rol. Rep. 338. 13 Co. 30, 41, 32. (b) This Court was strengthened and warranted by 34 H. 8. cap. 26. paragr. 4. with Reference to the Prescription before. 4 Inst. 242. Cro. Car. 531, 595. Godb. 436, 437. March 68. —They sate by Force of the King's Commission and Instructions, and proceeded as in a Court of Equity by their Wisdom and Discretion. 4 Inst. 242. —Herefordshire, Worcestershire, Shropshire, and Gloucestershire, though included in the Commission, under Pretence that they were within the Marches of Wales, were not within the Jurisdiction of this Court, for a Commission without an Act of Parliament cannot raise a Court of Equity. 4 Inst. 242. —For their Jurisdiction, vid. 1 And. 279. 3 Bulst. 34. 1 Rol. Rep. 190. Lit. Rep. 166, 245. Palm. 364. Cro. Car. 531, 557, 558, 595. March 52, 53. 2 Brownl. 29. Godb. 436, 437. 1 Rol. Rep. 83, 354, 368. 2 Rol. Rep. 308, 309, 327. March 7, 51, 52, 63, 64. 1 Vent. 330. Raym. 191. 1 Jon. 248 (c) By 1 Will. & Mar. cap. 27. setting forth in the Preamble, That the Proceedings and Decrees in this Court have by Experience been found an intolerable Burthen, &c. this Court, and all its Jurisdiction and Authority, is dissolved and taken away.

2. They shall not hold Plea upon a Replevin, because none shall hold Plea of a Replevin without Writ, for the Sheriff could not without Writ before the Statute of Marlebridge, cap. 21. (d) Mich. 7 Jac. B. per Coke.

(d) 13 Co. 31. S. P. per Coke, 1 Bulst. 110. S. P. adjudged.

3. The Council of York cannot hold Plea of a Plaint in Nature of a Detinue vi & armis, though Detinues are expressly within their Instructions, because this is in Nature of a Trespass. Mich. 7 Jac. B. between Curtis and Cooke resolved, and a Prohibition granted.

4. If

4. If a Man having Bona notabilia in ſeveral Dioceſes, makes an Infant his Executor, and dies, and Adminiſtration durante minore ætate is granted to B. in the Prerogative Court, and he is bound by Obligation to render a true Account; if B. be after compelled in the Court of Marches in Wales, to give Bond to render an Account there, a Prohibition lies, becauſe they there have no Authority to queſtion any Thing that belongs to the Court Chriſtian, if it be not for Adultery. Paſch. 17 Jac. B. Drinkewater Will.

5. The Obligee cannot ſue upon an Obligation in Engliſh before the Council of York, though it be within their Inſtructions, for the King cannot alter the Law without Parliament, and there cannot be ſuch a Suit in Chancery; and by this the King ſhould loſe his Fine, ergo. Mich. 10 Jac. B. per Curiam, between (e) Guy and Sedgewick and the Biſhop of York.

(c) Moor 874. Pl. 1220. S. C. adjudged. Godb. 201. S. C. adjudged.

6. If the Council of York and Wales begin with a Sequeſtration, a Prohibition lies, for a Sequeſtration is not to be granted there till a Contempt. Hill. 22 Jac. B. R. Vaghan's Caſe, Prohibition granted to York.

7. A Information cannot be preferred in the Marches of Wales againſt any Man that is not within the Juriſdiction of the Court, to compel him to anſwer it. Hill. 11 Car. B. R. in one Foſter's Caſe, per Curiam.

8. If a Man ſues in the Marches of Wales by Engliſh Bill in an Action upon the Caſe for 50 l. (as (f) he may by the Inſtructions there) upon a Promiſe, and the Defendant pleads the Statute of Limitations, and this is over-ruled, and thereupon the 50 l. is decreed againſt the Defendant, without awarding any Commiſſion in Nature of a Writ of Enquiry of Damages, a (g) Prohibition lies, for this is but an Action upon the Caſe by Engliſh Bill. Mich. 14 Car. B. R. between Hancock and Mervin, per Curiam, a Prohibition granted. Intratur Trin. 14 Car. Rot. 392.

(f) Upon a Covenant or Aſſumpſit to pay a certain Sum, but not where the Damages were uncertain, though laid to be under 50 l.

1 Levin. 206. 1 Vent. 330. (g) If they proceed in any Matter that is out of their Juriſdiction, either in Reſpect of the Place, or the Authority limited unto them, a Prohibition lies. 4 Inſ. 243. 13 Co. 32.

9. A Suit by Bill for Words, though the Damages were laid under 50 *l.* could not have been brought in the Marches of *Wales*; for though by their Inſtructions they had Power to hold Plea where the Damages were under 50 *l.* this was intended in ſuch Actions in which they had uſed to hold Plea: And it was ſaid, That no Precedent could be produced where they ever held Plea in any Caſe where all was to be recovered in uncertain Damages, for this would be to create a new Juriſdiction for the Court there to judge of Damages by Bill, Anſwer, and Proof of Witneſſes, without a Jury. *Paſch.* 19 *Car.* 2. between (h) *Jenkins* and *De la Grange*, 1 *Lev.* 206. *dubitatur*; and ordered, That there ſhould be a Declaration upon the Prohibition, that it might be determined upon Demurrer.

(h) 1 Sid. 323, 324. S. C. and Time given to ſearch for Precedents.

(V) Court-

(V) (a) Court (b) Leet.

(c) (d) *Quid.*

Fol. 541.

1. A **Court-Leet is the** (e) **moſt antient Court of the Land.** (f) 7 H. 6. 12. b. 9 H. 6. 44. b.

(a) 4 Inſ. 261.

(b) A View of the Frankpledge of the Inhabitants of D. in one County, appendant to a Manor in another County. Kelw. 146. a. 149. b. (c) For the View of Frankpledge, and the ancient Inſtitution and Practice thereof, for the keeping the King's Peace, &c. Vid. 2 Inſ. 73. Preface. (d) The Lord of the Leet ought to have a Pillory and Tumbrel, without which, Juſtice cannot be done; for always to puniſh by Amercement is againſt common Right. Kelw. 138. b. 140. b. 152. a. Vid. Statute of Pillory and Tumbrel, 51 Hen. 3. 1 Jon. 283. —And for Want thereof, the Lord may be fined. Kelw. 148. b. 149. a, b. 152. a. —His Liberties ſeiſed till, &c. 1 Jon. 283. —And Cro El. 125. per Poph. the Want thereof is a Cauſe of Forfeiture of the Leet. Moor 574, 607. They ought to be provided by the Lord of the Liberty, and not by the Inhabitants, unleſs there be a Preſcription to the contrary. Steverton and Stroggs, Cro. El. 698. adjudged. Moor 573. Pl. 789. 607. Pl. 839. adjudged. Cart. 29. cited. But Stocks are to be provided at the Charge of the Town, for originally they were not to puniſh, but to keep Men in Hold; and the Town that hath none, ſhall forfeit 5 l. Cart. 29. (e) Of ancient Time the Sheriff had Two great Courts, viz. the Tourn and County Court; after for the Eaſe of the People, the View of Frankpledge or Leet was by the King divided and derived from the Tourn, who granted to the Lords to have the View of the Tenants and Reſiants within their Manors, &c. from whence came the Duty in many Leets de certo Letæ, towards the Charge of obtaining the Grant of the Leet. 2 Inſ. 71. 6 Co. 77. b. 1 Jon. 283. —And if payable at the Leet by the Deciners, and 'tis not paid, they may by Cuſtom be amerced. 1 Part 457. Pl. 2. (f) Br. Leet 14. S. C.

2. **The Sheriff's Turn is not any** (g) **Court-Leet.** (h) 18 H. 6. 13. b. Curia. Contra, 25 H. 8. 69.

(g) The Leet being derived out of the Tourn, they have the ſame Stile and Juriſdiction. 2 Inſ. 71, 72. (h) Fitz. Leet 1 S. C.

3. **If a Man hath a great Leet within his Seigniory,** (i) **another cannot have a ſmall Leet within the** (*) **Precinct of a Manor which is within the ſame Seigniory.** (k) 18 H. 6. 13. b. Curia.

(i) It is a Rule of Law, that every Man ought to be within a Leet, and none can be of Two Leets. Cro. Jac. 584. But vid. Cro. Car. 76. Hetl. 19. 1 Jon. 283, 284. (*) In the Original 'tis Purſuit; but I take it to be miſprinted. (k) Fitz. Leet 1.

4. (l) **The Steward is Judge in this and not the Suitors.** Co. 6. Jentleman 12. Contra, (m) 17 H. 6. 13.

(l) 8 Co. 38. b. S. P. (m) This is miſprinted in the Original as here, for in the Book of H. 6. there is no Report of any Caſes in this Year; and I ſuppoſe it ſhould be 7 H. 6. 13. which vid. Br. 14.

5. **If a Man be elected in a Court-Leet to be a Conſtable within the Juriſdiction of the Leet, and before he is ſworn, the Juſtices of Peace at their Seſſions diſcharge him becauſe he is a Maſter of Arts, or for other Cauſe, and elect and ſwear another to be Conſtable there: Upon a Complaint of this to the Court of King's-Bench, the Court of Kings-Bench may grant a Writ to diſcharge the laſt Man, and to ſwear him that was elected at the Leet,** (n) **becauſe the Election of the Conſtable belongs properly to the Leet, without a reaſonable Cauſe to the contrary.** Hill. 10 Car. B. R. Herſon's **Caſe, who was elected in the Leet of the Biſhop of** Winton, in Waltham-Welbeck in Comitatu Southampton, **and the Writ granted accordingly.**

(n) Vid. the Diviſion, By whom made or removed, Title Conſtable.

6. Tr. 6 Car. B. R. Arundel's **Caſe of Dorſetſhire, a like Writ granted alſo.**

7. If there are ſeveral Manors within a Wapentach, and the ſeveral Lords of the Manors have Time out of Mind had Leets therein, at which the Reſiants within the reſpective Manors have appeared, and the Lord of the Wapentach by Preſcription hath had a Leet, to which

each Town hath uſed to ſend a Conſtable and Four Men; this grand Leet hath the Superiority of all other Leets within it, and the Reeves and Four Men ought to appear there, and enquire of all Matters enquirable within the inferiour Leets, and of Concealments of Offences in the ſaid Leets, but ſhall not compel any the Reſiants of the Manors, except the Reeve and Four Men from each Town, to appear there; but if they come not, (o) the Vill ſhall be amerced. *Mich.* 18 *Jac.* between *Cook* and *Stubbs*, *Cro. Jac.* 583. adjudged; and that for ſuch Leet a Special Preſcription ought to be made, and not a General One.

(o) Raym. 204.

8. A Man may preſcribe for a Leet to enquire of one or more Articles only. *Kelw.* 141. a. 148. *a.*

(X) (a) The (b) (c) Juriſdiction.

(a) Whether a Town may be preſented at a Court-Leet for not having a Pair of Stocks, Cart. 29. dubitatur.

1. VIde the Statute of 18 E. 2. (d) which ſhews of what Things a Leet hath Conuſance.

(b) Nothing done before the laſt Court preſentable now. Kelw. 66. b. (c) Vid. the Court of the Tourn, 1 Rol. Abr. 542. (d) They may enquire of corrupt Victuals, as a common Nuſance, though omitted in this Statute. 4 Inſ. 261.

(e) By the Statute of Magna Charta, cap. 17.

2. They have Power (e) to hold Plea of all Treaſons and Felonies, beſides the Death of a Man, and (f) Rape of a Woman. (g) 7 H. 6. 12. b. (h) 9 H. 6. 44. b.

'tis enacted, That no Sheriff, Conſtable, Eſcheator, Coroner, or any other of our Bayliffs, ſhall hold Pleas of the Crown: And 2 Inſ. 32. in the Expoſition upon this Act, 'tis ſaid, the Authority of the Sheriff to hear and determine Felonies by the Common Law in the Tourn, is by this Act wholly taken away, though his Power to take Indictments of Felony, and other Miſdeeds within his Juriſdiction remains. (f) Though this was Felony at the Common Law, yet being altered by Act of Paliament, though made Felony again by the Statute of Weſtminſter 2. cap. 34. yet cannot the Leet enquire thereof as of a Felony, 2 Inſ. 181. —But Q. for to enquire of Women raviſhed, not preſented before the Coroners, is within the Articles of the Leet. 18 E. 2. (g) Br. Leet 14. S. C. Fitz. Leet 10. S. C. (h) Br. Leet 2. S. C.

(i) Br. Leet 2. S. C.

3. They have Power to enquire of Treaſon, as of the forging of falſe Money. (i) 9 H. 6. 44. b.

(k) Fitz. Ley 5. S. C. Br. 99. S. C.

4. So they may enquire of high Treaſon done to the King himſelf. 9 H. 6. 44. b. Quære (k) 10 H. 6. 7.

(l) Fitz. Ley 5. c. Br. 99. S. C. Et vid. 2 Inſ. 147.

5. They have Power to enquire of Felony. (l) 10 H. 6. 7.

6. A Man cannot be amerced in a Leet for ſurcharging a Common, for that this concerns a private Intereſt, and not the Publick; for this Court is for Royal Juſtice, and not for private Matters. M. 12 Ja. B. between (m) Bore and Stoner, adjudged.

(m) 2 Rol. Abr. 83. S. C.

7. They may enquire of (n) common Nuſances done to the common People. (o) 9 H. 6. 45.

(n) Which ſhall be ſaid private, and which common Nuſances, vid. 2 Rol. Abr. 83. Letter Q. and Title Nuſance throughout. (o) Br. Leet 2. S. C.

(p) Fitz. Ley 5. S. C. Br. 99 S. C.

8. They have Power to enquire of all Manner of Affrays and Aſſaults. (p) 10 H. 6. 7.

(q) 4 Inſ. 261, 262.

9. (q) They have Conuſance of Bread and Beer. 18 H. 6. 13. b.

(r) In the Original 'tis et eo mound, &c. ſo appears to be miſprinted.

10. If a Man, by Reaſon of a Tenure, ought to mound a Ditch next the high Street, and (r) does not mound it, by which the Street is ſurrounded, ſo that the People cannot paſs; he may be amerced in the Leet for it, and may be awarded to be diſtrained to mound it. 29 E. 3. (s) 29. Curia.

(s) This is miſprinted in the Original as here, and I ſuppoſe ſhould be 28.

11. If one receives a poor Man to be his Tenant in a Town, who is chargeable to the Town, and this against a By-Law made by the Town, the Town having Power to make such By-Laws; this is punishable in the Leet. (t) P. 8 Ja. in Camera Scaccarii, per Curiam. Fol. 542.

S. P. they having Power by Custom to make such By-Law.

(t) Lan. 55, 56. S. C. &

12. An Order with a Pain may be made by the Steward of a Leet in a Leet, that none shall receive such Tenant as shall be chargeable to the Parish. (u) P. 8 Ja.

(u) Lane 56. S. C. & S. P.

13. In ancient Time the Leet had Power (w) to enquire of and punish Fornication and Adultery, by the Name of Letherwite. 2 *Inst.* 488.

(w) 4 Inst. 259, 260.

14. A Pound-Breach is not presentable in a Leet, (x) because not a common Nusance. *Pasch.* 27 *Eliz. Saunderson*'s Case, 4 *Leon.* 12. adjudged: Q. but it is said by *Rhodes*, Serjeant, that excessive Toll is enquirable there.

(x) A Railer presentable there. Hob. 147. per Curiam. — So of a Night-walker. Poph. 208.

15. By 4 *Edw.* 4. *cap.* 1. concerning the making of Cloths, Stewards of Leets have Power to hear and determine Offences committed against that Act, *&c.* and may commit the Offenders to Prison till the Penalties, *&c.* paid.

16. By 14 *&* 15 *H.* 8. *cap.* 10. they have Power to enquire of such as trace, destroy, or kill any Hares in the Snow, *&c.*

17. By 32 *H.* 8. *cap.* 13. they may enquire of Offenders against that Act, by putting Stone-Horses upon the Common under 15 Hands, *&c.* but must certify such Presentments to the next Sessions, or to the *Custos Rotulorum*, *&c.* But by this Act, the putting a scabbed and infectious Horse into the Common is presentable in the Leet as a common Nusance.

18. By 33 *H.* 8. *cap.* 6. they may enquire, *&c.* of those that keep Cross-bows or Hand-guns, contrary to that Act.

19. By 33 *H.* 8. *cap.* 9. of such as keep Houses of Gaming, *&c.* against that Act.

20. By 2 *Edw.* 6. *cap.* 10. of Offences against this Act in making of Malt, *&c.*

21. By 2 *&* 3 *Edw.* 6. *cap.* 15. of Conspiracies among Labourers and Workmen, Butchers, Brewers, *&c.* against this Act, which is revived by 22 *&* 23 *Car.* 2. *cap.* 19.

22. By 7 *Ed.* 6. *cap.* 5. of Wine sold contrary to that Act.

23. By 2 *&* 3 *Ph. & Mar. cap.* 8. of such as do not their Days-works, in Amendment of the (y) High-ways according to that Act.

(y) So of Offences against 18 Eliz. cap. 10.

24. By 4 *&* 5 *Ph. & Mar. cap.* 3. of false Musters, *&c.* within that Act.

25. By 1 *El. cap.* 17. of such as use Nets or Engines to take Fish, *&c.* against this Act; and the Steward must give this Act in Charge, under the Pain of 40 *s.*

26. By 23 *El. cap.* 10. of such as kill Pheasants and Partridges, contrary to that Act.

27. By 31 *El. cap.* 5. of Users of unlawful Games, or of any Art or Mystery, not being brought up in it.

28. By 31 *El. cap.* 1: of erecting, *&c.* of a Cottage, without laying Four Acres of Land to it, taking Inmates, *&c.*

22. By 1 *Jac. cap.* 22. of all Offences touching Tanners, *&c.*

(Y) Colla-

(Y) Collateral Authority of the Leet.

1. If a Man be riding there where a Leet is, the Steward for Want of others may compel him to be ſworn. (a) 7 H. 6. 13.

2. If the Bailiff of the Court, or other Officer, will not make a Panel to enquire, &c. upon the Command of the Steward, or will not perform his Duty, (b) he may be fined. (c) 7 H. 6. 12. b.

3. So he may be commanded to do it upon a Pain, and if he does not do it, he ſhall loſe the Pain. 7 H. 6. 12. b.

(a) Br. Leet 14. S. C.

(b) This Court may fine, but not impriſon. 11 Co. 43. b. 1 Part 499. Pl. 4. but Ow. 113. per Popham, the Steward may commit a Man for an outragious Miſdemeanor in Court; But Q. (c) Br. Leet 14. S. C. Br. Debt 85. S. C. 1 Part 468. Pl. 1. S. C. 470. Pl. 2. S. C. Et vid. there, Pl. 6, 7, 8.

4. If the (d) Petit 12. (e) make a falſe Preſentment, and this is found falſe by the Grand Inqueſt, yet the Petit 12. ſhall not be amerced. (f) 9 H. 6. 44. b.

(d) By whom a Preſentment there may be made. Kelw. 141. a. 148. a.

(e) But if being ſworn to preſent the Articles of the Leet, they refuſe to make a Preſentment according to their Oath, the Steward may fine them. Dyer 211. Pl. 31. Et vid. 1 Leon. 216, 217. 1 Rol. Abr. 560. Pl. 13. (f) Br. Cuſtom 3. S. C. Fitz. Cuſtom 1. S. C.

5. If a Man be amerced in a Leet, he ought to be amerced to a certain Sum, as 10 s. 20 s. or other certain Sum, and ought not to be amerced in general, and after affeered to a certain Sum, for the Amercement ought to be certain, and it ought after to be affeered and mitigated by others. Hobart's Reports 173. between (g) Wilton and Hardingham.

(g) Hob. 129. S. C. and ſaid, the Jury muſt amerce to a certain Sum, which may be affeered by others. Vid. 1 Part 458, 459. 3 Mod. 138. —But by Cro. Car. 275. 1 Jon. 301. the Amercement being a judicial Act, ought to be by the Court, and Affeerment by Affeerors.

6. The Sheriff in his Tourn, and the Steward in the Leet, may take Recognizances for the keeping the Peace, for theſe Courts were inſtituted for the Commonweal, as well for the Preſervation of the Peace, as the Puniſhment of common Nuſances, *&c.* 4 *Inſ.* 263, 264.

7. If in open Court one tells the Steward of the Leet that he lies, he may fine him, for the Leet is the King's Court, and a Court of Juſtice to which reſpect and Reverence ought to be ſhewed. *Mich.* 39 *&* 40 *Eliz.* between (h) the Earl of *Lincoln* and *Fiſher*, adjudged. *Moor* 470. *Pl.* 675. adjudged.

(h) Ow. 113. S. C. adjudged. Cro. El. 581. S. C. adjudged.

8. If one puts his Hat on in Court, and upon the Steward's admoniſhing him thereof, he anſwers, *I do not value what you can do*, the Steward may fine him. *Mich.* 14 *Car.* 2. between Sir *Edward Bathurſt* and *Cox*, *Raym.* 61. adjudged. 1

(Z) Court Cuſtomary.

Who are Judges.

1. There is a (a) Cuſtomary Court, conſiſting of Copyholders or Cuſtomaryholders, for without them it cannot be, and this Court may be held without any free Tenant, or other Suitors, beſides the Copyholders or Cuſtomaryholders, and of this Court the Lord or Steward is Judge. Co. Lit. 58.

(a) For this, vid. Title Copyholder throughout.

(A) The

(A) The (a) Tourn of the Sheriff.

(a) For this, vid. 2 Inſ. 70. 4 Inſ. 259. Preface to 9 Rep. 2.

1. THE (b) Sheriff's Tourn is incident to the Office of Sheriff. Co. 4. Mitton 33. b.

(b) 'Tis ſo call'd, but the Stile of the Court muſt not be Turnum Vic' tent' tali die apud L. &c. but Curia Viſus Franci Plegii Dom' Regis, tent' apud L. coram Vicecomite in Turno ſuo tali die, &c. 2 Inſ. 71, 121. 4 Inſ. 260.

2. By the Statute of *Weſtminſter* 2. made 13 *Edw.* 1. *cap.* 13. Sheriffs in their Tourns and elſewhere, that have Power to enquire of Treſpaſſors, ſhall do it by twelve lawful Men at leaſt, who ſhall put their Seals to ſuch Inquiſitions: So of every Bailiff of a (c) Franchiſe.

(c) Of Leets and Views of Frankpledge, exempted out of the Tourn. 2 Inſ. 388.

3. By 1 *Edw.* 3. *cap.* 17. Sheriffs and Bailiffs of Franchiſes, and all others that take Indictments in their Tourns or elſewhere, ſhall do it by Roll indented, whereof one Part ſhall remain with the Indictors, and the other with him that taketh the Inqueſt, ſo that one of the Inqueſt may ſhew one Part thereof to the Juſtices when they come to make Deliverance.

(B) (a) Who ſhall be bound to come to it.

(a) At this Court all above the Age of 12 ought to take the Oath of Allegiance, unleſs they are within ſome Leet, and then they ought to take it at the Leet. Co. Lit. 68. b. 2 Inſ. 147. Kelw. 141. a. 2 Rol. Rep. 56. (b) Eitz. Leet 1.

1. IF a Man hath a Leet of all the Reſiants within the Pretinct of his Manor which is within an Hundred, yet theſe Tenants ſhall be bound to come to the Sheriff's Tourn. (b) 18 H. 6. 13.

2. By (c) the Statute of *Marlebridge*, made 52 *H.* 3. *cap.* 10. Archbiſhops, Biſhops, Abbots, Priors, Earls, Barons, nor any (d) religious Men or Women, need not come to the Tourn, unleſs required for ſome other Cauſe, and (e) ſuch as have Hundreds of their own to be kept, ſhall not be bound to appear at the Tourn, but only in the Bailiwicks where (f) they dwell.

(c) By the Common Law Parſons of Churches, having Curam Animarum, were not bound to come to Tourns or Leets; but before this Act it was otherways in Caſe of all other Eccleſiaſtical Perſons. 3 Inſ. 121. (d) Though in proper Senſe this is taken for Regulars only, yet the Act extends to Seculars. 2 Inſ. 121. (e) The Words of this Part of the Act, as appears by 2 Inſ. 121. are, Et qui in Hundredis diverſis habeant Tenementa, non habeant neceſſe ad hujuſmodi Turnos venire, niſi in Ballivis ubi fuerunt converſantes. (f) If one hath an Houſe and Family in Two Hundreds, he muſt do his Suit to that Tourn or Leet where his Perſon is commorant. 2 Inſ. 122. —And if a Man hath an Houſe in Two Leets, he ſhall be ſaid to be commorant in that where his Bed ſtands. 2 Inſ. 122.

(C) (a) The Jurisdiction of the Tourn.

In Respect of the Thing.

(a) Vid. the Court-Leet, 1 Rol. Abr. 541.

(b) Affrays and Bloodshed are within the Articles of the Leet. 18 Edw. 2.

1. NOthing shall be enquired before the Sheriff in his Tourn but Actions popular, (b) Affray, Blood spilt. (c) 4 H. 6. 10.

(c) Fitz Tourn de Vic' 1. S. C. Br. Leet 16. S. C. Br. Presentments in Court 7 S. C.

2. As an Assault made upon a Man is not enquirable there, because it is but a Tort to a particular Person, of which Trespass lies. (d) 4 H. 6. 10.

(d) Fitz Tourn de Vic' S. C. Br. Leet 15. S. C. Br. Presentments 7. S. C.

3. The Stoppage of a Water which is to the Nusance of all the People of the Country may be enquired of there, for this is popular. (e) 4 H. 6. 10.

(e) Fitz Tourn, &c. 1. S. C. Br. Presentments 7. S. C.

Fol. 543.

4. So of a Bridge over which the People ought to pass. (f) 4 H. 6. 10.

(f) Fitz. Tourn, &c. 1. S. C. Br. Presentments 7. S. C.

5. He may enquire of the Death of a Man before him and the Coroner. Statute of Marlbridge, (g) cap. 24.

(g) I suppose this is misprinted: But Q. what Statute is intended.

6. He hath not Conusance of Bread and Drink in a Tourn. (h) 18 H. 6. 13. b.

(h) Fitz. Leet 1. S. C.

2 Inst. 72. S. C. cited, and said, that this Opinion was only obiter, for Want of the Knowledge of Antiquity, for that it is clear that the Breach of Assise of Bread and Ale is presentable in the Tourn as a common Nusance, and therewith agrees continual Experience. 2 Inst. 72.

7. But vide Statutum Walliæ in Magna Charta, Fol. 6. That the Sheriff may enquire de Assisa Panis & Cervisiæ non observata, & de eam infringentibus.

8. If the Sheriff find in his Tourn that a Man hath encroached upon the King's Highway, he hath Power to abate it. 29 E. 3. 21. b.

9. Tithes of ancient Time determinable in the Tourn. 2 *Inst.* 661.

10. All Causes Ecclesiastical were anciently determinable in the Tourn. 4 *Inst.* 259, 260.

11. Its ancient Institution was to hear and determine all Felonies, except the Death of a Man, and common Nusances. 4 *Inst.* 260.

12. By the Statute of *Magna Charta*, *cap.* 17. no Sheriff, *&c.* shall (i) hold Pleas of the Crown.

(i) By this Act his Power of hearing and determining Thefts and other Felonies is taken away, but not his Power to take Indictments thereof. 2 Inst. 32. —And by the 1 Edw. 4. cap. 2. Sheriffs shall deliver Indictments taken in the Tourn to the Justices of Peace at their next Sessions, in Pain of 40 l. who shall proceed thereupon as if taken before themselves, and shall deliver indented Estreats of the Fines to the Sheriff, to be levied to his own Use, &c. Et vid. Cro. Car. 275. 1 Jon. 301. Godb. 190.

(D) In

(D) In Reſpect of the Place.

1. If a Thing be to be done within a Franchiſe, where there is a View of Frankpledge, in which Default of not repairing a Cauſey or other Matter, and all other Things within the Franchiſe, are preſentable: The not repairing the Cauſey, or other Matter, is not preſentable in the Tourn of the Sheriff, becauſe it is out of his Jurisdiction, being in the Franchiſe. 29 E. 3. 21. a. b. adjudged. 28 E. 3. 95. b.

2. (a) But if there be a Default in the Lord of the Franchiſe, in not cauſing the Cauſey to be amended, this may be preſented in the Sheriff's Tourn without any Warrant by Writ, for that the Franchiſe was derived originally out of the Tourn. 10 H. 4. 4. (b) 28 E. 3. 95. b. M. 17 Ja. B. R. between (c) Loader and Samuel, per totam Curiam, upon Evidence at the Bar. Contra, 29 E. 3. 21.

(a) Co. Lit. 168. b. but per 4 Inſ. 261. though there is a Default in the Leet, yet there can be no Enquiry in the Tourn, for what is within the Precinct of the Leet is exempt from the Tourn, otherwiſe there might be a double Charge; but in ſuch Caſe there may be a Writ directed to the Sheriff to enquire thereof, againſt the Opinion of Fineux in 12 Hen. 7. and that this Writ is not taken away by 28 Edw. 3. cap. 9. But Q. Et vid. Cro. Jac. 584. (b) Fitz. Bar. 289. S. C. (c) Cro. Jac. 551. S. C. & S. P. per Curiam; but to entitle the Tourn, this Default in the Leet ought to be ſpecially ſhewed in the Pleadings.

3. But this may be preſented in the Sheriff's Tourn by Preſcription, 29 E. 3. 21. without Doubt.

(E) (a) (b) Court (c) Baron.

(a) 4 Inſ. 268.

(b) This Court is incident to every Manor, and it was at first inſtituted for the Eaſe of the Tenants, for ending Debts and Damages under 40 s. 4 Inſ. 268. Ow. 35. 1 Brownl. 175. 1 Bulſ. 55. —The Style of this Court is Curia Manerii ſui præd'. (the Name of the Manor being in the Margin) tent' tali die coram A. B Seneſchallo ibidem. 4 Inſ. 268. —My Lord Coke ſays, he hath ſeen Court-Rolls in the Reign of Edw. 1. (having the Name of the Manors in the Margin) ſtyled thus, Aula ibidem tent' tali die, &c. becauſe it was holden in the Hall of the Manor. 4 Inſ. 268.

1. THE Court-Baron is the Court of the Lord of the Manor. Co. 4. Mitton 33. b.

(c) 4 Inſ. 46.

2. (d) The (e) Suitors (f) are Judges, and the (g) Steward but as a Regiſter. 6 H. 4. Placito 3. Co. Lit. 58. Co. 4. Mitton 33. b.

(d) 4 Inſ. 268. S. P.

(e) Though Women may be Suitors, yet they are not Judges, but the Men only. 2 Inſ. 119. (f) Though the Plea there is held upon a Writ of Right. 6 Co. 11. b. 12. a. 4 Inſ. 268. (g) And a Man cannot preſcribe to hold a Court-Baron before his Steward, but before Suitors. Cro. Jac. 582. adjudged. 1 Mod. 173. Cro. El. 792. Noy. 20. Godb. 49. —But perhaps may preſcribe to hold a Court, before his Steward, but not a Court-Baron. Cro. Jac. 282. 1 Leon. 316. 1 Brownl. 21. Noy 20. 2 Jon. 23. Godb. 68, 69. — A Court-Baron being incident to a Manor of common Right, cannot be be preſcribed for. Pell and Towers, Cro. El. 792. adjudged. Noy 20. adjudged.

3. In a Court-Baron they cannot hold Plea of Debt or Treſpaſs, where the Debt and Damage amounts to 40 s. Co. Lit. 118. Vide for this the Statute of (h) Glouceſter, cap. 8.

(h) Vid. the Expoſition here, 2 Inſ. 311, 312. Ante 281. Pl. 11.

4. In a Court-Baron they cannot hold Plea of Treſpaſs vi & armis, Co. Lit. 118. becauſe this Court cannot impoſe a Fine.

5. Vide Hengam Magna, cap. 3. de Juriſdictione Curiæ Baronis, Fol. 9.

6. By *Magna Charta*, (h) *cap.* 24. a *Precipe in Capite* is not to be granted, whereby any Freeman may loſe his Court.

7. By 52 *Hen.* 3. *cap.* 22. (i) no Man ſhall cauſe his Freeholders to ſwear (k) againſt their Will, for that ought not to be done without the King's (l) Commandment.

(h) For the Expoſition thereof, vid. 2 Inſ. 39.

(i) The King bound hereby in his Court-Baron, Hundred or County-Court. 2 Inſ. 143. (k) Intended between Party and Party, for to enquire for the Lord of all the Articles belonging to the Court-Baron or Hundred, they may be ſworn. 2 Inſ. 142. For which Articles, vid. Stat. 4 Edw. 1. entitled, Extenta Manerii. (l) In a Writ of Right-Patent, wherein Plea is held of Freehold, the Court may give an Oath, for the Writ is Mandatum Regis. 2 Inſ. 143.

8. All Pleas in a Court-Baron, of Common Right and by Courſe of Law, are determinable by Wager of Law; but by Preſcription they may be determined by Jury. 2 *Inſ.* 143.

(F) What Things it may do.

1. **If a Man recovers in a Court-Baron, they have not Power to make Execution to the Plaintiff of the Goods of the Defendant, but they may diſtrain him, and retain the Diſtreſs till Satisfaction.** (a) 4 H. 6. 17. b. (b) 22 Aſſ. 72.

(a) Br. Court-Baron 6. S. C. but a Quære made, for 'tis uſual for Suitors aſſigned by the Steward to tax the Sums, and then to award a Levari Facias. Quære if by Cuſtom or by Common Law. — By 1 Brownl. 81. upon a Levari out of a Court-Baron, Goods cannot be ſold without a Cuſtom to ſell, &c. Et vid. Noy 17. 20.

(b) Fitz. Execution 110. S. C. Br. Execution 80. S. C.

2. **Upon a Recovery of Damages in a Court of ancient Demeſne, upon a Writ of Right, if Execution be granted, the Bailiff of the Court may take and ſell the Cattle of the Defendant.** (c) 7 H. 4. 27.

(c) Br. Execution 26. S. C. 1 Rol. Abr. 887. Pl. 1. S. C.

3. P. 6 E. 1. B. R. Rot. 8. per Judicium Curiæ, Curia Baronis non habet Poteſtatem placitandi de aliqua Tranſgreſſione in Parco vel in Chacea de feris Beſtiis, niſi quis inveniatur cum manu opere.

4 Hill. 7 E. 1. B. Rot. 13. Juratores dicunt, quod Alicia, quæ fuit Uxor Adæ, poſt Mortem Adæ, Finem fecit cum T. W. de quo pred' Ada tenet ſua * Tenementa, per 22 s. pro Dote ſua habenda, & poſtea, quia pred' Alicia dixiſſet, quod predict' T. W. injuſte predict' Pecuniam ab ea extorſit, amerciavit ipſam in Curia ſua, primo ad dimidiam Marcam, & poſtmodum ad 10 s. pro Defamatione illa; **upon which Verdict, Judgment is given:** Et quia predict' T. W. non potuit nec debuit de Jure in Curia ſua de aliqua Defamatione placitare, nec aliquem pro ea amerciare, conſideratum eſt, quod predicta Alicia recuperet Pecuniam predict' ſic extortam verſus predict' T. W. & T. W. in Miſericordia.

* Fol. 544.

5. If in a Court-Baron the Defendant appears upon the Diſtreſs, yet the Goods diſtrained are not forfeited, nor can be ſold by the Bailiff, for the Diſtreſs is but in Nature of a Pledge: And though by the Courſe of the Common Law, where a Man is attached by his Goods, and appears not, they are forfeited, yet in a Court-Baron (d) no Attachment lies, but a Diſtreſs infinite only. *Mich.* 8 *Jac.* between (e) *Gomerſal* and *Medgate*, *Yelv.* 194. adjudged, where ſuch Sale was made by the Bailiff of the King's Manor.

(d) The Proceſs in a Court-Baron is Summons, Attachment, and Diſtreſs infinite. 2 Rol. Rep. 403. Et vid. 1 Bulſ. 53. (e) Cro. Jac. 255. S. C. adjudged. 1 Bulſ. 52, 53. S. C. adjudged per totam Curiam, contra Williams.

(G) (a) The (b) (c) Hundred Court.

(a) 4 Inſ. 267.

(b) This for the Eaſe of the Subject was by the King divided and derived from the County-Court, and hath the ſame Juriſdiction. 2 Inſ. 71. 4 Inſ. 267. Vide County-Court poſt.

(c) Vide Title Hundred, 2 Rol. Abr. 73.

Juriſdiction.

1. IN an Hundred Court they may ſwear Twelve Freemen to preſent a Thing. 39 E. 3. 35. b.

2. In an Hundred Court they cannot hold Plea of Debt or Treſpaſs where the Debt or Damages amount to 40 s. Co. Lit. 118.

3. In an Hundred Court they cannot hold Plea of a Treſpaſs vi & armis. Co. Lit. 118.

4. By Uſage a Man may be amerced for not bringing a Porpoiſe or other Royal Fiſh that he finds in the Pariſh to the Manor of the Hundred, where he ſhould have 12 d. for his Labour, though the Lord of the Hundred hath a Property in the Thing for which the Amercement is. 39 E. 3. 35. b.

5. An Execution may be in the Hundred Court by *Levari Facias*. *Trin.* 24 & 25 *Car.* 2. between (d) *Doe* and *Parmiter*, 2 *Levin.* 81. *per Curiam*; and ſaid, where the Books ſpeak of a *Diſtringas*, they muſt be intended of a *Levari*, for a Diſtreſs infinite would be endleſs in an Execution.

(d) 2 Reb. 117, 126. S. C.

(H) (a) (b) (c) Pipowders.

(a) 4 Inſ. 272.

(b) The Steward is Judge there, 6 Co. 12. a. 4 Inſ. 272. 2 Bulſ. 23.

1. TO every (d) Fair a Court of Pipowders (e) belongs of Right. 17 Ed. 4. cap. 2.

for there are no Suitors. (c) Curia Pedis Pulveriſati, becauſe for Contracts and Injuries done concerning the Fair or Market, Juſtice ſhall be done as ſpeedily as the Duſt can fall from the Foot. 4 Inſ. 272. Cro. El. 530. 2 Bulſ. 22. —No Action lies in this Court but for an Injury complained on, heard and determined the ſame Market-day, the Proceedings being de hora in horam, and within the Precinct of the Market. 2 Inſ. 272. —This Court continues during the Time of the Fair, and no longer. 2 Bulſ. 23. per Williams Juſtice. —By Kelw. 99. a, b. it may be adjourned from Market to Market. —The Continuance may be entered by an idem dies, &c, Moor 459. Pl. 637. (d) It may alſo belong to a Market. Cro. El. 773. per Curiam. —By 4 Inſ. 272. it is incident to a Market as well as a Fair, ſo Kelw. 99. a. (e) 'Tis an Incident inſeparable. 1 Brownl. 175. 1 Bulſ. 55.

2. Mirroir de Juſtices, Fol. 3. cap. 1. ſect. 3. That from Day to Day the Right of Strangers Plaintiffs in Fairs and Markets be haſtened, (f) as of Duſt, according to the Law of Merchants.

(f) In the Original 'tis Come de Poudrons.

3. 17 Ed. 4. cap. 2. reciting, That divers Perſons coming to Fairs, be grievouſly vexed and troubled in the Court of Pipowders by feigned Actions, and alſo by Actions of Debts, Treſpaſſes, Feats, and Contracts, made and committed out of the Time of the ſaid Fair, or the Juriſdiction of the ſame, contrary to Equity and good Conſcience, &c. be it enacted, That no Miniſter of any ſuch Court of Pipowders ſhall hold any Plea, (g) without (h) Oath made by Plaintiff or his Attorney, that the Contract or other Feats contained in the Declaration was made within the Fair, and with-

(g) Though ſuch Oath ought to be made if the Defendant will inſiſt upon it, yet it ſhall not be made Part of the Record. 4 Inſ. 272.

(h) Yet this concludes not the Defendant. 4 Inſ. 272. —But notwithſtanding he may plead to the Juriſdiction of the Court. 2 Bulſ. 22. by the expreſs Words of the Statute, vide.

in the Time of the Fair, and within the Jurisdiction and Bounds of the said Fair. (i) 1 R. 3. cap. 6.

(i) By this Act, the Statute of 17 Edw. 4. is made perpetual.

(I) What Action lies there, and for what.

1. If one slanders another who trades in the Market, in any Thing which concerns his Trade, the Action lies in the Court of Pipowders; but the Words ought to be spoke in the Market, and not before: But if the Words do not concern any Thing touching the Market, the Court hath not Jurisdiction. Co. 10. (a) Hall. (b) Jones 73.

(a) Howel and Johns, Cro. Eliz. 773. S. C. adjudged. Moor 623. Pl. 854. S. C. adjudged. Moor 831. S. C. cited. 4 Inst. 272. S. C. cited. (b) The Word and is wanting here as in the Original.

(c) 4 Inst. 272. S. P.

2. (c) No Action lies upon a Contract made at a Fair before. D. 3. M. 133, 80. adjudged.

(K) Of what Things and Actions it may hold Plea.

Fol. 545.

1. Vide Mirroir de Justices 16. B. cap. 1. sect. 15. of what Actions they shall hold Plea.

2. A Court of Pipowders belonging to a Fair cannot hold Plea of Obligations, for this is ordained for Things arising in the Fair. Mich. 10 Jac. B. R. between (a) Goodson and Duffield, per Curiam.

(a) Moor 830. Pl. 1116. S. C. & S. P. per Curiam. Cro. Jac. 313. S. C. & S. P. per Curiam. 2 Bulst. 21, 22. &c. S. C. & S. P. per Curiam.

3. There may be a Court of Pipowders by Prescription (b) without a Fair or Market, that may hold Plea of Obligations by Prescription. Mich. 10 Jac. B. R. between (c) Goodson and Duffield, resolved per Curiam.

(b) By Prescription, Moor 624. S. P. per Curiam. Cro. El. 256. per Curiam. (c) Moor 830. Pl. 1116. S. C. & S. P. resolved per Curiam. Cro. Jac. 313. S. C. & S. P. resolved per Curiam. 2 Bulst. 21, 22. &c. S. C. & S. P. resolved per Curiam.

4. The Contract or Cause of Action must be in the same Fair or Market, and not in a former. 4 *Inst.* 272.

5. It must be for a Matter concerning (d) the same Fair or Market. 4 *Inst.* 272.

(d) This Court is only for Matters arising within the Market, and by Occasion of the Market, as Batteries and Disturbances happening there. Cro. El. 774. 2 Bulst. 24. Cro. Car. 46. Hob. 12.

6. It must be for a Matter done or arising within the same Fair or Market. 4 *Inst.* 272.

(L) Courts

(L) (a) Courts of Boroughs, and other (b) inferior Courts.

(*) Of what (c) Things (d) they may hold Plea, and try by Jury there.

1. IF an Obligation be made out of the Jurisdiction of the Court, though the Action brought upon it is transitory as to other Courts, as the Courts at Westminster, that have a general Jurisdiction, yet such inferior Courts have not any Jurisdiction of any Thing that arises out of the Jurisdiction, and therefore they have not Power to hold Plea thereof. Pasch. 15 Car. B. R. between (e) Richardson and Bernard, adjudged per Curiam, in an Action brought by him that recovered upon such Obligation in an inferior Court, for an Escape of him that was taken in Execution, upon the Judgment against the Officer that suffered him to escape; and adjudged, That this was coram non Judice, and meerly void; and that the Officer shall take Advantage thereof, and Judgment given against him that brought the Action for the Escape after a Verdict for him. Intratur, Trin. 14 Car. B. R. Rot. 1590. for there it appears by the Declaration, that the Obligation was made at a Place in the Body of the County out of their Jurisdiction.

(a) By the Stile of the Court it ought to appear by what Authority it is held. 1 Rol. Abr. 795. Pl. 21. which for this vid. and the Notes there.

(b) The Courts of the County-Palatine are reckon'd among the Superior Courts. 1 Saund. 74. 1 Sid. 330, 331.

(*) Vide Title Error, in toto.

(c) Nothing shall be intended to be within the Jurisdiction of an Inferior Court, but what is expresly alledged to be so. 1 Saund. 74. 1 Sid. 331. —But whether Hull Bridge should be intended within the Jurisdiction of the Court of Hull, vid. Bernard and Bernard, 1 Lev. 289. 1 Vent. 72. dubitatur. Et vid. Styl. 200. 1 Lev. 154. (d) Where in Debt against an Heir, if he pleads riens per Discent, the Plaintiff must reply Assets within the Jurisdiction. 1 Rol. Abr. 494. Pl. 17. —So if Payment at the Day is pleaded to a Bond, it must be alledged to be within the Jurisdiction. Styl. 2. (e) 1 Rol. Abr. 809. Pl. 3. S. C. which vid. and the Notes there. March 8. seems to be S. C.

2. In an Action upon the Case in an inferior Court, if the Plaintiff declares, That at a Place within the Jurisdiction of the Court the Defendant assumed, That in Consideration that such a Ship should go from Yarmouth, which was out of the Jurisdiction, to Amsterdam, he would give to the Plaintiff 5 l. and avers, That the Ship went from Yarmouth to Amsterdam, and thereupon the Defendant pleads Not guilty: This is not triable in this inferior Court, because they cannot enquire of those Things which are out of their Jurisdiction, and without it the Action does not lie, though the Agreement was within the Jurisdiction. Pasch. 15 Car. B. R. (f) between Brian and Langhorne, adjudged in a Writ of Error upon such a Judgment in Newcastle, and the Judgment reversed for this Error. Intratur, 15 Car. Rot. 465.

(f) March 3. seems to be S. C. and a Diversity taken between Courts that have a general Jurisdiction and those which have a particular Jurisdiction only. Vid. Cro. Car. 571.

3. In an Action upon the Case in Windsor Court, upon a Promise, if the Plaintiff declares, That at Windsor aforesaid, within the Jurisdiction of the Court, in Consideration that the Plaintiff assumed to draw with Four Horses 1500 Tiles from any House in Hedley in Comitatu Bucks, to the Top of Hedley Hill ibidem, the Defendant assumed to pay 5 l. Though the Defendant pleads non assumpsit, yet the Court cannot proceed to try it upon this Declaration, for that it appears in the Declaration, that Hedley Hill and the House a quo, &c. are in Comitatu Bucks, of which the Jury cannot take Conusance; and if they proceed to try it, the Jury ought to enquire of it for Damages. Pasch. 15 Car. B. R.

* Fol. 546.

between * (g) Ive and Stone adjudged, and the First Judgment reversed. Intratur, Hill. 14 Car. Rot. 444.

(g) Cro. Car. 571. S. C. cited and agreed.

4. In an Action upon the Case in the Court of Bath in Comitatu Somerset, if the Plaintiff declares, That he was a Taylor, and that he used the said Art for several Persons inhabiting tam infra Civitatem pred', quam alibi infra Regnum Angliæ, and the Defendant, to scandalize him in his said Art, said these Words of him: Thou hast stole as much Cloth out of my Suit and Cloak which thou mad'st for me, as did make thy Wife a Wastcoat, by which he lost his said Customers: Though the Defendant pleads Not guilty, yet the Court cannot proceed to try it upon this Declaration; for that the Jury upon the Tryal ought to give Damages for the Loss of Customers out of the Jurisdiction of the Court. Mich. 15 Car. B. R. between (h) Stowel and Ireland, per Curiam, in a Writ of Error upon a Judgment in Bath, and it was reversed accordingly, but after Day was given over to the next Term. Intratur, Trin. 15 Car. Rot. 1587. and after, Hill. 15 Car. the Judgment was affirmed, (i) because it was so alledged only for Damages.

(h) Ireland and Blockwell, Cro. Car. 570. S. C. adjudged. 1 Jon. 450. S. C.

(i) But in an Action for calling the Plaintiff Whore, by which she lost her Marriage, the Loss of the Marriage must be laid within the Jurisdiction, because the Words are not actionable without special Damage. Litlebury and Wright, 1 Sid. 85, 95. adjudged. Raym. 63. adjudged. 1 Levin. 69. adjudged. — And vid. Corbin and Merson, 1 Sid. 342. 1 Levin. 153. 1 Keb. 798, 837. Et vid. March 48.

5. In an Action upon the Case in the Mayor's Court of Oxon, if the Plaintiff declares, That in Consideration the Plaintiff would buy, or procure to be bought, Wines in London, and would convey them to Oxford to the Defendant, to be sold by him, the Defendant assumed at Oxford to pay the Plaintiff the Money laid out by him for the Wines and Carriage of them, and the Moiety of the clear Profits arising by Sale thereof; and the Defendant pleads non assumpsit to this: In this Case the Court of Oxford cannot try it, because they cannot enquire of the Performance of the Consideration for Damages which is performed out of their Jurisdiction, scilicet, the buying of Wines in London, and the (k) Carriage of them to Oxford from London. Pasch. 1649. between Turner and Tyler, adjudged in a Writ of Error upon such Judgment in Oxford, after Verdict for the Plaintiff after non assumpsit pleaded, and the Judgment reversed accordingly. Intratur, Mich. 24 Car. B. R. Rot. 210.

(k) Cro. Jac. 552. like Point appears, and no Exception taken to it. Et vid. Styl. 191, 313.

6. In an Action upon the Case in the Court of Launceston in Cornubia, if the Plaintiff declares, That whereas he was an Attorney of the Hundred-Court of Stratton in Cornubia, the Defendant, having Communication with J. of the said Office of the Plaintiff, said these scandalous Words of him within the Jurisdiction of the said Court of Launceston, Thou art a Cheater, &c. After Verdict for the Plaintiff, and Damages given, and Judgment, this is Error, for that the Jury could not enquire whether the Plaintiff was Attorney of the Hundred-Court, this being out of their Jurisdiction, and this being the principal Cause of the Action and Damages. Pasch. 1651. between Facie and Heddon, adjudged per Curiam, and the Judgment given in Launceston reversed accordingly.

7. If an inferior Court hath Jurisdiction to hold Plea of any Sum under 40 l. in an Action upon the Case upon a Promise, in which the Defendant assumed to perform an Award made by J. S. or otherways to pay to the Plaintiff 40 l. This Action does not lie in this inferior Court, though the Plaintiff acknowledges himself satisfied (l) to draw it within the Jurisdiction of the Court, because it consists in Damages to be assessed by the Jury,

(l) This is printed according to the Original, but the Words of Part seem to be wanting.

and the Jury may give more or less Damages than 40 l. and therefore before the Damages are made certain by Assessment of the Jury, the Plaintiff cannot acknowledge Satisfaction of any Part thereof. Pasch. 15 Car. B R. between Gilbert and Wilkins, adjudged per Curiam, in a Writ of Error upon a Judgment in Banbury, and * Judgment there given reversed for this Cause. among others. Intratur, Trin. 14 Car. Rot. 755.

* Fol. 547.

8 (m) An inferior Court cannot hold Plea of an Obligation, Contract, Battery, or other transitory Action, if it was not made within the Jurisdiction of the Court, inasmuch as the Jurisdiction of the Court is limited to Things arising within the Jurisdiction. (n) Mich. 15 Car. B. R. per Curiam, preter Berkly, who inclined the Contra for the common Practice of such Courts.

(m) 2 Inst. 231. S. P.

(n) 2 Rol. Abr. 317. Pl. 2. S. C.

9. If in the *Marshal's* Court the Plaintiff declares, That in Consideration the Plaintiff, at the Request of the Defendant, had taken Pains to procure him a Lease of an House in *Holborn*, the Defendant *apud S. infra Jur', &c.* promised to pay him 10 l. *&c.* This is not sufficient to intitle the Court to a Jurisdiction, inasmuch as it does not appear that *Holborn*, where the House stands, is within the Jurisdiction; and the Jury are not only to try the Promise, (o) but the Consideration also. *Mich.* 13 *Car.* 2. between (p) *Ramsy* and *Atkinson*, 1 *Levin.* 50. the Judgment in the *Marshalsea* for Want thereof reversed.

(o) Judgment upon an Assumpsit, in Consideration the Plaintiff would sollicit a Cause in Chancery, &c. 1 Vent. 28. reversed for Want of Jurisdiction. Et vid. Bernard and Bernard, 1 Levin. 289. 1 Vent. 72.

(p) 1 Sid. 65. S. C. adjudged.

10. (q) In an *Indebitatus Assumpsit* for Money for a Cow sold, it must appear that the Sale was within the Jurisdiction; for the being indebted there, does not necessarily imply that the Sale was there, for he that is indebted in one Place is so in every Place. *Mich.* 14 *Car.* 1. *Sid.* 87. between *Godfry* and *Sanders* adjudged.

(q) Whitehead and Brown S. P. Raym 75. adjudged.

1 Levin. 96. adjudged. Hanslap and Cater S. P. 1 Vent. 243. adjudged. 2 Lev. 87 Judgment for Want thereof reversed, because of the Multitude of Precedents; though per Hale and Wylde it would otherways have been well enough. 1 Jon. 230. S. P. adjudged. Et vid. 2 Mod. 141. 1 Saund. 74 1 Sid. 331. 1 Vent. 72, 240. 1 Levin. 105, 137, 208. Healy and Ward, 1 Vent. 2. 1 Mod. 32. —Otherways in the Courts of the County-Palatines. Peacock and Bell, 1 Saund. 74. adjudged. 1 Sid. 331. Et vid. 1 Lev. 208.

11. In Debt for Rent upon a Lease made *infra Jur'* of an inferior Court, it must appear also that the Lands lie within the Jurisdiction; (r) for if Part of the Cause arises within the inferior Jurisdiction, and Part without, the inferior Court ought not to hold Plea. *Trin.* 15 *Car.* 2. between (s) *Drake* and *Beare*, 1 *Lev.* 104. for Want thereof the Judgment reversed.

(r) But if in the Court of H. the Plaintiff declares, That he lent his Horse at H. for the Defendant to ride to B. and that the Defendant assumed at H. to re-deliver him, this is well enough, for it is not the Riding but the Re-delivery which is the Cause of the Action. 1 Sid. 151. cited. 1 Sid. 180. cited, because founded upon the Loan, and the Failure of the Delivery. 1 Vent. 72. S. C. cited.

(s) 1 Sid. 151. S. C. adjudged. 1 Vent. 2. S. C. cited.

(M) (a) Court (b) of *Stannaries.*

(a) 4 Inſ. 229. Et vid. 16 Car. 1. cap. 15.

(b) The Juriſdiction of this Court is guided by ſpecial Laws, Cuſtom, and Preſcription, Time out of Mind, 4 Inſ. 229. 16 Car. 1. cap. 15. —For the Stile thereof, vid. 12 Co. 11. 4 Inſ. 229. (d) For ancient Charters, Records, and Acts of Parliament concerning the Stannaries, and for an Expoſition of this Charter of Edw. 1. by Authority of Parliament in 50 Edw. 3. vid. 4 Inſ. 232, 233. &c. 12 Co. 10, 11. (d) The Reſidue of this Placitum is printed according to the Original, which I muſt confeſs I know not how to render in Engliſh.

1. (c) 33 E. 1. Rot. **Cartarum, membrana 8. parte** 40, 41. pro Stannatoribus noſtris in Comitatibus Devoniæ & Cornubiæ, **grant to them, &c. of their Privileges,** &c. (d) tout un Forſque del lieus del Priſon, ſcilicet, l'Oſtwithiel pur Cornwal, & Lidford pur Devon, & del Coinage, ſcilicet, l'Oſtwithiel, Bodmyn, Liskerret, Truro, & Helſton, in Cornubia.

2. 33 E. 1. **Libro Parliamentorum** 105. ad Petitionem Stannatorum Cornubiæ, conceditur ChartaLibertatum, juxta Formam Confirmationis Regis Henrici, per ſe non conjunctim cum Stannatoribus Devoniæ, &c.

3. 1 E. 2. **Rotulo Patentium, prima parte, membrana** 13. Conceſſio Minerariis Regis in Minera Regis in Comitatu Devoniæ commorantibus, quod ipſi a die Confectionis Preſentium, per quadriennium proximo ſequens completum, liberi ſint & quieti in Civitatibus, Burgis, Villis, Mercatis & aliis locis quibuſcunque in Comitatu Devoniæ predict', & aliis Comitatibus Vicinis, de Theoloneo, & omnibus aliis Conſuetudinibus preſtandis, de quibuſcunque Neceſſariis pro Victu & Veſtitu eorum Minerariorum ibidem emendis, & quod de Tranſgreſſionibus, Occaſionibus perſonalibus, ſeu Placitis aliquibus, alicubi in Curiis Comitum, Baronum, vel aliorum Dominorum quorumcunque, toto Tempore predicto, non placitent, nec placitentur, contra Voluntatem ſuam, niſi coram Cuſtodibus noſtris Mineræ predictæ, & Vicecomite noſtro ejuſdem Comitatus, qui pro Tempore fuerint. Vobis omnibus & ſingulis firmiter inhibentes, ne Minerarios noſtros predictos contra hanc Conceſſionem noſtram moleſtetis in aliquo ſeu gravetis, quo minus ipſi quietanciis & Libertatibus predictis uti poſſunt, juxta Formam Conceſſionis ejuſdem.

4. 4 H. 8. cap. 8. Richard Strode **impriſoned in** Lidford **till he was delivered by a Writ of Privilege out of the King's** Exchequer **at** Weſtminſter, **for that he was one of the Collectors in the ſaid County for the Firſt of the Two Fifteenths granted in this Parliament.**

5. 23 H. 8. cap. 8. **If any Perſon ſhall be ſued, accuſed, indicted, impriſoned, amerced, condemned, or otherways vexed or troubled in his Perſon, Lands, Tyn-works, Goods or Chattels, by any of the Miniſters or Officers of the King's Courts of** Stannary, &c.

6. Hill. 35 E. 1. B. R. Rot. Walter Wallings, **Stannator, was indicted at** Exeter **before the Juſtices** Itinerant **for killing** Walter Wallings, **the Son of his Brother,** in Decena de Holme, **and after it is there ſaid,** quod Locus in quo interfectus fuit, fuit infra Libertatem Stannariæ, **and after the Defendant rendred himſelf to the Sheriff of the County of** Devon; **and after** Thomas de Swineſey, Cuſtos Stannariæ, **came to the Sheriff, and required him to deliver the ſaid Defendant to him, upon which the Sheriff delivered him to the ſaid** Thomas, **by which the Defendant was** ductus ad Gaolam de Lidford, in Libertate ejuſdem Stannariæ; **and after it is ſaid,** quod Defendens adhuc eſt in Lidford, infra Libertatem predictæ Stannariæ; **and after it is demanded of the Sheriff, wherefore he delivered the Defendant to the ſaid** Cuſtos **of the** Stannary? * **who ſaid that he demanded him by Force of the ſaid Charter,** 33 E. 1. **upon which they were adjourned to** Weſtminſter coram Rege, **and Day given to the ſaid** Cuſtos **and to the Defendant to anſwer it;**

* Fol. 548.

but the Custos did not come, but excused himself by Sickness, and for the Damage that might arise in the Stannaries by his Absence; but the Defendant appeared there, and pleaded Not guilty, and was found not guilty.

7. 2 Ed. 3. Rotulo Patentium Parte 1. Membrana 27. Numero 130. upon the Supplication of the Tinners, the King granted, That no Tin shall be weighed at Tavistock, eo quod multum distat a Mari, and so with great Charge transported after (e) Coinage and Weighing, and for this Grievance it should hereafter be weighed at Ashburton, Chagford, and Plympton, and not at Tavistock. Apud Westmonasterium in Scaccario, among the Eiers de Cornubia, 5 Ed. 2. Rot. 6. apud Launceston, William B. and G. T. are sued by Writ of Conspiracy by J. T. for appealing him of a Robbery, 3 Ed. 2. &c. upon which comes P. W. and shews the Letters-Patents of 33 E. 1. which are entered in hæc Verba, and thereupon P. W. demands Conusance of this Plea, for that the Defendants sunt Stannatores, to which the Plaintiff J. T. said, quod predicti Stannatores Curiam suam habere non debent, quia dicit, quod ista Sequela jam per 5 Dies versus predictos Defendentes & alios continuata est, absque hoc quod pred' P. W. vel aliquis alius eorum Ballivus, Curiam suam inde petiisset, vel Cartam predictam ostendisset. Dicit etiam, quod cum contineatur in dicta Charta, quod predicti Stannatores operantes in Dominicis Regis, dum operantur in eisdem Stannariis, liberi esse debeant, & quieti de omnibus Placitis & Querelis Curias Regis tangentibus. Et cum predictus P. W. asserit predictos Stannatores coram nullo Justiciario Regis, vel Ministro, nisi coram eorum Custode, non debere respondere, predicti Defendentes non sunt operantes in Dominicis Regis, nec alibi operantes; & hoc offert verificare, prout, &c. profert etiam quandam Commissionem & quoddam Breve Regis, per quod quidem Breve idem Rex predictis Willielmo B. & allis mandavit, quod Thomam de la Hyde Custodem Stannariæ Regis predict' in Socium admittant ipso Thoma tunc ibidem presente, & predictam Commissionem admittente; and the Defendants being demanded whether they will answer, say, That not till it be determined whether they shall have their Court; and the Plaintiff demands Judgment, as indefensum, upon which Day is given over ad audiendum Judicium, but nothing done in the Roll.

(e) In the Original 'tis Coignage and Waying.

8. The Court of Trematon in Cornubia is not any Stannary-Court, for the Stile of the Court is, Manerium de Trematon Curia Domini Regis ibidem tenta coram J. S. &c. and a Writ of Error lies in B R. upon a Judgment there, and they may hold Plea there of Replevins. Co. Book of Entries, Fol. 293. between Walter Skelton and John Starkey and Nicholas Axford, 15 El. Rot. 78.

9. If a Suit be in the Dutchy-Court of Calstock in Cornubia, touching a Copyhold, and after a Verdict, Mr. Coryton, the Vice-warden, grants a Mandate to the Steward of the Court not to give Judgment, for that the Defendant had petitioned him in Point of Equity, and a Prohibition is granted, upon a Surmise that the Vice-warden hath nothing to do as Vice-warden in the Dutchy-Courts; but there hath been a Usage there to appeal to the Lord Warden, as Chief Steward of the Dutchy, for Matters of Equity, and Mr. Coryton was only Vice-warden of the Stannaries by his Patent, and not Deputy-Steward of the Dutchy. Tr. 10 Car. B. R. between
a Prohibition granted, upon the Motion of Master Attorney-General. Mich. 10 Car. B. R. between (f) Adams and Hunn, per Curiam, a Prohibition granted.

(f) Cro. Car. 333. seems to be S. C. 2 Rol. Abr. 314. D. 2. S. C. which vid. with the Notes there.

10. No

(g) For any Matters touching the Stannaries: Otherways upon a Judgment there given upon collateral Matters. 3 Bulſ. 183. per Coke Chief Juſtice, ſaid to have been ſo reſolved upon a Conference by all the Judges, as is to be ſeen recorded in Chancery in the Petit-Bag Office. Q. Ow. 8. 1 Sid. 233.

10. No Writ of Error lies upon (g) any Judgment in theſe Courts, but the Party grieved muſt be relieved by Appeal in ſeveral Degrees; Firſt to the Steward of the Stannary-Court where the Matter lies; then to the Under-Warden of the Stannaries, and from him to the Lord-Warden of the Stannaries; and for Want of Juſtice there, to the Prince's Privy-Council. 4 *Inſ.* 230.

11. Blowers, and all other Labourers and Workers, (without Fraud or Covin) in and about the Stannaries in *Cornwal* and *Devon*, have the (h) Privilege of the Stannaries during the Time they work there. 4 *Inſ.* 231. reſolved by all the Judges.

(h) 2 Rol. Rep. 44, 45.

12. All Matters concerning the Stannaries, or depending thereupon, are to be heard and determined (i) according to the Cuſtom of the ſame, Time out of Mind uſed. 4 *Inſ.* 231. reſolved by all the Judges.

(i) But vid. Cro. Car. 333.

13. Tranſitory Actions between Tinner and Tinner, or Worker and Worker, tho' not concerning the Stannaries, nor ariſing therein, if the Defendant be found within the Stannaries, may be brought in theſe Courts, or at Common Law. 4 *Inſ.* 231. reſolved by all the Judges.

14. But if one Party only be a Tinner or Worker, ſuch tranſitory Actions which concern not the Stannaries, nor ariſe therein, cannot be brought there. 4 *Inſ.* 231. reſolved by all the Judges: And in ſuch Caſe the Defendant, by the Cuſtom and Uſage of that Court, may plead to the Juriſdiction, and (k) ought not to be arreſted *eundo* to ſwear it, or *redeundo*.

(k) 2 Rol. Rep. 379. S. P. but it was ſaid by the Chief Juſtice, that after the Oath taken, they will for 3 d. enter the Plaintiff a Tinner.

15. There ought to be no Demurrer in thoſe Courts for Want of Form, but for the Matter of Subſtance only. 4 *Inſ.* 231. reſolved by all the Judges.

16. They have no Juriſdiction of any local Action ariſing out of the Stannaries: And Matters of Life, Member, and Plea of Land, are expreſly excepted out of their Charters. 4 *Inſ.* 231. reſolved by all the Judges.

(a) Common Pleas.

(a) This Court was not created by or ſoon after the Making of Magna Charta, for at that Time there were Juſtitiarii de Banco, &c. Co. Lit. 71. b. 2 Inſ. 22, 23. But for the Antiquity of this Court, vid. the Prefaces to the 8 & 9 Rep. and 8 Co. 145. (b) For in thoſe Days the King's-Bench followed the King ubicunque in Anglia. 1 Inſ. 71. b. 2 Inſ. 554. 4 Inſ. 71, 72. (c) Before this Act, Common Pleas might have been held in B. R. and all original Writs were returnable there. 2 Inſ. 21. (d) And therefore all Writs returnable in this Court, are coram Juſticiariis noſtris apud Weſtmon', or other certain Place. 1 Inſ. 71. 2 Inſ. 22. —But Writs returnable in the King's-Bench are coram nobis ubicunque fuerimus in Anglia. 1 Inſ. 71. 2 Inſ. 22, 166, 554. —But coram nobis apud W. is well enough, the King's-Bench being there. 1 Lev. 108. 1 Sid. 80, 81. 1 Mod. 81.

1. BY the Statute of *Magna Charta, cap.* 11. *Communia Placita non* (b) *ſequantur* (c) *Curiam noſtram, ſed teneantur in* (d) *aliquo certo Loco.*

2. By 2 *Edw.* 3. *cap.* 11. The Juſtices before the Common Bench be removed, ſhall be warned by a Time, that they may adjourn the Parties, ſo that they loſe not their Proceſs.

(a) (b) (c) Starchamber.

1. THis Court in ancient Time ſate but rarely, for that enormous and exorbitant Cauſes which this Court dealt with only in thoſe Days rarely fell out. 4 *Inſ.* 61.

(a) 4 Inſ. 60. &c.

(b) All the Writs and Proceſs of this Court were under the Great Seal. 4 Inſ. 63. —Subpœna, Attachment, Proceſs of Rebellion, &c. 4 Inſ. 65. Hob. 195. (c) By the Statute of 16 Car. 2. cap. 10. reciting, That the Judges of this Court had not kept themſelves to the Points limited by 3 H. 7. but had made Decrees for Things of which they had no Authority, and inflicted heavier Puniſhments than by Law they ought; and for that their Decrees have been an intolerable Grievance, this Court and all its Juriſdiction is diſſolved.

2. (d) This Court was not firſt erected by the Statute of 3 *H.* 7. *cap.* 1. for before that Act there was a Court of *Starchamber*, of which all the King's Privy-Council were Judges; and therefore, though by that Act the (e) Chancellor, Treaſurer, and Keeper of the Privy-Seal, calling to them a Biſhop, Temporal Lord of the Privy-Council, and the Two Chief Juſtices, or in their Abſence Two other Judges, may proceed, *&c.* (f) yet the Biſhop, *&c.* are not barely Aſſiſtants, but Judges of the Court: But by 31 *Edw.* 3. *cap.* 12. for the reverſing erroneous Judgments in the *Exchequer*, a new Court being raiſed before the Chancellor and Treaſurer, calling to them the Judges, the Chancellor and Treaſurer are only Judges in the Writ of Error. 4 *Inſ.* 62.

(d) Hard. 141.

(e) By 21 H. 8. cap. 20. the Preſident is added. —And this Court cannot ſit for hearing Cauſes under the Number of Eight at leaſt. 4 Inſ. 65.

(f) Cro. Car. 168. S. P. per Curiam.

(a) Juriſdiction.

1. BY 3 *H.* 7. *cap.* 1. this Court, upon (b) Bill or Information to the Lord Chancellor, *&c.* might by Writ or Privy-Seal call before them (c) Miſdoers, for (d) Maintainance, Giving of Liveries, Signs and Tokens, Retainers by Indentures, Promiſes, (e) Oaths, Writings, or otherways, Embraceries, Miſdemeanors of (f) Sheriffs in making Pannels or Returns, by taking Money, by Injuries, by (g) Riots, and (h) unlawful Aſſemblies, and (i) them and others by their Diſcretion examine, *&c.* and ſuch as they found defective puniſh after their Demerits, and (k) as they ought to be puniſhed if convicted after the due Order of Law.

(a) For this, vid. 33 H. 8. cap. 1. 4 & 5 Ph. & Mar. cap. 8. 5 Eliz. cap. 9. 27 Eliz. cap. 4. 4 Inſ. 64, 65. 4 Co. 16. b. Hob. 84, 92. 114, 120, 121, 195, 215, 235, 236, 264, 270, 294. 324 Noy 99, to 105. 12 Co. 103, 121, 123, 132. Moor 555. Pl. 752. Noy 99. Moor 555. Pl. 753, 562. Pl. 764. Noy 99. Moor 630. Pl. 866. Cro. El. 531. 12 Co. 123. Noy 99. Moor 761. Pl. 1053. Noy 101. Moor. 756. Pl. 1053. Noy 101. Moor 760. Pl. 1052. Noy 101. Moor 770. Pl. 1064. Noy 101. Moor 778. Pl. 1080. Noy 102. Moor 781. Pl. 1082. Noy 102. Moor 820. Pl. 1109. Noy 102. Moor 562. Pl. 765. 563. Pl. 766, 767, 768. 775. Pl. 1043. 770. Pl. 1065. 778. Pl. 1079, 786. Pl. 1086. 813. Pl. 1101, 818. Pl. 1107. 821. Pl. 1110. 2 Bulſ. 320. 1 Rol. Rep. 113, Cro. Car. 168, 531. Hard. 141. —Libels, 5 Co. 125. b. Moor 627. Pl. 862. 813. Pl. 1100. Hob. 62, 215, 235, 236. 252 12 Co. 35. 2 Browul, 152 Poph. 139. (b) However, all Bills in this Court were conſtantly directed to the King. 4 Inſ. 62. (c) This Court hath no Juriſdiction of any Offence that concerns Life, or Obtruncation of any Member, the Ears only excepted. 4 Inſ. 66. (d) Upon the Statute of 32 H. 8. though ſubſequent, &c. 4 Inſ. 64, 65. 1 And. 132. Hob. 116. (e) Hob. 62, 201, 325, 326. (f) Hob. 62, 263, 264. (g) Hob. 138. (h) Hob. 236. (i) viz. after Anſwer upon Interrogatories; and in this Point, the Act was introductory of a new Power, which the ancient Court had not, nor could have but by Act of Parliament or Preſcription. 4 Inſ. 63. Et vid. Hob. 115. (k) Where they may inflict Puniſhment by Pillory, Papers, &c. 4 Inſ. 66.

The Court of (a) Requeſt.

(a) Cannot award Proceſs to ſeize Goods, &c. Brograve and Wats, Cro. El. 651. Moor 549. Pl. 735. —Nor to impriſon. Noy 6.

1. (b) BY the original Inſtitution of this Court, (in which the Lord Privy-Seal, at his Pleaſure, and the Maſters of Requeſt aſſemble and meet) ſuch Petitions as were exhibited to the King, and delivered to the Maſters of Requeſt, were to be peruſed by them, and the Party by them directed to take his Remedy according to his Caſe, either at Common Law or in *Chancery*. 4 *Inſ.* 97.

(b) 1 And. 280. S. P.

(c) Cro. El. 646. S. P. adjudged. 1 And. 279. 280. Hob. 77. Yelv. 111. Cro. Car. 596.

2. (c) But this Court (d) had no Power of Judicature; and all Proceedings there were *coram non Judice*. 4 *Inſ.* 97, 98. But it is ſaid, That in reſpect of the long Continuance, and the many Decrees there made, it is worthy the Wiſdom of the Parliament to eſtabliſh it.

(d) And though Temp' H. 8. they procured a Commiſſion, &c. yet this did not ſtrengthen their Juriſdiction, for a Court of Equity cannot be raiſed by Commiſſion. 4 Inſ. 97.

County (a) Court.

(a) The Suitors are Judges. 2 Inſ. 235. —Though Proceedings upon a Juſticies. 2 Inſ. 312. 6 Co. 11. b. 1 Mod. 171.

1. IT is a Maxim of the Common Law, *quod Placita de Catallis, debitis, &c.* (b) *quæ Summam* (c) 40 *s. attingunt vel excedunt, ſecundum Legem & Conſuetudinem Angliæ, ſine Brevi Regis placitari non debent.* 2 *Inſ.* 312.

(b) Though founded upon ſeveral Contracts, each of which were under 40 s. 1 Vent. 65. (c) An entire Debt cannot be divided and ſued for by ſeveral Plaints under 40 s. 2 Inſ. 312. But for this, vid. 2 Rol Abr. 317. Pl. 1. —If the Plaintiff counts to his Damages 40 s. though the Jury find the Damage under 40 s. ſo that in Truth the Cauſe de Jure belonged to the Court, yet he ſhall not have Judgment. 2 Inſ. 312.

(d) Of Debts ex Contractu, but not of Debts ex Delicto, as upon the Statute of Tythes. 1 Levin. 253. dubitatur.

2. But by *Juſticies* this Court may hold Plea of Goods, (d) Debts, *&c.* of any Value. 2 *Inſ.* 312. and the Proceſs therein is an Attachment of his Goods, *&c.* but no *Capias*.

3. So by Force of a *Juſticies*, it may hold Plea of Treſpaſs *vi & armis*. 2 *Inſ.* 312.

4. In Replevin by Writ or Plaint upon the Statute of *Marlebridge*, this Court may hold Plea of Goods and Chattels above the Value of 40 *s.* 2 *Inſ.* 139, 312.

5. By the Statute of *Glouceſter*, made 6 *Ed.* 1. *cap.* 6. Sheriffs ſhall plead Pleas of Treſpaſs in their Counties, as accuſtomed, *&c.* (e) but for Maims and Wounds a Man ſhall have his Writ as before hath been uſed.

(e) So that this Court hath no Juriſdiction in ſuch Caſe: Secus of a Battery without wounding or maiming. 2 Inſ. 312. —But it cannot hold Plea of any Treſpaſs vi & armis. Co. Lit. 118. 2 Levin. 93. 1 Mod. 215.

6. An Action of Account againſt a Receiver for 13 *s.* 4 *d.* or other Sum under 40 *s.* lies not in the County-Court, for being no Court of Record, it cannot aſſign Auditors. 2 *Inſ.* 380.

Commiſ-

(a) Commiſſions.

What ſhall be good.

(a) No new Commiſſion can be framed without Authority of Parliament, 2 Inſ. 478. 4 Inſ. 163, 245. —A Commiſſion under the Great Seal to take J. N. a notorious Robber, and to ſeize his Lands and Goods, illegal. 2 Inſ. 54.

1. IF a Commiſſion under the Great Seal of *England* is directed to ſeveral Perſons, to enquire of ſeveral Offences, but that they ſhall not have Power to hear and determine the ſame, this is illegal, elſe a Man might be unjuſtly accuſed, and have no Opportunity of clearing himſelf by Trial. *Trin.* 5 *Jac.* 12 *Co.* 30, 31. Such Commiſſion reſolved to be illegal, and alſo becauſe in *Engliſh*, and the Offences to be enquired of were not in the Body of the Commiſſion, but in a Schedule annexed to it.

2. By 42 *Edw.* 3. *cap.* 4. Commiſſions of Enquiries ſhall be made to the Judges of the one Bench or the other, Juſtices of Aſſiſe or of the Peace, with others of the moſt worthy of the Country, ſave in the Office of Eſcheatorſhip.

(a) Determination thereof.

(a) The Authority of Juſtices in Eyre, Oyer and Terminer, &c. is determined by the King's-Bench ſitting in the ſame County. Dy: 159. a. 4 Inſ. 73. 9 Co. 118. (b) Cro Car. 128. S. C. cited and agreed.

1. IF a Judge of the *Common-Pleas* is made a Judge of the *King's-Bench*, by this the inferior Authority is determined, for it would be impertinent for him to reverſe his own Judgment, which otherways he might do upon a Writ of Error. (b) *Dy.* 159. a.

(c) Dy. 19. Pl. 47.

2. But a Man (c) may have Two ſeveral Powers together, as Juſtice of Peace, and of Oyer and Terminer, *&c. Dy.* 159. a.

(d) Where by the iſſuing and Notice of the Second Commiſſion, the First is determined.

3. If a Commiſſion is made to Judges of Aſſiſe, and after the King makes other Judges of Aſſiſe in the ſame County, (d) by this the Firſt Commiſſion is not determined; but they may proceed thereupon (e) till Notice of the Second. *Kelw.* 116. And they are not bound to take Notice of a (f) Proclamation thereof in the County, for the Law hath not provided that any ſuch Proclamation thereof ſhould be made.

1 Leon. 270. Godb. 105. — And yet Proceedings ſhall not be diſcontinued. Vid. 11 H. 6. cap. 6. 1 Edw. 6. cap. 7. Ante Title Diſcontinuance. (e) The old Sheriff may act till the new Patent ſhewed him; ſo that he may have Notice of his Diſcharge. Cro. El. 12, 440. Moor 186. Pl. 333. (f) 4 Inſ. 165. S. P. con. —But Juſtices of Peace left out of the new Commiſſion, muſt take Notice thereof after Publication of the new Commiſſion, at the next Seſſions. Moor 187. 4 Inſ. 165. S. P.

(g) But by 1 Ma. cap. 8. no Sheriff ſhall be a Juſtice of Peace.

4. By 1 *Edw.* 6. *cap.* 7. if a Judge of Aſſiſe, Juſtice of Gaol-Delivery, or of the Peace, or other in any of the King's Commiſſions, be made a Duke, Archbiſhop, Marqueſs, *&c.* Biſhop, Knight, Juſtice of one Bench, or the other, Serjeant at Law, or (g) Sheriff, yet he ſhall remain Juſtice or Commiſſioner.

5. By the 2 *&* 3 *Ph. & Mar. cap.* 18. a new Commiſſion of the Peace or Gaol-Delivery for the County, *&c.* ſhall not ſuperſede a former Commiſſion for a City or Town-Corporate, being no County.

(*) By the Death of the King.

(*) Where and what Proceſs diſcontinued by the Death of the King, vid Ante 158.

1. (a) THE Patents of the (b) Judges, (c) Sheriffs, Eſcheators, (d) Commiſſioners of Oyer and Terminer, Gaol Delivery, and of the Peace, and of the Attorney-General, determine by the Death of the King, in whoſe Name they are made. 1 *And.* 44. reſolved by all the Judges.

(a) Dy. 165. a. S. P. 7 Co. 30. a. S. P. Dy. 193. b. Cro. Car. 1, 2. N. Benloe 79. Pl. 121. (b) Otherways of Coroners choſe by Writ. Dy. 165. a. 2 Inſ. 175. (c) Otherways in London, and other Places where by Charter. 7 Co. 30. b. (d) Where the Examination of Witneſſes after his Death, but before Notice, was good. Cro. Car. 98, 99.

2. By 7 & 8 *Will. cap.* 27. no Commiſſion, Civil or Military, ſhall determine by the Death of the King, his Heirs or Succeſſors, but ſhall continue for Six Months after ſuch Death, unleſs ſuperſeded or made void by the next immediate Succeſſor, according to the Act of Settlement.

3. By 1 *Ann. cap.* 8. reciting, That ſome Doubts might ariſe concerning the Extent of the former Act, it is enacted, That no Patent or Grant of any Office or Employment, Civil or Military, ſhall be void by the Death of the Queen, her Heirs and Succeſſors, but ſhall continue for Six Months, unleſs ſuperſeded or made void by the next and immediate Succeſſor, according to the Act of Settlement.

4. And by the ſame Act, no Commiſſion of Aſſiſe, Oyer and Terminer, general Gaol-Delivery, or Aſſociation, Writ of Admittance, of *ſi non omnes*, of Aſſiſtance, or Commiſſion of Peace, ſhall be determined by the Death of the Queen, or any King or Queen of this Realm, but ſhall continue for Six Months, unleſs ſuperſeded, *&c.* by her Majeſty, her Heirs or Succeſſors.

Courts and Commiſſions.

(a) Adjournment thereof.

(a) By Part of the Commiſſioners is void, and as none. Dal. 24. b. 25. a.

1. IF a Commiſſion of Oyer and Terminer is granted to endure (b) for a certain Time, or *quamdiu nobis placuerit*, there needs no Adjournment from Seſſions to Seſſions. *Dal.* 24. b.

(b) Styl. 179.

(c) 3 Inſ. 31.

(d) 4 Inſ. 165.

2. But if in the Commiſſion there is no certain Time limited, nor theſe Words, *quamdiu nobis placuerit*, but it is by general Words, without a Day, or (c) *pro hac vice tantum*, (d) there ought to be an Adjournment from Day to Day, and in Default thereof the Commiſſion is determined. *Dal.* 25. a.

(e) Ante 257. Pl. 1. 258. Pl. 2.

3. If a Corporation by their Charter are to hold a Court (e) every *Monday*, yet they may (f) adjourn it, and omit a Week, without Prejudice to their Privilege. 2 *Rol. Rep.* 87. agreed.

(f) When an Adjournment in an inferior Court ought to be to a Day certain. 1 Rol. Abr. 484. Pl. 4, 5.

(a) Covin. Colluſion.

Fol. 549.

(a) Vid. Title Fraud.

1. (b) If a Man, that has a Right of Action to certain Lands, by Covin cauſes another to ouſt the Tenant of the Land, to the Intent to recover it from him, and he recovers accordingly againſt him by Action tried, yet he ſhall not be (c) remitted to his ancient Right, but is in of the Eſtate of him who was the Ouſtor. (d) 41 Aſſ. 28. Curia, adjudged, and an Aſſiſe lies againſt him. 44 Aſſ. 49.

(b) Co. Lit. 357. b. S. P. Poph. 64. 100.

(c) Where a Man ſhall not be remitted becauſe of Covin,

Vid. 2 Rol. Abr. 420. Letter C. (d) Br. Remitter 46. S. C. Br. Fauxifier de Recovery 40. S. C.

2. If a Man diſſeiſes me of Land, to which a Woman hath Title of Dower, of Covin and with Conſent of the Woman, to the Intent to endow her, and he endows her in the Country accordingly, yet this is of no Effect againſt me, but I may ouſt him becauſe of the Covin. Dubitatur, (f) 44 Aſſ. 29.

(f) Br. Fauxifier de Recovery 43. S. C.

3. The ſame Law, though the Endowment was upon a Recovery againſt him in a Writ of Dower, becauſe of the Covin. (h) 44 Aſſ. 29.

(g) Though the Aſſignment be indifferently made by the Sheriff of an equal Third Part, yet ſhall the Diſſeiſee, &c. avoid it, for the wrongful Manner ſhall avoid the Matter that is lawful. Co. Lit. 35. a. 357. B. 3 Co. 78. a. 5 Co. 31. a. 6 Co. 58. a. 8 Co. 132. b. (h) Br. Fauxifier de Recovery S. C.

4. If Goods are ſold in a Market-Overt, by Covin between Two, in Purpoſe to bar him that has Right, (i) this ſhall not bar him thereof. 2 *Inſ.* 713.

(i) Cro. Eliz. 86.

(A) What Perſon or Perſons may do it.

1. Covin cannot be but (a) between two. (b) 39 H. 6. 19. b.

(a) It is a ſecret Aſſent, determined in the Hearts of Two or more, to the Defrauding and Prejudice of another. Co. Lit. 357. a, b. (b) Br. Colluſion 23. S. C.

(B) What Things may be averred to be upon Colluſion.

Records.

1. If a (a) Recovery by a Stranger, pending the Writ, be pleaded in Abatement, the Demandant cannot aver it to be by Covin between the Tenant and the Stranger. (b) 41 E. 3. 11.

(a) So if in Dower againſt the Diſſeiſor, he pleads the Entry of the Diſſeiſee, the Demandant ſhall not be admitted to aver that this Entry was by Covin to abate her Writ, becauſe the Entry was lawful, and mix'd with no Tort, 8 Co. 132. b. Vid. Palm. 275, 276. (b) Fitz. Brief 533.

(C) In what Caſe the ordinary Courſe ſhall be changed by Covin.

(a) Br. Colluſion 24. S. C. Br. Privilege 31. S. C. Mid. 1 Rol. Abr. 807. Pl. 3, 4. (b) Cro. Car. 128.

1. (a) 39 H. 6. 50. A Man comes by Habeas Corpus out of London, and had no Cauſe to have the Priſon, but by his Covin, it was ordered, That he ſhould be in Execution till he had paid the Debt recovered againſt him after the Writ brought, (b) and that after he ſhould be remanded to anſwer the Plaints there. A Judgment ſhall be ſtay'd for Colluſion. (c) 7 H. 4. 19. b.

(c) Br. Colluſion 15. S. C. Judgment 18. S. C. Fitz. Proclamation 14. Br. 2.

2. If Land be alienedy pending a Writ of Debt by Covin, to avoid the Extent thereof for the Debt, yet when the Covin appears upon the Return of the Elegit by the Sheriff, the Land ſo alienedy ſhall be extended. D. 3. 4. Ma. 149, 80.

3. If a Man makes a Deed of Gift of his Goods in his Lifetime by Covin to ouſt his Creditors of their Debts, yet after his Death the Vendee ſhall (d) be charged for them. 13. H. 4. 4. b.

(d) As an Executor of his own Wrong. Yelv. 197. Cro. Jac. 271.

Customs of London.

Fol. 550.

(A) An (a) (b) Action brought (c) there by the Custom.

1. (d) AN Action by the Custom lies (e) in London for these Words spoke of a Woman, Thou art a Whore, and wilt play the Whore for Two Pence, for in London such Women shall be carted. M. 13 Car. B. R. between (f) Bavoir and his Wife, against Cooper, per Curiam, after an Habeas Corpus and Procedendo granted, a Supersedeas was denied: But the Opinion of Berkeley was the contra, for that (g) Co. 4. Oxford's Case, is contra: And in this these Precedents were cited, scilicet, between (h) Bond and Watson, Trin. 8 Car. B. R. a Procedendo granted for such Words, and a Supersedeas denied per Curiam: And the Court said in this Case, That if a Judgment be given in London in this Action, a Writ of Error lies, in which the Law may be decided; and therefore it is reasonable to grant a Supersedeas (i) to hinder the Suit there. Trin. 1650. between (k) Penton and Harrison, adjudged per totam Curiam, and a Procedendo granted accordingly, where the Words were, Thou art a Whore, and my Husband's Whore.

(a) Waste brought there by Custom, Green and Cole, 2 Saund. 252. 1 Levin. 309.

(b) Before the Day of Payment against Debtor Fugitive. Hob. 86. —To find Sureties, 1 Vent 29.

(c) Where the Customs are united to the Courts, there the Action cannot be brought elsewhere, as against a Feme Covert, sole Merchant, &c. Moor 135, 136. Cro. El. 409. —But against an Infant bound Apprentice according to the Custom of London, the Action may be brought elsewhere. Moor 136. —So upon a Recognizance taken by the Chamberlain for Orphans Money. Cro. El 682. adjudged.

(d) March 107. S P. and agreed, That of late there have been many Procedendo's granted. Styl. 69, 70. S. P. dubitatur. Raym 81. 1 Levin. 116.

(e) If laid in London when spoke elsewhere, the Defendant may plead the Words were spoke at, &c. and traverse the speaking in London; and if the Plea is refused, may have a Prohibition. 1 Levin. 116.

(f) Cro. Car. 486, 487. S. C. accordingly. 2 Rol. Abr. 69. Pl. 1. S. C.

(g) 4 Co. 18. S. C. and a Procedendo denied per totam Curiam, for that a Custom to maintain Actions for such brabling Words was against Law, and therewith agrees Cro. Car. 350.

(h) 2 Rol. Abr. 69 Pl. 1. S. C.

(i) Cro. Car. 69. 1 Mod. 26.

(k) Denton and Harrison, Styl. 229. S. C. accordingly. 2 Rol. Abr. 69. Pl. 1. S. C.

2. (l) If *A.* and *B.* are bound as Sureties for and with *C.* to *D.* and *D.* recovers against *A.* in *London*, and has Execution against him, *A.* may there sue *B.* for Contribution, *ut uterque eorum oneretur pro rata*, according to the Custom of *London*. *Pasch.* 26 *Eliz.* between *Offly* and *Johnson*, 1 *Leon.* 166. such Action being removed in *B. R.* by Writ of Privilege, was remanded, because otherwise the Plaintiff would be without Remedy, for by the Course of the Common Law no Action lies.

(l) Moor 136 S. P. such Action being removed in B.

3. If a Woman declare, *pro* (m) *rationabili parte bonorum* of her Husband, in the Court of the Mayor aad Aldermen of *London*, and alledges the Custom, That when Citizens and Freemen of *London* die, (n) their (o) Goods and Chattels, above Debts and necessary Funeral Expences, ought to be divided into Three Parts, and that the Wife of the Testator ought to have one Part, the Executors another to discharge Legacies,

(m) F. N. B. 122. b. 2 Inst. 33.

(n) If the Husband voluntarily assigns a Term to a Child, for a Provision, and dies, yet the Wife shall have her Customary Part therein. 2 Levin. 130.

(o) The Interest which a Citizen had as Executor and Residuary Legatee, Chanc. Cas. 310. decreed to be within the Custom. —A Mortgage in Fee to him, Part of his personal Estate. 1 Chanc. Cas. 285. —Secus of a Lease waiting on the Inheritance of a Citizen. 2 Chanc. Cas. 160.

cies, and dispose at their Discretion, and the (p) Children of the Testator, (q) Male or Female, (r) which are not sufficiently provided for in the Life of the Father, the other Third Part; and that the Suit for the same ought to be in that Court, &c. being removed in *B.* it may be there proceeded upon. *Hill.* 5 *Car.* (s) *Cason's* Case. *Hetl.* 158. *per Curiam*; and said, there were several Precedents to this Purpose. And it was said by *Richardson*, Chief Justice, That the Plaintiff might have declared (t) without alledging the Custom, (u) because it was well known there; but that is otherways where an Action upon (w) the Custom is brought in a Place where the Custom extends not.

(p) The Heir shall have his Share in the Distribution. 2 Jon. 204. per Curiam.

(q) Though the Father cannot dispose of the Customary Part from his Children, yet he may by his Will appoint, that if one dies before 21, another shall have his Part. 1 Levin. 227, 228. But quære 1 Chanc. Cas. 199. con. (r) 12 Co. 122. (s) Lit. Rep. 324, 325. S. C. and seems only a Translation of it into French. (t) But upon a Writ of Error, how shall it then appear there is such Custom? Godb. 49. Lat. 134. dubitatur; and said, before in nullo est Erratum pleaded, the Defendant in Error may allege the Custom, and so conclude in nullo est Erratum. (u) The Judges of every Place are presumed to have knowledge of the Laws thereof. Hob. 86, 87. (w) So where the Custom is alledged in Pleading, it must be a Tempore cujus, &c. 2 Leon. 29. Cro. Eliz. 185.

(B) The Custom touching (a) Orphans.

1. A Woman before the contracts Marriage with J. S. agrees with him, that she shall have Power to devise the Sum of 200 l. to any Person, and after the Marriage she by her Will gives it to the Children of her First Husband, and dies: The Husband after acknowledges a Judgment at the Common Law for the Security of it, yet by the Custom of Orphans of London, he may be compelled by the Court of Orphans of London to give new Security for it at the Chamber of London. Pasch. 17 Jac. B. (b) Andrews's Case per Curiam.

(a) Where an Infant may waive the Benefit of suing in the Court of Orphans, and file a Bill in Equity against any one for the Discovery of the personal Estate. March 107.

But by 4 Inst. 249. if an Orphan sue in the Ecclesiastical Court, or elsewhere, for a Legacy, or Duty to them, by the Custom a Prohibition lies. (b) Hut. 30. S. C.

2. If a Man for Orphanage-money gives a Security in the Prerogative Court, yet he may be compelled to give other Security to the Chamber of London. P. 17 Ja. B. said by Hutton to be the Case of one Lush of late Time, resolved.

3. In London there hath been a Court of Orphans Time out of Mind, and there hath been a Custom, That if any (c) Freeman or Freewoman (d) dies, (e) leaving Orphans under Age unmarried, that they have had the (f) Custody of their Body and (g) Goods, and that the Executors and Administrators have used to exhibit true Inventories before them, and if there appeared to be any Debt, to be bound to the Chamberlain, to the Use of the Orphans, in a reasonable Sum, to make a good Account thereof, upon Oath, after they have received them, and (h) if they refused, to commit them till they were bound: This is a good and reasonable Custom; and if the Ecclesiastical Court will compel them to make an Account there against this Custom, a Prohibition lies. Hobart's Reports, Case 313. (i) Zuche's Case.

(c) 1 Rol. Rep. 316.

(d) Though she did not inhabit or die in London. 1 Rol. Rep. 316. 1 Sid. 250. —All the Children of a Freeman, though he dies and they were born out of London, shall be Orphans. 1 Vent. 180. 1 Mod. 80.

(e) So if Legacy given them by other Freemen. Hut. 30. —Or in a Foreign County. 1 Vent. 180.

(f) If such Orphan is taken out of the Custody of such Person to whom by them committed, they may imprison the Offender till he produces the Infant, or is delivered by Course of Law. Wilkinson and Colton, 1 Sid. 250. Ray. 116. 1 Levin. 162. adjudged, though the Custom laid to imprison without Exception of Peers, and without Time to answer. Vid. 1 Mod. 80. 1 Lev. 32.

(g) But Money in their Hands is not a meer Depositum, but in Nature of a Debt or Those in Action, which does not vest in the Husband by the Marriage of such Orphan, nor can he bequeath it by Will. 2 Vent. 340, 341.

(h) 1 Rol. Rep. 316. (i) Hob. Fol. 247. S. C.

4. By

4. By this Cuſtom, if (k) any one, without the Conſent of the Court of Aldermen, marry ſuch Orphan under the Age of 21, though out of the City, they may fine and impriſon him for Non-payment thereof; and if the Cuſtom ſhould not extend to Marriages out of the City, their Power would be but in vain. *Hill.* 23 & 24 *Car.* 2. between the (l) King and *Harwood*, 1 *Levin.* 32.

(k) Though not a Freeman. 1 Ven. 178 1 Mod. 79

(l) 1 Vent. 178 S. C. 1 Mod. 79. S. C.

(C) Forein Attachment.

1. This is not a good Cuſtom. 21 Ed. 4. 67.

(D) What Perſons ſhall be bound by this Cuſtom, and in the Hands of what Perſon a Debt may be attached.

Fol. 551.

1. D. 8 Eliz. 247, 73. Toſt was indebted to Foxcroft, and A. indebted to the ſaid Toſt: Toſt died inteſtate. The Ordinary committed Adminiſtration, and after Foxcroft ſued the Ordinary, and upon his Default the Debt of A. was attached by the Cuſtom, and after the Adminiſtrator brought Debt againſt A. who pleaded the Attachment, and yet the Plaintiff recovered, for that no Action of Debt lay as above againſt the Ordinary, nor by the Ordinary againſt A. Debttee of the Inteſtate, after the Adminiſtration committed by any Law: And (a) ſome were of Opinion, that at the Common Law (b) no Action lay againſt the Ordinary, but by the Statute of Weſtminſter 2 cap. 19. which is within the Time of Memory, and therefore the Cuſtom cannot extend to it.

(a) Cro. El. 410. this Caſe and Opinion cited and denied.

(b) For this, vid. 1 Rol. Abr. 906. Pl. 3, 4. and the Notes there.

2. Co. 5. (c) Snelling 82. B. this laſt Opinion is reſolved not to be Law, and reſolved, That the Adminiſtrator is within another Cuſtom, to be charged for a Contract, becauſe he was chargeable at Common Law as an Executor by his Adminiſtration; and the Name of the Charge, ſcilicet, Adminiſtrator, is only changed by the Statute, and yet in Subſtance is all one: And it ſeems by the Book this Cuſtom is all one with a Forein Attachment.

(c) Cro. Eliz. 409. S. C. adjudged. Noy 53. S. C. adjudged. 1 Rol. Rep. 105. S. C. cited. 2 Jon. 204. S. C. cited; and like Point adjudged.

3. If by this Cuſtom a Debt be attached in the Hands of B. B. may plead it in Bar againſt his Debttee. 21 Edw. 4. 67.

4. (d) But when ſuch an Attachment is pleaded, the Plaintiff may traverſe the Cauſe thereof, ſcilicet, that the Defendant was not indebted to him who attached it. Mich. 12 Jac B. R. by Coke, and by him there cited. P. 40 El. B. R. (e) Pain's Caſe adjudged. Old Entries, Debt in Attachment 1. Fol. 157. b. But note, This is upon the Cuſtom of London (f) within the Year and Day.

(d) Cro. El. 830. S. P. adjudged.

(e) Cro. El. 589. 599. S. C. adjudged, though the Year and Day was paſt, 1 Rol. Rep. 106. S. C. cited.

(f) For the Year and Day diſcationare debitum, vid. Cro. El. 713. 1 Leon. 52.

(E) (a) What Debt or Goods may be attached by the Cuſtom.

(a) Whether a Debt owing to a Company was attachable for the Debt of the Company. 1 Mod. 212. dubitatur.

1. Such Goods cannot be attached, of which he had no Property at the Time of the Attachment, (b) 17 Ed. 4. 7. b. per Curiam.

(b) Br. Debt 163. S. C.

2. If A. be indebted to B. and J. S. a Stranger takes by Tort certain Goods of A. as a Treſpaſſer; B. cannot by the Cuſtom attach theſe Goods in the Hands of J. S. for the Debt of A. becauſe the Property is out of A. at the Time, and only a Right in him. Trin. 4 Ja. B. R. between Stamere and Amony adjudged.

(bb) Noy 115. S. P.

3. (bb) A Legacy cannot be attached in the Hands of an Executor by Forein Attachment, becauſe it is uncertain whether, after Debts paid, the Executor hath Aſſets to pay it. Mich 14 Jac. B. R. between (c) Page and Lawketon and Davis, per Curiam reſolved, and a Conſultation granted accordingly, after a Prohibition to the Eccleſiaſtical Court, where the Suit was for a Legacy. Mich. 14 Jac. B. R. between Scurra and Mercial, per Curiam, for that a Legacy is not demandable nor ſuable at Common Law.

(c) 3 Bulſ. 243. S. C. adjudged.

4. If A. be indebted to B. by Obligation, and B. is indebted by Contract to H. and B. dies, and his Adminiſtrator demands the Debt upon the Obligation of A. who promiſes him, that if he will forbear him for a Month, that he will pay him then, but he does not pay him accordingly; and after H. brings Debt in London againſt the Adminiſtrator upon the Contract, (as he may there by the Cuſtom) the Debt of A. due by the Obligation may be attached in the Hands of the Adminiſtrator, for notwithſtanding the promiſe * broke, yet the Debt continued due by the Obligation, and a Recovery upon the Obligation will be a Bar of the Action upon the Promiſe, in which all ſhould be recovered in Damages. M. 12 Ja. B. R. between (d) Spinke and Tenant, per Curiam.

* Fol. 552.

(d) 1 Rol. Rep. 105, 106. S. C.

5. If A. lends to B. 100 l. to be repaid by B. upon the Death of his Father, and after the Death of the Father of B. this 100 l. is attached by Force of a Forein Attachment, and after A. brings an Action upon the Caſe againſt B. for this Money; this Forein Attachment will be a good Bar thereof, though the Cuſtom be to attach Debts, and this is an Action upon the Caſe, in which Damages only are to be given; becauſe this is a Debt, and he might have had an Action of Debt thereupon, and therefore inaſmuch as this was well attached, he ſhall not defeat it by bringing an Action upon the Caſe for it. Tr. 11 Car. B. R. between Sir Nicholas Hals and Walker, per Curiam, upon a Demurrer upon a Foreign Attachment in Exeter, which is of the Nature of an Attachment in London.

6. If A. ſells certain Stockings to B. upon a Contract, for which B. is to give 10 l. to A. and if he ſells the Stockings again before Auguſt after, that he ſhall give 2 d. more for every Pair of the ſaid Stockings; the 10 l. is attachable by Forein Attachment, becauſe an Action of Debt lies for it, but the 2 d. for every Pair of Stockings is not attachable, becauſe this reſts only in Damages to be recovered by an Action upon the Caſe, and not by Action of Debt, becauſe it is made payable upon a Poſſibility only. P. 11 Car. B. R. between Read and Hawkins, per Curiam, upon a Demurrer, where a Action upon the Caſe was brought for the 10 l. only, and the Forein Attachment pleaded in Bar; but the Judgment was given againſt the Defendant for the miſpleading the Forein Attachment. Intratur, H. 11 Car. Rot. 78.

but per Curiam it had been a good Bar if it had been well pleaded.

7. If there are ſeveral Accounts, &c. between *A.* and *B.* and *A.* dies, and his Executor and *B.* ſubmit to the Award of *J. S.* and he awards, that the Executor ſhall deliver certain Goods, of which *A.* died poſſeſſed, to *B.* and that *B.* ſhall pay the Executor 300 *l.* This Money cannnot be attached in the Hands of *B.* for the Debt of *A.* for upon the Matter, the Executor being liable to a *Devaſtavit*, ought to have Remedy in his own Right for the Sum awarded *Hill.* 22 & 23 *Car.* 2. between (e) *Horſam* and *Target*, 1 *Vent.* 112. adjudged *per totam Curiam.*

(e) 1 Levin. 306. S. C. adjudged.

8. If *A.* is indebted to *B.* who is indebted to *C.* and *B.* aſſigns the Debt of *A.* to *C.* in Satisfaction of his Debt; now the Debt due from *A.* is become the Right and Property of *C.* and *B.* hath nothing but in Truſt for *C.* and therefore it ought not to be attached for any ebt of *B.* and upon the ſpecial Matter ſhewed, the Lord Mayor ought to give Relief. *Mich.* 34 *Car.* 2. between *Lewis* and *Wallis*, 2 *Jon.* 222, 223. *per Curiam.*

(F) At what Time.

In what Caſes it may be.

1. (a) If a Man recovers (b) Debt or Damages in B. R. this Debt cannot after be attached in London, for the inferior Court cannot attach a Debt in a ſuperior Court. P. 32 El. B. R. between (c) Kery and Bowyer, per Curiam; & Tr. 32 El. after adjudged, and there is cited (d) Sir John Parret's Caſe to be adjudged accordingly.

(a) 4 Leon. 240. S. P. 1 Mod 103. S. P.

(b) So if levied upon a Fi' Fa', and in the Sheriff's Hands. 1 Leon 30, 264.

(c) Cro. El. 186. S. C. adjudged.

(d) Cro. Eliz. 63. S. C. ſaid to be adjudged. 1 Leon. 29 S. C. adjudged. 3 Leon. 240. S. C. cited.

2. After an Iſſue in an Action of Debt in B. R. the Debt for which the Action is brought cannot be attached in London for the Cauſe aforeſaid. M. 31, 32 El. B. R. the Caſe of Fenner and Samuel is cited to be adjudged.

3. So after Imparlance to an Action of Debt in B. R. the Debt cannot be attached in London for the Cauſe aforeſaid. M. 31, 32 El. B. R. between (e) Babington and Babington, adjudged per Curiam.

(e) Cro. El. 157. S. C. adjudged. 3 Leon. 232. S. C. adjudged.

4. (f) If a Writ of Debt, (g) returnable in Banco, be purchaſed before the Attachment, (h) it cannot by the Cuſtom be attached. M. 5 Ja. between Arſton and Procter.

(f) Cro. El. 691. S. P. adjudged.

(g) So if a Suit be begun in Equity, the Effect thereof ſhall not be prevented by a Foreign Attachment. 2 Chanc. Caſ. 233.

(h) Pell and Pell, Cro. El. 191. 3 Leon. 210. Et vid. Cro. El. 593.

5. But otherways it is if the Writ of Debt be purchaſed after the Attachment by Covin with an Antedate. M 5 Ja.

6. If *A.* is indebted to *B.* and *C.* is indebted to *A.* and *B.* brings Debt in *B. R.* againſt *A.* pending this Action *B.* may affirm a Plaint in *London* againſt *A.* for the ſame Debt, &c. and attach the Debt in the Hands of *C.* for though a Debt in *London*, for which there is a Suit depending in *B. R.* cannot be attached, yet he that hath brought an Action in *B. R.* may notwithſtanding, according to Cuſtom, attach the Debt of the Party, for the Debt in Queſtion in *B. R.* is not touched by this Attachment.

tachment. *Mich.* 39 & 40 *El.* between *Lewknor* and *Huntly*, *Cro. El.* 593. adjudged, 712, 713. reſolved alſo upon a Writ of Error, though the Judgment was reverſed for another Reaſon.

Fol. 553.

(G) At what Time it may be.

1. AN Obligee before the Debt is due by Obligation, cannot by the Cuſtom attach a Debt for it, becauſe he cannot affirm a Plaint for the firſt Debt before it is due. Tr. 32 El. B. R. between (a) Dalton and Selby agreed.

(a) 3 Leon. 236. S. C. adjudged. Cro. El. 184. S. C. but obſcurely reported.

2. But if B. is indebted to A. and C. is bound to B. but the Day of Payment is not yet come, A. may attach this Debt in the Hands of C. before it is due to B. Tr. 32 El. B. *R.* between (b) Dalton and Selby, ſaid, that the Cuſtom of London is ſo. But the Court ſaid this is not laudable nor to be allowed.

(b) 3 Leon. 236. S. C. & S. P. per totam Curiam. Cro. El. 184. S. C. but S. P. ſeems con. But vide, for the Caſe is but obſcurely reported. Et vid. 1 Rol. Rep. 105. Cro. El. 713. Noy 68.

(bb) Noy 68. S. P.

3 (bb) But in ſuch Caſe, if it be pleaded, that ſuch Debt was attached by the Cuſtom before the Debt was due by the Condition of the Obligation, it ought to be ſpecially pleaded, that by the Cuſtom ſuch Debt may be attached before the Day of Payment by the Condition of the Obligation. Mich. 10 Car. B. R. between Adler and Clapper, per Curiam, upon a Demurrer, where the Cuſtom was alledged generally, as the Uſe is in other Caſes for Debts then due, and therefore the Court inclined it was not good. Intratur, Mich. 10 Rot. 328. Hill. 10 Car. this being moved again, the Court was of the ſame Opinion.

(c) In the Orignal it is to whom he, is indebted; ſo that it ſeems to me to be miſprinted, and that it ought to have been corrected as here: But Q.

4. If A. lends Money to B. to be repaid upon the Death of the Father of B. and after an Action is brought by C. againſt A. and after the Father of B. dies: the Money due by B. to A. may after be attached in the Hands of B. though it was not due at the Time of the Plaint commenced againſt A. inaſmuch as it became due before the Time that by the Cuſtom Proceſs is to be granted againſt him (c) in whoſe Hands it is attached. Trin. 11 Car. B. R. between Sir Nicholas Halls and Walker, per Curiam, upon a Demurrer upon a Foreign Attachment in Exeter, which is all one with an Attachment in London.

(d) 1 Sid. 327. S. P. adjudged.

5. (d) A Debt may be attached by the Cuſtom before it is due, but before it is due Judgment cannot be given upon this Attachment, that he ſhall have or retain it in Satisfaction of his Debt demanded before it is due, for thereby there ſhould be an Execution of this Debt attached before it becomes due, which cannot be, for by the Judgment it is put in Execution preſently. Tr. 14 Car. B. R. between (e) Pierſe and Calcott, adjudged upon a Demurrer. Intratur, Mich. 13 Car. Rot. 473. But note, it was objected on the other Side, that this was a good Cuſtom, becauſe the Judgment is not that the Debt attached ſhall be paid preſently, but only that he that is Plaintiff ſhall have it in Satisfaction of his Debt preſently, but to be paid when it becomes due.

(e) 1 Jon. 406. S. C. adjudged.

(H) In

(H) In what Actions it may be.

1. IN an Action of Debt for Tobacco, in the Detinet, a Debt cannot be attached within the Custom in Satisfaction thereof, because it does not appear of what Value this Tobacco was, so that it might appear that the Debt is but a Satisfaction to the Value, which cannot be supplied by a Plea in Bar made in another Action against him in whose Hands the Debt was attached. Tr. 14 Car. B. R. between (a) Pearse and Calcot, per Curiam, adjudged upon Demurrer. Intratur, Mich. 13 Car. Rot. 473.

(a) 1 Jon. 406. S. C.

Fol. 554.

2. But if the Value of the Tobacco had been averred in the Record of the Attachment, the Debt might have been well attached in this Action: In the said Case of Pierse and Calcot not denied.

but S. P. does not clearly appear; but said, that if Goods are attached, the Value ought to be found before Judgment.

(I) How the Proceedings may be in the Forein Attachment.

1. WHere the Custom is to swear the Debt, it is no good Custom if it be alledged that the Plaintiff swore his Debt to be true, by himself, or by his Attorney; (a) for his Attorney cannot swear it to be a true Debt. Tr. 14 Car. B. R. between (b) Peirse and Calcot, per Curiam, adjudged upon a Demurrer. Intratur, Mich. 13 Car. Rot. 473.

(a) Cro. El. 713. S. P. adjudged.
(b) 1 Jon. 406. S. C. adjudged.

2. If *A.* affirms a Plaint against *B.* and upon *nihil* returned it is surmised, that *C.* hath Money in his Hands due to *B. &c.* and the Money is attached in the Hands of *C.* who appears upon the Attachment, and pleads that he owes nothing to *B.* This is a good Plea to a common Intent. *Hill.* 32 *El.* between (c) *Tross* and *Michel*, *Cro. El.* 172. adjudged upon a Writ of Error upon a Judgment in *Exeter*, and the Judgment against *C.* given upon Demurrer reversed for this Reason principally, though objected *C.* might have Money in his Hands which was attachable, and yet no Debt, as if he had Money to keep, *&c.* But it was also assigned for Error, that *A.* had Judgment to recover Costs against *C.* which are not recoverable in a Forein Attachment, and no Judgment was given that *C.* should be discharged against *B.*

(c) 1 Leon. 321. S. C. upon a Writ of Error accordingly.

(K) Who shall have it, and against whom.

1. IF A. recovers Debt against B. in London, B. may attach this Debt in his own Hands for so much due to him. Pasch. 32 El. B. R. between (a) Kerry and Bowyer, admitted. Trin. 32 El. B. R. same Case admitted. Mich 11 Jac. B. between Lopas and Holman.

(a) Cro. El. 186. S. C. & S. P. admitted.

2. A Debt due to an Administrator (b) may be attached (c) within the Custom, for an Administrator is within the Custom. Mich. 12 Jac. B. R. between (d) Spinke and Tenant, per Curiam.

(b) Cro. El. 843.
(c) But where the Custom was laid to affirm a Plaint against the Administrator, &c. this did not warrant an Attachment made upon a Plaint affirmed against the Ordinary before Administration committed, &c. 2 Jon. 165, 166. adjudged.
(d) 1 Rol. Rep. 105, 106. S. C

3. If in Bar of an Action a Forein Attachment is pleaded, that the Custom is, that if any Man brings his Action against another for any Debt, and upon a Return made, that he non est inventus, & quod nihil unde, &c. and thereupon surmises that any other is indebted to the Defendant in such a Sum, and thereupon to pray Process to attach the Sum in his Hands and to defend, ita quod the Defendant appears to answer the Plaintiff, and the Serjeant returns that he hath attached him to defend the Sum in his Hands, and the Defendant does not appear at four Courts after, &c. that Judgment shall be to recover it in his Hands, &c. this is no good Custom without a Surmise that the Stranger who is indebted to the Plaintiff is within the Jurisdiction of the Court, and the Return of the Serjeant is not sufficient that he hath attached him to defend it in his Hands, for perhaps the Serjeant intends that he may attach the Debt in his Hands, though he be not within the Jurisdiction of the Court, and his Return shall not bind the Party without an actual Surmise thereof by the Party himself. Trin. 11 Car. B. R. between Sir Nicholas Halse and Walker, adjudged upon a Demurrer, where a Forein Attachment in Exeter was pleaded, which was all one with the Custom of London, and all Customs there confirmed by Parliament in the Time of Queen Elizabeth.

4. The Custom of London is, that if any Plaint be affirmed in London, before, &c. against any Man, and it is returned nihil, if the Plaintiff will surmise, that any Man within the City is Debtor to the Defendant in any Sum, he shall have Garnishment against him for him to come in to answer, if he be indebted in the Form as the other hath alledged, and if he comes and does not deny it, then this Debt shall be attached in his Hands, &c. So note, that the Plaintiff ought to surmise, that the other Man who is indebted to the Defendant is within the City. (f) 22 E. 4. 30. per Starkey, the Recorder of London, the Custom so certified.

(f) Fitz. Custom 5. S. C. Br. Bar 92. S. C.

5. Whether the Custom of Forein Attachment holds between a Citizen and Foreiner, quære, D. 3 El. 196. 42.

Fol. 555.

(L) (a) Pleader of a Judgment in a Forein Attachment in Bar of an Action in other Courts.

(a) Vid. Fern and Stubbs, Godb. 400, 401. Lat. 228. —Whether the Debt must be alledged to have arose infra Jurisdictionem. 1 Vent. 236.

1. By the Custom of a Foreign Attachment of London, if A. sues B. in London, &c. and C. is indebted to B. in the same Sum, and the said C. is condemned there to A. according to the Custom, and Judgment given against him accordingly; yet if no Execution be sued against C. A. may resort to have Judgment and Execution against B. his principal Debtor, and B. may sue C. for his Debt notwithstanding the unexecuted Judgment. D. 7 E. 6. 82. 72. by Brook, Recorder of London, this certified to be the Custom of London.

(b) Godb. 401 Lat. 228. (c) A Custom for a Forein Attachment before some Default in the Defendant, is naught. 1 Vent. 236.

2. In Bar of an Action brought in B. R. if the Defendant pleads a Judgment in a Forein Attachment in Bar, and alledges the Custom to be, that if the Plaintiff in the Court hath Process against the Defendant, and upon a nihil (b) returned, makes a Surmise that B. is indebted in so much to the Defendant, and upon his Prayer to attach it in his Hands by Process, and he does it accordingly, and if the (c) Defendant makes Default at four Courts after that, by the Custom, at the last of the said four Courts, the Plaintiff may pray Process against B.

to come in and shew Cause wherefore the Judgment should not be against him at the next Court after, and when he comes to apply this Custom to his Case, he shews that there were four Defaults, and that at the Fourth Default the Plea was continued for several Courts, and then Process went against B. and then after Judgment against him; (d) this is not warrantable by the Custom, inasmuch as he shews by the Custom it ought to be at the next Court after the Four Defaults. Trin. 11 Car. B. R. between Sir Nicholas Halls and Walker, per Curiam, upon Demurrer adjudged.

(d) Moor 570. Pl. 779. like Point.

3. Co. 9. Machally 68. b. resolved by all the Justices and Barons, that after the Plaint entered in the Book of the Porter of London and before the Entry thereof in the Court before the Sheriff, the Defendant may be arrested by the Custom of London.

4. By the Custom of London, after the Plaint entered as in the said Case before, or before the Plaint entered, if it be afterwards entered, any Serjeant ex Officio, at the Request of the Plaintiff, may arrest the Defendant absq; aliquo preceptore tenus vel aliter, and this Custom was allowed to be good by all the Justices and Barons. Co. 9. Machally 67, 69. b.

5. By the Custom of London, after a Plaint entered as before, the Defendant may be arrested by his Body, by a Precept in Nature of a Capias ut supra, before any Summons, and yet it is allowed to be a good Custom by all the Justices and Barons, inasmuch as it is established and confirmed by Parliament. Co. 9. Machally 68.

6. Co. 9. Machally 69. b. it was objected, that the Custom of London is not good, in that the Entry of the Plaint, upon which the Party was arrested ut supra, was without Form, and so short and obscure, that opus est interprete: By all the Justices and Barons the Custom is allowed, for that this was but a short Remembrance to draw the Declaration at large afterwards in the Court of Pleas, which by the Custom is sufficient to arrest him.

7. If in Debt upon an Obligation of 100 *l.* conditioned for the Payment of 50 *l.* at a Day, the Defendant pleads, that before the Day of Payment of the 50 *l.* it was attached in his Hands by a Creditor of the Plaintiff, *&c.* and that after the Day, upon a *Scire Facias* against him, according to Custom, he paid it; this is a good Bar of the whole, because the Attachment being made before the Day of Payment, it became a Debt to the Creditor, and the Obligee could take no Advantage of a Breach of the Condition afterwards. *Pasch.* 19 *Car.* 2. between *Robbins* and *Staudard*, 1 *Sid.* 327. adjudged.

8. (e) But if the Attachment had been of 20 *l* only, it might have been pleaded in Bar (f) of so much. *Pasch.* 16 *Car.* 2. 1 *Sid.* 327. *per Curiam.*

(c) Godb. 196. Ow. 2.
(f) Moor 598. Pl. 820.

(M) What Persons shall be within the Custom.

1. Co. 5. (a) Snelling 82. b. adjudged, that when the Custom is, that if Two Citizens of London make a Contract, and that he that ought to pay the Money dies, his Administrator shall be bound to pay it as well * as if it were by Obligation, that this is a good Custom, because the Administrator was chargeable at Common Law; and by the Statute the Name of the Charge is only changed, but the Substance remains all one; and

(a) Cro. El. 409. S. C. adjudged.
* Fol. 556.
Noy 53. S. C. adjudged.

and resolved also, that the Stranger, which is no Citizen, after such Debt recovered against the Administrator by a Citizen, shall be bound by this Custom.

(b) Br. Devise 51. S. C. (c) Br. Customs 41. S. C. Fitz. 7. S. C.

2. (b) 11 H. 7. 21. cited in D. 8. 9 El. 255. 3. Fitzwilliams Recorder certified, that by the Custom of London, a Foreigner as well as a Citizen and Freeman of London, may devise his Lands or Tenements in Fee. (c) 5 H 7. 10. & 19. (d) per Brian.

(d) Br. Devise 22. S. C. Fitz. Custom 8. S. C.

3. Doctor and Student 21. There is a Custom in London, that Freemen there may by their Testament enroll'd, devise the Lands of which they are seised, to any except Mortmain; but 30 H. 8. S. 132. in London, a Man may by Testament devise to a common Person, though the Testament be not enroll'd.

(e) Br. Customs 41. S. C. Fitz. S. C. (f) Br. Devise 22. S. C. Fitz. Custom 8. S. C.

4. (e) 5 H. 7. 10, & (f) 19. b. per Brian, none may devise to (g) Guilds and Corporations in London, unless he be a Citizen and Freeman; and he may, D. 8, 9 Eliz. 255. 3. intended, that this Devise is to be made to a Corporation within the City only, and not out, and made a Quære.

(g) By the Custom of London, a Freeman may devise to a Corporation of London, a Citizen may devise to any Man, and a Citizen and Freeman may devise in Mortmain. Moor 136. Et vid. 3 Bulf. 16.

5. Vid. D. 8, 9 El. 255. 7. Devise of Lands in London to Trinity College in Cambridge, and by all the Justices 'tis good by the Statute of 1 & 2 P. M. and nothing is said of the Custom.

6. Doctor and Student 21. Citizen and Freeman may devise in Mortmain. 30 H. 8. S. 132. And he that makes such Devise ought to be a Citizen and Freeman, and ought to be resiant.

(h) Br. Customs 7. S. C.

7. (h) 45 Ed. 3. 26. b. adjudged, that a Citizen not resiant, taxable, or inheritable, cannot devise to St. Mary-Overy in Mortmain; and there it is said that so it had been adjudged before this Time. (i) 38 Ass. 18. adjudged.

(i) Br. Mortmain 37. S. C.

8. But there it is agreed by Finchden, that Citizens born and inheriting in London, by Way of Heritage, or Resiants, and taxable to Scot and Lot, may devise in Mortmain Lands of which they are seised in Fee: But D. 8, 9 El. 255. 3. cited the (k) 45 E. 3. to be, that such Devise cannot be made in Mortmain unless by a Citizen or Freeman; but the Book is contrary. (l) 38 Ass. 18. agreed.

(k) Br. Customs 7. S. C.

(l) Br. Mortmain 37. S. C.

9. 30 H. 8. S. 132. Such Testament ought to be enroll'd ad proximam Hustings.

10. Doctor and Student 21. puts the Devise in Mortmain by Testament enroll'd, but none of the other Books makes any Mention thereof.

(m) Fitz. Custom 8. S. C.

11. (m) 5 H. 7. 19. b. per Brian, this Custom came by Grant of the King.

12. Co. 8. 129. Case of the City of London, it is said, that in London, Citizens and Freemen by their Custom may devise in Mortmain, notwithstanding the Statute of Mortmain be to the contrary, for the Customs are confirmed by Act of Parliament.

13. D. 28, 29 H. 8. 33. 12. the Custom of London is, that a Man may devise his purchased Lands in Mortmain.

14. 12 El. D. 290. 61. admitted and adjudged, that a Recovery suffered by Baron and Feme, of the Lands of the Feme, is as strong to bind the Right of the Feme-Covert by the Custom of London, as a Fine at Common Law. Vide such Custom in Wales. 21 El. D. 363. 26.

(N) Cuſtoms of Things.

Fol. 557.

1. C. 5. Snelling 82. admitted by Judgment a good Cuſtom, that if a Contract be made by Two Citizens, and he that ought to pay the Money dies inteſtate, his Adminiſtrator ſhall be bound to pay it as well as if it were by Obligation. (a) Cro. El. 409. S. C. admitted. Noy 53. S. C. admitted.

(O) (*) Cuſtoms of *London*.

(*) 2 Rol. Abr. 579, 580, 581. vide.

1. There is a Cuſtom in London, that when a Chaplain keeps any Woman in his Chamber ſuſpitiouſly, a Man may come to his Chamber with the Beadle of the Ward, and enter the Chamber and ſearch. 2 H. 4. 12 b.

2. It is no good Cuſtom in London, that if any Perſon dies within any Pariſh in London, and is carried out of the Pariſh to be buried in any other Pariſh, if he is buried in the Chancel or otherways, he ſhall pay ſo much to the Parſon of the Pariſh where he died, as he ſhould have paid if he had been buried there in the Chancel, or otherways, as where he was buried; for this Cuſtom is againſt Reaſon, that he that is not any Pariſhioner, but paſſing through the Pariſh, lies at an Inn for a Night, ſhould be forced to be buried there, or to pay as if he had been buried there. Hobert's Reports (a) 238. between Topſal and Ferrers. (a) Hob. Fol. 175.

S. C. 1 Rol. Abr. 559. Pl. 1. S. C.

3. (b) The Cuſtom of London is good, that if a Villein abides in London for a Year and a Day, that he ſhall not be taken, nor put out by Writ de nativo habendo, nor by any Proceſs thereupon iſſuing. (c) 7 H. 6. 32. dubitatur. 8 H. 6. 3. b. for this is not more than is in ancient Demeſn. (b) Moor 2. Pl. 4. S. P. adjudged. (c) Br. Cuſtoms 23. S. C. Br. London 6. S. C.

4. By the Cuſtom of London, no Attaint lies for a falſe Verdict given in London. (d) 7 H. 6. 32. b. (d) Br. Cuſtoms 23. S. C.

5. It is a good Cuſtom in London, that the Mayor of London may take Recognizances of any Perſons being of full Age, or Women unmarried, (e) for he is a Judge of Record, and though perhaps the Debt grew due out of London. Dubitatur, Tr. 32 El. B. R. between (f) Chamberlain and Thorp. (e) And the Courts above will take Notice thereof.

1 Leon. 284. (f) Cro. Eliz. 186, 187. S. P. dubitatur. 1 Leon. 130. S. P. dubitatur.

6. It is a good Cuſtom of London, That they Time out of Mind have uſed to have a meaſuring of Coals infra Portum London, (g) which extends from Staines-bridge to London-bridge, and from thence to Graveſend, and from thence to Yenland, or Yendale, and all this is the Port of London. Mich. 11 Ja. B. between the City of London and Manly, per Curiam. (g) 4 Inſt. 250. 1 Sid. 148. (h) 2 Bulſ. 192, 193. (i) Unmarried, and above the

7. (h) It is a good Cuſtom in *London*, that if an (i) Infant binds himſelf (k) (l) Apprentice by (m) Indenture, with Covenants com-

Age of 14. 2 Rol. Rep. 305. Palm. 361. 2 Bulſ. 192. 1 Mod. 271. (k) Cuſtom in London to put over an Apprentice to another. March. 3. (l) To a Citizen and Freeman of London. 2 Bulſ. 295. Moor 136. (m) If not enroll'd before the Chamberlain within the Year, upon a Petition in French to the Mayor and Aldermen, &c. a Sci' Fa' ſhall iſſue to the Maſter, to ſhew Cauſe why not enroll'd; and if it was through the Maſter's Default, the Apprentice may ſue out his Indentures: Otherways if through the Fault of the Apprentice, as if he would not come to preſent himſelf before the Chamberlain, &c. for it cannot be enroll'd unleſs the Infant is in Court, and acknowledges it. 2 Rol. Rep. 305. Pal. 361. Et vid. 1 Mod. 271.

prized therein, that he ſhall be bound by theſe Covenants as if of full Age. *Trin.* 25 *Eliz. Stanton's* Caſe, *Moor* 135. *Pl.* 280. admitted.

8. It is a good Cuſtom in *London*, That if a Feme-Covert trades by her ſelf in a Trade with which her Husband does not intermeddle, and thereby contracts Debts, that ſhe ſhall (n) be ſued for them, and her Husband named only for Conformity; and that if Judgment be given againſt them, that ſhe only ſhall be taken in Execution. *Paſch.* 3 *Car.* 1. between (o) *Langham* and the Wife of *Bewel*, *Cro. Car.* 69.

(n) So ſhe may ſue. 1 Leon. 131.

(o) 1 Mod. 26. S. C. cited; and ſaid, that it was reſolved in this Caſe, though not reported by Croke, that if the Wife uſes the ſame Trade that her Husband does, ſhe is not within the Cuſtom: But for this, vid. the Caſe in Croke, and Lit. Rep. 31, 32. S. C. Hetl. 9. S. C. Et vid. 2 Brownl. 218.

9. By the Cuſtom of *London*, a Tenant at Will under the yearly Rent of 40 *s.* ſhall not be turned out without a Quarter's Warning, and (p) ſuch Tenant paying above 40 *s.* yearly Rent, ſhall not be turned out without half a Year's Warning. *Mich.* 1657. between *Dethich* and *Saunders*, 2 *Sid.* 20.

(p) A Cuſtom, that Tenant for Years ſhall hold for half a Year after his Term ended is not good. Moor 8. Pl. 27. Palm 212.

10. It is a good Cuſtom in *London*, if a Freeman foreſtals Fiſh coming to a Market within the City, and upon Complaint to the Court of Aldermen he appears there, and confeſſes the Fact, and they order that he ſhall deſiſt, and he will not promiſe to obey, *&c.* that they may (r) commit him until he ſignifies to the Court that he will conform. *Paſch.* 23 *Car.* 2. the City of *London* and *Coates.* 1 *Vent.* 115. adjudged.

(r) Cuſtom to commit for refuſing to ſerve on the Livery. 2 Levin. 200. —To fine and impriſon for opprobrious Words ſpoke of an Aldermen. 1 Vent. 327. 1 Levin. 200. Et vid. Cro. El. 689. —To impriſon for diſturbing the Election of a Warden of a Company, and for not promiſing not to diſturb again. Styl. 78. dubitatur. —To impriſon till he takes the Oath of an Alderman of London. March 29.

(a) (b) Cuſtoms.

Fol. 558.

(a) Mid. Title Preſcription, and the Diviſions thereof.

(b) A Preſcription ought to ſtand upon Reaſon, but a Cuſtom cannot have Commencement but by Parliament, and not by Grant, as Borough-Engliſh, &c. 2 Bulſ. 106. — And a Cuſtom ſhall be preſumed ſo to commence. 1 Rol. Rep. 46. per Coke. (c) Time and Uſage the eſſential Parts of a Cuſtom. Co. Lit, 110. b. (d) What Cuſtoms cannot be alledged in an Upland Town. Co Lit. 33. b. 110. b. (e) But a Cuſtom, that if a Copyholder leaſes for one Year, that it ſhall determine by his Death, is good. Lit. Rep. 233. Hut. 101, 102. Hetl. 126, 127. —But a Cuſtom that it ſhall determine upon his Surrender to the Lord is void, elſe he might deſtroy the Eſtate which he himſelf had made. Hut. 101, 102. Hetl. 126, 127.

(A) (c) What Cuſtoms are good.

What Cuſtoms are good in Reſpect of the Eſtates that ſhall be bound by them.

D. 19 El. 357. 46. adjudged, That the Cuſtom of a (d) Town, that a Tenant in Fee of Socage-Land ſhall not deviſe or grant Leaſes for more than Six Years, and if he does, that the Leaſes ſhall be void, is a Cuſtom againſt common Reaſon, and (e) the Liberty of a Fee-Simple. (ſemble, the Book intends a Deviſe by the Statute.)

(B) Gavelkind.

1. (a) P. 4. E. 1. b. Rot. 2. Margeria, quæ fuit Uxor Johannis Godfrey, petit verſus Willielmum de Dagenham Medietatem, &c. Defendens dicit, quod Conſuetudo de Gavelkind (unde prædictum Tenementum tenetur) talis eſt, quod Vidua amittet Dotem, ſi fornicata vel maritata fuerit, & quod dicta Margeria peperit Filium de quodam Willielmo A. poſt Mortem Viri ſui, ob quod debet amittere Dotem. Margeria concedit talem eſſe Conſuetudinem, & dicit quod nunquam fuit convicta, ſecundum quod convinci debet ſecundum Legem de Gavelkind, dicit enim quod ipſe inquiſiviſſe debuit per Inſidias quando ipſa fuit in parturiendo, & tunc debuiſſet ipſam cum Puero ſuo cepiſſe cum Clamore & Huteſio; unde deficut ipſa nunquam convicta fuit ſecundum Legem de Gavelkind, petit Judicium ſi debet repelli a Dote. Defendens dicit, quod fornicata eſt, ideo veniat Jurata, &c. Et Jurata dicit, quod talis eſt Conſuetudo ut ſupra, & quod ipſa eſt fornicata, & non eſt neceſſe quod ipſa capiatur cum Puero ſuo in parturiendo cum Huteſio & Clamore. Ideo Margeria in Miſericordia, & Defendens ſine Die.

(a) Raym. 76. S. C. cited. 1 Sid. 136. S. C. cited.

(C) What Cuſtoms are good, what not.

1. CONſuetudo ex certa Cauſa rationabili uſitata privat communem Legem. Lit. 37. Davies 1. 32.

(D) What

(D) What Cuſtoms are good.

What Cuſtoms ſhall be good in Deſtruction of a Preſcription.

1. CO. 9. William Aldred 58. b. is cited, that the 29 El. (a) Bland brought an Action upon the Caſe againſt Moſely, and counted, That whereas Time out of Memory, &c. there had been Seven Lights to his Houſe, the Defendant in York City had erected an Houſe upon his Land, and ſtopped them, to which the Defendant ſaid, That the Cuſtom of the City is, &c. that ſuch Obſtruction ſuper Terram ſuam per Edificationem is lawful; and adjudged not good, becauſe the Cuſtom (b) cannot take away the Preſcription, and it may be that the Preſcription began by Grant: Quære, for there is (c) ſuch Cuſtom in London.

(a) Yelv. 216. S. C. cited, and ſaid, the Cuſtom being alledged to ſtop Lights by building upon a new Foundation where no Houſe was before, was adjudged void, elſe a Man's Houſe might on every Side be encompaſſed with Buildings, and he ſhould loſe all his Lights. 1 Rol. Abr. 566. Pl. 2. S. C. (b) One Preſcription may be pleaded againſt the other, where they may ſtand together. Godb. 113. 2 Mod. 104, 103. (c) The Cuſtom there is to build upon the old Foundation to any Height, though the Lights of a Neighbour are ſtopp'd thereby; and this is a good Cuſtom, tending to the Peopling of Cities, and Encouragement of Trade, &c. Hughs and Keine, Yelv. 215, 216. per Curiam, though Judgment was given upon another Point 1 Bulſ. 115, 116. per Curiam. Godb. 183. per Curiam.

Fol. 559.

(E) (a) What ſhall be againſt the Law of Reaſon.

(a) Vide Moor 588. Bridg. 11, 12. 1 Leon. 217, 314. 3 Leon. 41, 42. —A Cuſtom to elect a Canon before any Vacancy ridiculous and void. 2 Jon. 199.

1. IT is not a good Cuſtom in London, that if any Stranger comes into any Pariſh in London, and dies there, and his Body is carried and buried out of the Pariſh, that ſo much ſhall be paid for his Burial, and other Things belonging thereto, as for the Sermon, &c. to the Pariſh where he dies, as is paid in the Place where he is buried; for this is againſt Reaſon to bind Strangers by ſuch a Cuſtom for Burial, who are not compellable to come to the Church to receive the Sacraments there. P. 15 Ja. B. (b) Sir J. Ferris's Caſe, reſolved per Curiam, and a Prohibition granted accordingly upon a Suit in the Spiritual Court by the Pariſh of St. Buttolph, London, where the Party died, for theſe Duties.

(b) 1 Rol. Abr. 557. Pl. 2. S. C. Hob. Fol. 175. S. C. adjudged.

2. It is a good Cuſtom, That whereas J. S. is ſeiſed in Fee of the Manor of T. and all the Tenements in the ſaid Town are held of the ſaid Manor, that he and all thoſe, &c. have had Time out of Mind, &c. a Bakehouſe, Parcel of the ſaid Manor, maintained at their Charge, and that this Bakehouſe was ſufficient to bake Bread for all the Inhabitants, and for all Paſſengers through the ſaid Town, and the Bread there baked had uſed, &c. to be ſold at reaſonable Prices, and that no other Perſon within the ſaid Town had uſed to bake any Bread to ſell, to any Perſon: This is a good Cuſtom, though it reſtrains other Men to exerciſe their Trades within a certain Place. H. 32 El. B. R. between (c) Sir G. Farmer and Brooke, per Curiam, M. 32, 33 El. B. R. adjudged, for this might have a reaſonable Beginning to bind his own Tenants as this only does. Co. 8. 125.

(c) Cro. Eliz 203, 204. S. C. adjudged 1 Leon. 143. S. C debated. Ow. 67. S. C. adjudged con. 8 Co. 125. S. C. cited to have been adjudged per totam Curiam. 2 Bulſ. 195. S. C. cited to have been adjudged. 3 Bulſ. 61. cited; and ſaid, That it muſt be averred, that the Oven is ſufficient to ſerve all.

3. If there be a Cuſtom within a Pariſh, That the Parſon of the ſaid Pariſh ought yearly to find a Bull and a Boar within the ſaid Pariſh, for the Encreaſe of Cattle, for the Maintainance of Hoſpitality; and that in Conſideration thereof the Parſon ſhall have the Tenth of the Encreaſe, &c. This is a good Cuſtom, for it is grounded upon a good Conſideration, inaſmuch as the Parſon ſhall have the Tythe and Tenth of the Encreaſe. (d) Tr. 39 El. B. R. per Curiam.

(d) Yielding and Fay S. C. Cro. Eliz. 569. adjudged. Moor 355. Pl. 381. admitted.

4. It is a good Cuſtom, that where he and all, &c. have Time out of Mind been ſeiſed of a Mill in the Pariſh of D. that all the Inhabitants within the ſaid Pariſh ought to grind all the Grain that they expend in their Meſſuages or Tenements at the ſaid Mill: This is a good Cuſtom, though all the Inhabitants are not his Tenants. M. 11 Ja. B R. between (e) Higgs and Gardiner, adjudged, (f) for this Cuſtom may have a reaſonable Beginning, as by Compoſition upon building the Mill.

(e) 2 Bulſ. 195, 196. S. C. adjudged.

(f) But a Cuſtom that the Lord ſhall have the beſt Beaſt of every Perſon dying within his Manor, which is found there, is naught, for between the Lord and a Stranger, it could have no lawful Commencement, though between the Lord and his Tenants it may be good. Cro. El. 725. adjudged. 2 Rol. Abr. 266. Pl. 1.

5. A Cuſtom againſt Reaſon is void. D. 1. Taniſtry 32. b.

6. A Cuſtom which is injurious and prejudicial to a Multitude, and beneficial only to ſome particular Perſon, is repugnant to the Law of Reaſon. Davies 1. Taniſtry 32. b.

7. A Cuſtom in a Town for a Lord to enter into the Lands of his Tenant, till an Agreement made for the Arrears when the Tenant ceaſes for two Years, is not good, for it is an ill Uſage to ouſt a Man of his Inheritance. (g) (h) 43 E. 3. 32. Curia.

(g) Without Action or Anſwer. 2 Inſ. 56, 47. (h) Fitz. Cuſtom 15. S. C. 1 Bulſ. 115. S. C. cited.

8. But if this Cuſtom had extended it ſelf into many Towns, it had been good. (i) 43 E. 3. 32.

(i) Fitz. Cuſtom 15. S. C.

9. It is a good Cuſtom, that the Tenants of the Manor ought of themſelves to chooſe a (ii) Bedle to collect the Rent and Amercements of the Manor, and * that if the Bedle be not ſufficient, that the Tenants ſhall anſwer them to the Lord. (k) 44 E. 3. 13. (l) 11 H. 4. 2. 11 H. 6. 52. b.

* Fol. 560.

(iii) For his Office-Oath and Derivation of his Name, vid. Co. Lit. 234. b. (k) Fitz. Avowry 73. S. C. Br. 25. S C. (l) This is miſprinted in the Original as here; but I ſuppoſe ſhould be 14 H. 4. 2. which vid. Br. Cuſtoms 18.

10. Alſo the Cuſtom is good, if it be beyond this before, that if the Bedle elected by the Tenants refuſes to do it, that he ſhall be amerced, and that the Lord may diſtrain him till he hath found Sureties to perform his Office, though the Tenants are to anſwer for him. 11 H. 6. 52. b.

11. It is a good Cuſtom, that the Lord of the Town ſhall have to his Fold the Sheep of Strangers which come upon the Land of his Tenants, and not the Tenants. (m) 46 E. 3. 13.

(m) Br. Cuſtoms 8. S. C.

12. It is a good Cuſtom, that when a Man hath agiſted his Cattle in my Park, in the Time of a great Snow, for Neceſſity to cut the Branches of the Oaks for them, (n) 46 E. 3. 12. b. admitted, but ſuch Uſage is not ſufficient, unleſs it hath been Time out of Mind, &c.

(n) Fitz. Brief 599. S. C.

13. It is not a good Cuſtom in a Leet, that if the Petit 12. make any falſe Preſentment, and it is found falſe by the

Grand Inqueſt, that the Petit 12. ſhall be amerced, for this is againſt common Right, and Extortion. (o) 9 H. 6. 44. b. Curia.

(o) Fitz. Cuſtom 1. S. C. Br. 3. S. C.

14. But it is a good Cuſtom, that if they conceal any Thing that ought to be preſented, that they ſhall be amerced, (p) 9 H. 6. 44. b.

(p) Fitz. Cuſtom 1. S. C. Br. 3. S. C.

15. (pp) It is a good Cuſtom, that every Man of the Town that hath an Houſe next adjoining and abutting to the High-ſtreet, may ſell all Merchandizes in his Shop within the ſaid Houſe, in the Time of the Market which is held in the High-ſtreet. (q) 11 H. 6. 19. b. 25.

(pp) 8 Co. 127. S. P. con. But for this, vide 2 Rol. Abr. 123. B. 1. and the Notes there.

16. (r) It is a good Cuſtom, that a Copyholder in Fee may (s) cut down (t) Trees, and ſell them at his Pleaſure. P. 6 Ja. B. between Glaſcock and Peche.

(q) Br. Preſcription 98. S. C. 1 Jon. 245. S. P. per Curiam. (r) For this, vid. Dal. 8. Noy 2. Hob. 11. 1 Bulſ. 50. 2 Brownl. 85. Godb. 234, 235. 3 Bulſ. 81. Winch. 1. Styl. 233. (r) Whether ſuch Copyholder may dig for Mines. 1 Sid. 152.

(u) 1 Bulſ. 158. S. P. reſolved per totam Curiam.

17. (u) But otherways it is of a Copyholder for Life. P. 6 Ja. B. Tr. 7 Car. B. R. between (w) Rooke and Huggins, adjudged upon a Special Verdict per totam Curiam, where the cutting of Elms by a Copyholder for Life by ſuch Cuſtom was adjudged a Forfeiture, and cited. (x) Powel and Peacock adjudged. Hobert's Reports 16. ſaid by Warburton to have been lately adjudged.

(w) Cro. Car. 220, 221. S. C. adjudged. 1 Jon. 245. S. C. adjudged. (x) Cro. Jac. 29. S. C. adjudged; and being pleaded, quod quilibet Cuſtomarius tenens might, &c. the Cuſtom was held too large and unreaſonable, for him that had but for a Month, or at Will, to cut down Trees. Noy 2. S. C. cited. Cro. Car. 221. S. C. cited. 2 Brownl. 89. S. C. cited.

18. It is a good Cuſtom, that a Copyholder for Life, who by Cuſtom may name his Succeſſor, may cut Timber-Trees, and convert them at his Pleaſure, for he is quaſi a Copyholder in Fee. Tr. 10 Ja. between (y) Rawles and Maſon, per Curiam.

(y) Cro. Car. 221. S. C. cited. 1 Brownl. 132. S. C. 2 Brownl. 95, 86. S. C. fully debated; 192, 193, &c. 202. adjudged per totam Curiam.

19. A Cuſtom within a Pariſh, that all Lambs fallen and bred upon one Tenement in the ſame Pariſh, though belonging to ſeveral Owners, ſhall be reckon'd together as if but one Man's, and the Tenth ſo counted together paid for Tythes, is void and unreaſonable, for by this Means it might happen, that a Man might have but one Lamb, and that ſhould be taken for Tythe, and he that had more ſhould pay nothing. *Mich.* 18 *Jac.* between *Barker* and *Cocker*, *Hob.* 329. adjudged.

(F) What Things may be done by Cuſtom.

1. IT is a good Cuſtom, That when one goes to plough, that he may turn his Plough upon the Land next adjoining, be it ſow'd or not. (a) 22 E. 4. 8. b. adjudged; but (b) 21 E. 4. 28. b. dubitatur.

(a) Br. Cuſtom 51. S. C. Br. Treſpaſs 351. S. C.

(b) Br. Cuſtom 51. S. C. Br. Treſpaſs 351. S C.

(c) 5 Co. 84. S. S.

2. (c) It is a good Cuſtom to dry Nets upon the Land of another Man, in Favour of Fiſhing and Navigation. Davies 1. Taniſtry 32. b.

3. It is no good Cuſtom, That none ſhall put his Cattle into his Land before the Lord, for it is not reaſonable that if the Lord will not put in his Cattle, that the Tenants ſhall loſe the Profit of their Soil; but if a Day is limited 'tis otherways. (d) 21 E. 4. 28. b. (e) 2 H. 4. 24. b. Davies 1. Taniſtry 32. b.

(d) Br. Cuſtom 51. S. C.

(e) Br. Cuſtom 12. S. C. Fitz. 10. S. C.

4. It is a good Cuſtom, That none ſhall put in any (f) Cattle in certain Lands after the Corn cut and (g) Vines till Michaelmas following, but that Two Men ſhall have their great Cattle there to take the firſt Seiſin of the Paſture; and this Cuſtom is good againſt the Lord alſo. (h) 48 E. 3. 23. b.

(f) In the Original 'tis Dwels.

(g) In the Original 'tis Vines.

(h) This is miſprinted in the Original as here, and I ſuppoſe ſhould be 46 E. 3. 23. b.

Fol. 561.

5. It is no good Cuſtom, That the Lord of the Manor ſhall detain a Diſtreſs taken upon the Demeſns till a Fine at his Will paid for the Damage. Lit. 46. Davies 1. Taniſtry 33.

6. A Cuſtom, That the Lord may take for his Heriot (i) the Beaſt of a Stranger, levant and couchant upon the Land of the Tenant, is not good. (k) D. 3. El. 199. Davies 1. Taniſtry 33.

(i) So where the Cuſtom was laid, that if the Tenant hath none, or the beſt Beaſt is eſloin'd, the Lord has uſed to take the beſt Beaſt levant and couchant upon the Land. Wilſon and Wiſe, Moor 16. Pl. 58. adjudged. N. Bendl. 112. Pl. 147. adjudged. Et vid. N. Bendl. 302. Pl. 294. Dal. 61. Ow. March 165. that the Cattle of a Stranger may be diſtrained for an Heriot, but not ſeiſed. (k) 2 And. 153. S. P. cited.

7. A Cuſtom, That the Lord of the Manor ſhall have 3 d. for a Pound Breach of every Stranger is not good. (l) 21 H. 3. 40. Da. 1. Taniſtry 33. (m) 11 H. 7. 13, 14. (n) But it is good againſt the Tenants of the Manor. (o) 11 H. 7. 13.

(l) Br. Preſcription 40. S. C. Fitz. 67. S. C. Cro. El. 725. S. C. cited.

(m) Br. Preſcription 106. S. C.

(n) So of a Cuſtom, That if a Tenant makes a Reſcous, or drives his Cattle off the Land when the Lord comes to diſtrain, that he ſhall be amerced by the Homage, &c. Godb. 135.

(o) Br. Preſcription 106. S. C.

8. Where by Cuſtom the Homage of the Manor hath uſed Time out of Mind to make By-Laws, for the better ordering the Tenants of the Manor, touching their Common, under a Pain, it is a good Cuſtom, that the Lord of the Manor hath uſed Time out of Mind, &c. to diſtrain the Cattle of him that broke the By-Laws for the Penalty in any Place within the Manor, though it be within the proper Soil of the Lord, or others, and not in the Lands of the Offender, for this is not iſſuing out of the Land. D. 15 El. 322, 23. adjudged; but there 24 moved again in another Caſe.

(G) (a) What ſhall be againſt the Law of Reaſon.

(a) Where a Cuſtom to charge a Man's Inheritance for a Thing done in Preſervation thereof is good, 1 Sid. 151.

1. IT is a good Cuſtom, That the Corporation of Litchfield have had a Market there Time out of Mind, &c. and that the Corporation ought to repair the Way to it, and to appoint a Bellman that ought to ſweep the Market-place, and in Recompence thereof the ſaid Bellman Time out of Mind, &c. from thoſe that brought their Grain to the ſaid Market, and untied their Sacks there to ſell it, had uſed (b) to take a Pint of Grain, if it was but one Buſhel or under, but if it was above a Buſhel, then a Quart, to the Uſe of the ſaid Corporation: This is a good

(b) Where Toll is payable, vide Title Toll.

good Custom, for the Men that are charged by it have a reasonable Benefit thereby. P. 12 Ja. B. R. between (a) Hill and Hawkes, & Tr. 12 Ja. B. R. adjudged.

(a) Moor 835. Pl. 1124. S. C. adjudged, That the Custom was good, though the Corn was not sold, but brought in to be sold. 2 Bulst. 201, 206. S. C. adjudged. 1 Rol. Rep. 1, 2, 44, 46. S. C. adjudged.

2. It is a good Custom, That the Corporation of Gravesend have used Time out of Memory to maintain a Barge for Passengers between Gravesend and London, and (b) that no Foreigner ought to carry any Person from Gravesend to London without Licence of the Company of Watermen of Gravesend. M. 5 Ja. B. R. between (c) Pincocke and Saunders, adjudged upon Evidence at the Bar.

(b) 2 Brownl. 177, 178. vide.

(c) Raym. 327. S. C. cited.

3. It is a good Custom, That where the Bishop of Sarum was seised in Fee in the Right of his Bishoprick, of certain Mills within the City of Sarum, that all the Inhabitants resident within the City in any ancient Messuage held of the said Bishop, have used a Tempore, &c. (e) all their Grain by such Inhabitants in their said Houses spent, at the said Mills, and not elsewhere, without Licence, &c. to grind, and pay for the said Grinding; and in Consideration thereof, the Bishops, a Tempore, &c. (f) have used to keep Servants, &c. to grind, and Loaders to carry, &c. for here are mutual Considerations, and mutual Actions lie; for one is to grind there, and the other to maintain his Mills, and all Provision for Grinding. Hobart's Reports 256. between (g) Harbin and Green, per Curiam; though this extends as well to Grain bought as to Grain that grows upon their Tenements.

(e) The Custom laid so is unreasonable, for that Corn may be used in feeding Pullen, &c. which it is not proper to grind. Conton and Litleby, 1 Vent. 168. per totam Curiam. 2 Saund. 117. 2 Levin. 27. Et vid. Hard. 67, 68. 1 Levin. 15. (f) Styl. 421. (g) Hob. Fol. 189. S. C. Styl. 421. S. C. cited.

4. But such Custom is not good, if it extends to Grain sold in his House, to restrain such Inhabitant from selling Grain in his House * without grinding thereof. Hobart's Reports 256. between (h) Harbin and Green adjudged.

* Fol. 562.

(h) Hob. Fol. 189. S. C. adjudged: And per Hobart, though the Breach assigned had been only in Corn spent, yet the Action would not have lain, because the Custom being entire, is totally void, though some Part of it alone might be good in Law. Moor 887. Pl. 1247. S. C. adjudged.

5. It is no good Custom, That the City of *Norwich* hath Time out of Mind maintained a Key for unlading Goods brought up the River to the City, and that every Vessel passing through the River by the Key had paid a certain Sum, for the Vessels that unlade not at the Key, or other Place in the City, have no Benefit from the Maintainance of the Key. *Pasch.* 22 *Car.* 2. (i) *Anonymus*, 1 *Vent.* 71. adjudged; but said, the Custom might extend to such Vessels as received their Freight at the Key.

(i) Haspart and Wills, S. C. 1 Mod. 47. adjudged; and said, That if the Unlading had been at any other Place in the City, there would have been some Reason for it, or if it had appeared they had cleansed the River. 1 Sid. 454. adjudged.

6. If a Lord of a Manor which extends it self upon the Banks of Part of a River only hath Time out of Mind maintained a Key for the Lading and Unlading of Goods, and kept a Bushel within the Manor for the Measuring, and other Merchandizes, he cannot prescribe *ratione inde* for a Bushel of Salt of every Ship sailing in the River; for the Repairing the Key, and keeping a Bushel within the Manor, cannot warrant the Taking of Toll out of the Manor for Goods not brought to the Key within the Manor, though brought to another Place within

the ſame River. *Hill.* 25 & 26 *Car.* 2. between (k) *Prideaux* and *Warne*, 2 *Levin.* 96, 97. adjudged.

(k) Raym. 232. S. C. adjudged.

1 Mod. 104, 105. S. C. and the Court inclined accordingly.

7. It is a good Cuſtom, That the Mayor and Commonalty of *London* have had of every Maſter of a Ship 8 *d. per* Tun, in the Name of Weighage, for every Tun of Cheeſe brought from any Place in *England* to the Port of *London*; (l) for the Liberty of bringing it into the Port, which is a Place of Safety, is a ſufficient (m) Conſideration, and the Mayor and Commonalty have the View and Correction of the River *Thames*. *Mich* 33 *Car.* 2. between the Mayor of *London* and *Hunt*, 3 *Levin.* 37. adjudged upon a Writ of Error in *Cam' Scac'*, and the Judgment affirmed accordingly.

(l) Lit. Rep. 102.

(m) Relief by Bill in Equity for a Duty, tho' no Conſideration for it appeared. Lit. Rep. 103. 1 Pract 769. Pl. 1.

8. The Lord of a Manor may preſcribe to keep and repair a Wharf within the Manor, *& ratione inde* to have Toll of all Goods landed within the Manor, though not upon the Wharf, for the (n) Landing upon the Soil is an Eaſement, and all the Lands in the Manor were the Lord's originally, and this is in Nature of a (o) Toll-Traverſe. *Trin.* 7 *Will. & M.* between *Criſp* and *Belwood*, 1 *Lev.* 97. 3 *Lev.* 424. adjudged.

(n) 7 Co. 17. a.

(o) For this, vid. 2 Rol. Abr. 522.

9. It is a good Cuſtom within a Manor adjoining to the Sea, That in caſe of any Shipwreck of any Ship caſt upon the Manor *inter Fluxum & Refluxum Maris*, the Lord ſhall take Care of the Sick and Wounded, and Burial of the Dead, and keep the Goods there caſt for the Uſe of the Proprietors, and in Conſideration thereof, (p) to have the beſt Anchor and Cable of the Ship; for though Charity obliges the Lord ſo to do, yet it is not unreaſonable that he ſhould have a Recompence of his Charity and Charge. *Trin.* 3 *Will.* between *Simpſon* and *Bithwood*, 3 *Levin.* 307. adjudged.

(p) 3 Levin. 85. S P. adjudged con. no Cuſtom of Salvage appearing.

(H) What ſhall be good (a) Cuſtoms.

(a) To grant Copyholds in Reverſion, with Aſſent of the Copyholder in Poſſeſſion.

1. (b) IT is a good Cuſtom, that a Copyholder for Life may (c) nominate him that is to ſucceed him. Trin. 10 Ja. between (d) Rawles and Maſoon, per Curiam.

Goulſ 102, 105. 3 Leon. 226. Godb. 140. —To aſſign one to take the Profils of a Copyhold during the Minority of the Heir. 1 Leon. 266, 328. Cro. El. 224. —And in Prejudice hereof, the Copyholder by 12 Car. 2. cannot diſpoſe of the Cuſtody of his Children. 3 Levin. 395. —To make a Letter of Attorney to Two Copyholders to ſurrender his Copyhold after his Death. Styl. 211. dubitatur. 403. adjudged. (b) Noy 3. S. P. adjudged. (c) Per Moor 788. Pl. 1088. by Two Juſtices, ſuch Cuſtom to compel the Lord to make a Grant is not good: Secus if to compel an Admittance. (d) 1 Brownl. 132. 2 Brownl. 85, 86. S. C. fully debated; 192, 195, &c. 201. adjudged.

2. Jurata preſentat, quod eſt quædam Conſuetudo in Hundredo de Mid' in Kancia, quod ſi quis in Adulterio Prolem genuerit, & ipſe inde non poſſit ſe acquietare per Legem ſuam, aut recognovit Factum, ita quod convictus ſit, quod ipſe forisfaciet omnia Bona & Catalla ſua Domino Regi; & per hanc Conſuetudinem Ballivus Reginæ ſeiſivit omnia Bona cujuſdam Adulteri, pro quorum Captione nunc preſentatur; & fatetur quod talis habetur Conſuetudo in placitando hic. Mich. 21 E. 3. B. R. Rot. 10.

3. It is a good Cuſtom, That an Eſtate of Freehold and Inheritance hath uſed to paſs by Surrender without the Aſſent of the Lord in his Court, by Delivery over by the Bayliff to

the Feoffee, according to the Form of the Charter, to be inroll'd in Court or such like. Co. Lit. 59. b.

4. If the Lord of a Copyhold by Custom claims to have a Fine of the Copyholder upon every Alteration of the Lord, be it by Alienation or otherways, this is a void Custom as to the Alteration or Change of the Lord by the Act of the Lord himself; for by such Means the Copyholders might be oppressed by the Multitude of Fines by the Act of the Lord. Co. Lit. 59. b.

5. But it is a good Custom, That the Copyholder hath used to pay a Fine upon the Alteration of the Lord by the Act of God, as by Death of the Lord. Co. Lit. 59. b. Where is cited a Case to be resolved upon a Reference out of Chancery. Trin. 39 El. Armstrong's Case.

6. It is a good Custom, That a Copyholder hath used to pay a Fine upon every Alteration of the Tenant, be the Alteration (e) by the Act of God, or by the Act of the Party. Co. Lit. 59. b.

(e) For the Custom of the Honour of Glouceſter Fee, That every Tenant there dying seised of an Inheritance, shall pay to the Lord for a Messuage and Cottage 5 s. &c. for which the Bayly of the Lord, or his Deputies, may distrain. 1 Sid. 17, 18. dubitatur.

7. It is a good Custom, That a Man that hath a Ferry over a River, &c.

8. A Man may prescribe or alledge a Custom to have solam Vesturam Terræ from such a Day to such a Day, and by this the Owner of the Soil shall be excluded from feeding there. (f) Co. Lit. 112.

(f) 2 Rol. Abr. 267. Pl. 6. S. C. which vid. and the Notes there.

9. So a Man may prescribe to have separalem Pasturam of such Land, and exclude the Owner from feeding there. (g) Co. Lit. 122.

(g) 2 Rol. Abr. 267. Pl. 7. S. C. which vid. and the Notes there.

10. It is a good Custom in a Copyhold Manor, That a Feme-Covert, with, or without the Consent of her Husband, may devise her Copyhold Land to her Husband, or whom else she pleases. *Pasch.* 25 *Eliz.* (h) *Moor* 123. *Pl.* 268. *per Curiam.*

(h) Skipwith's Case, Godb. 14, 143. S. C. the Custom being laid, That she may devise it to her Husband, and surrender it in the Presence of the Reeve and 6 others. 3 Leon. 81, 83. S. C. adjornatur. 2 Brownl. 218. seems to be S. C. cited to be adjudged, because the Power was annexed to her Estate by the Custom by which it began. Vid. —But of such a Custom as to Freehold Lands, Q. 4 Co. 61. b. 1 And. 152. 1 Rol. Abr. 563. Pl. 6.

11. It is a good Custom within a Manor, That if any Tenant by Deed or Feoffment aliens, or by (i) Will gives his Lands holden of the Man to another, that such Alienation or Gift must be presented at the next Court, or at some Court of the Manor held within one Year, or else shall be void; for Lands passed not by the Common Law, without solemn Livery, that the Country might have Notice thereof, and this Custom fortifies the Reason of the Common Law. *Trin.* 41 *Eliz.* (k) *Perriman's* Case, 5 *Co.* 84. adjudged.

(i) For such Custom, as to the Presentment of the Will of a Copyholder, vid. Cart. 71, 86. 87.

(k) Cro. Eliz. 668, 669. S. C. adjudged per Curiam, con. Anderson. 2 And. 135, 136. S. C. contra the Opinion of the Fourth Judge, which I presume was himself: Et vide there his Reasons more fully.

12. A Custom in *Ipswich* to choose yearly Two Burgesses, called who used yearly to make a Feast, and to fine those who refused to make a Feast, and to imprison them till paid. *Mich.*

17 *Jac. Willis*'s Caſe, *Cro. Jac.* 555. upon an *Habeas Corpus*, allowed good, and the Priſoner remanded.

13. A Cuſtom that the Lord ſhall have Common in all the Lands of his Tenants for Life or Years lying freſh is void; for it is againſt Law that the Leſſor ſhall have Common againſt his own Leaſe, becauſe it is Part of the Thing demiſed; *aliter* of an Heriot, which is collateral. *Mich.* 19 *Jac.* between *White* and *Sayer*, *Palm.* 211. adjudged.

14. It is a good Cuſtom in a Manor, That the Homage have uſed yearly to chooſe Two Surveyors to take Care that corrupt Victuals are not ſold within the Manor, and to deſtroy ſuch as they find expoſed to Sale there; for the Preſervation of Men's Health is deſigned thereby, and it is at the Paril of the Surveyors if they deſtroy any Meat that is not ſo. *Trin.* 27 *Car.* 2. (l) between *Vaughton* and *Atwood*, 1 *Mod.* 202. adjudged by Three Judges, *North dubitante*: And where the Book ſays Judgment was given for the Plaintiff *niſi*, I ſuppoſe it miſprinted, and that it ſhould be Defendant.

(l) 2 Mod. 56. S. C. adjudged.

(I) Againſt the Law of the Land.

1. EVery Cuſtom againſt the Maxims of the Common Law is not void. Davies 1. Taniſtry 30.

2. For it is a good Cuſtom, That a Feoffment of Tenant in Tail with Warranty ſhall not be a Diſcontinuance. (a) 30 Aſſ. Pl. 47.

(a) Br. Cuſtoms 68. S. C.

3. It is a good Cuſtom, That a Woman ſhall not have Dower where ſhe received during the Coverture Part of the Money for the Sale of the Land. (b) 20 E. 3. Brook Cuſtoms 53.

(b) Fitz. Preſcription 39. S. C.

4. It is a good Cuſtom, That if a Man marries a Widow ſhe ſhall not have Dower. Kitchin 149. Da. 1. 30. b.

5. But a Cuſtom, That the Wife of Tenant in Fee ſhall not be endowed is not good. Da. 1. Gavelkind 49. b.

Fol. 563.

6. A Cuſtom, That the Wives of Iriſh Lords or Captains ought to have the ſole Property in certain Parts of the Goods during the Coverture, with Power to diſpoſe of them (c) without the Aſſent of the Husband is not good, becauſe it is againſt the Common Law. Da. 1. Gavelkind 50. b.

(c) 1 Rol. Abr. 609. Letter G. 1, 2, 3.

7. It is a good Cuſtom, That if a Man be ſeiſed of Land for 40 Weeks, though without Title, he ſhall not be ouſted by Entry without Action. 21 E. 3. 46. b. adjudged.

8. A Cuſtom, That the (d) Tenants of an Honour ſhall pay (e) for every Alienation a Fine to the Lord is not good, becauſe it is againſt the Law that any ſhould make Fine for an Alienation but the King's Tenants. (f) 14 H. 4. 3. But quære thereof, for if it were againſt Reaſon, the Law would not allow it the King. Contra, (g) 14 H. 4. 1.

(d) A Cuſtom, That every Tenant of a Manor that marries his Daughter without the Licence of the Lord ſhall pay a Fine, is againſt Reaſon, and void, for every Freeman may marry his Daughter to whom he pleaſes. Lit. Sect. 209. —But that every Tenant (though his Perſon be free) that holds in Bondage, the Freehold being in the Lord, ſhall pay ſuch Fine, is good. Co. Lit. 140. a. (e) For ſuch Fine upon a Deſcent, vide 1 Sid. 17, 18. (f) Br. Cuſtom 17. S. C. Fitz. 12. S. C. (g) Br. Cuſtom 17. S. C. Fitz. 12. S. C. Et vid. Br. Cuſtom 19. And the Caſe of Hungerford and Happland, 1 Jon. 132. 3 Bulſ. 323. Lat. 37, 95, 130. 3 Bulſ. 323.

9. A Cuſtom againſt common Right is not good. 7 H. 6. 32.

10. A Cuſtom is not good that trenches in Prejudice of the whole Realm. 7 H. 6. 32.

11. It is not a good Cuſtom of a Court to award a Capias in an Action of Debt, or other ſuch Writ, before any Summons awarded, for this is againſt the Courſe of the Common Law, and

and all Courts. Pasch. 3 Jac. B. R. between (h) Banks and Pembleton, in a Writ of Error. Pasch. 5 Jac. B. R. between (i) Ballard and Cooke, the which intratur, Trin. 4 Jac. Rot. 681. Hill. 4 Jac. B. R. between (k) Moyle and Catchmed, adjudged; which intratur, Trin. 4 Jac. Rot. 1609.

(h) 1 Rol. Abr. 780. S. C. 793. Pl. 4. S. C. 2 Rol. Abr. 277. D. 2. S. C. which vide, and the 780. Pl. 6. S. C. 793. Pl. 4. S. C.

Notes there. (i) 1 Rol. Abr. 780. Pl. 6. S. C. 793. Pl. 4. S. C. (k) 1 Rol. Abr.

12. It is a good Custom in London, That the Mayor, Recorder, or any Alderman, being a Justice of Peace, may take Depositions of any Person produced before them, in perpetuam rei memoriam, ex parte alicujus Personæ, and that such Depositions shall be recorded there in perpetuam rei memoriam, and that these Depositions so taken for any Persons there given in Evidence, shall be good Evidence to a Jury to induce the Consciences of any, and to enforce the Truth: This is a good Custom, though these Depositions may be taken in perpetuam rei memoriam, without any Suit depending. Contra Hill. 32 El. B. R. between (l) Kinnersby and Cooper.

(l) Cro. Eliz. 168. S. C. and Judgment given upon the Pleading, and not upon the Validity of the Custom. 1 Leon. 98, 99. S. C. & S. P. by Three Judges; but Judgment was given upon a Fault in the Pleading.

13. (m) It is not a good Custom in London, That if a Man becomes Bail for another in an Action there, and the Plaintiff recovers against the Principal, and sues out a Capias against him, and the Sheriff returns non est inventus, that presently upon this Return, without any Scire Facias against the Bail, the Bail may be taken in Execution upon his Recognizance; for this is against the Law and Reason, inasmuch as if he had sued his Scire Facias against the Bail, they might have pleaded the Release of the Plaintiff, or Death of the Principal, &c. Trin. 32 El. B. R. between (n) Devered and Ratcliffe, adjudged.

(m) Cro. Car. 561. S. P. adjudged. Palm. 567. S. P. adjudged.

(n) Cro. El. 185. S. C. adjudged. 2 Leon. 29, 30. S. C. adjudged.

14. So it is not a good Custom in an inferior Court, upon a Judgment in the same Precept in Nature of a Capias ad satisfaciend', to give a Warrant to the Bailiff to take the Principal in Execution, if he may be found, and in his Default to take the Bail; for this is against the Law to take the Bail before a Capias returned against the Principal, and Scire Facias against the Bail, Hill. 10 Car. B. R. between Seaborne and Savaker, per Curiam, upon Demurrer. Intratur, Trin. 10 Car. Rot. 572.

15. It is not a good Custom in an inferior Court (which is not within the Statute of 32 H. 8.) to grant a Tales de Circumstantibus, because this was against the Law. Pasch. 16 Jac. B. R. between (o) Goodveare and Elvin, dubitatur. Mich. 11 Car. B. R. between Cowpland and Burnet, adjudged * in a Writ of Error, upon a Judgment given in the Liberty of the Dean and Chapter of York, and the Judgment reversed accordingly. Intratur, Hill. 10 Car. Rot. 1195.

* Fol. 564.

(o) 2 Rol. Abr. 672. D. 1. S. C. which vid. and the Notes there.

16. It is a good Custom in an inferior Court, That when any Man comes to the grand Distress in any Plea, and it is returned that he is distrained by his Goods, & quod nihil habet ulterius per quod distringi potest, that his Goods shall be delivered to the Plaintiff, finding Security, that if the Suit passes for the Defendant, that he shall have again his Goods, and that if it pass for the Plaintiff, that he shall have them. Mich. 13 E. 3. B. R. Rot. 160. in Maidstone in Kent, in the Court of the Archbishop.

17. (p) A Cuſtom in an inferior Court to try Iſſues by Six Jurors is not good, though many Courts have uſed it, and many Judgments depend thereupon. Trin. 8 Car. B. R. between (q) Tredinwicke and Peryman, adjudged in a Writ of Error upon a Judgment in Bodmyn in Cornwall, and the Judgment reverſed accordingly; though it then appeared to the Court by many Certificates, that more than twenty Courts in Cornwall have the ſame Cuſtoms, and infinite Trials there accordingly.

(p) 1 Sid. 233, S. P. per Curiam.

(q) Cro. Car. 259. S. C. adjudged per totam Curiam; and it was ſaid by Jones, that although in ſome Parts of Wales there be ſuch Trials by 6 only, it is by reaſon of the Statute of 34 H. 8. which appoints, that Trials may be by 6 only, where the Cuſtom hath been ſo.

18. It is a good Cuſtom in the County-Palatine of Cheſter, That if Judgment be there given in a baſe Court, and thereupon a Writ of Error is brought before the Chief-Juſtice there, and he reverſes the firſt Judgment, to give Coſts to him at whoſe Suit it is reverſed. Trin. 9 Car. B. R. between Foden and Maddock. Intratur, Paſch. 8 Car. Rot. 397. admitted in a Writ of Error, where it was certified as a Cuſtom, and agreed per Curiam to be a good Cuſtom.

19. It is a good Cuſtom in an inferior Court, that in an Action of Debt, if the Defendant does not deny the Debt, but petit quod inquiratur de vero Debito ſecundum Conſuetudinem, that a Jury may be returned, that ſhall try it, and if they find it to be a true Debt, that the Plaintiff ſhall have Judgment thereupon. Mich. 11 Car. B. R. between Smith and Watſon, adjudged in a Writ of Error (r) upon ſuch Judgment in Norwich, and the firſt Judgment affirmed accordingly. Intratur, Trin. 10 Car. Rot. 676.

(r) Cro. El. 894. S. P. upon the Cuſtom of Norwich, where the Jury found the Debt to a certain Sum, and the Plaintiff had Judgment for that Sum adjudged upon a Writ of Error, and the Judgment affirmed accordingly. 1 Mod. 96. S. P. adjudged: And Hale ſaid, this Courſe prevented a Suit in Chancery. Et vid. 1 Rol. Rep. 193.

20. If there be a Cuſtom in an inferior Court, that if a Man brings an Action againſt another there, and the Defendant appears, and pleads to Iſſue, and at the Day of Trial, the Defendant being ſolemnly called, does not appear, nor find Pledges, qui eum manucapere voluerint, to have his Body from Court to Court, at every Court there after to be held, (s) till the Plea be determined, as he ought by the Cuſtom, but in Contempt of the Court, receſſit & defaltam facit, and Judgment is thereupon given, yet this is not a good Cuſtom, but utterly unreaſonable; but they ought according to Law to take the Inqueſt by Default, for if he had appeared, and ſtaid in Priſon without finding Pledges, yet they ought not to have given Judgment againſt him if he would have pleaded to Iſſue. Trin. 11 Car. B. R. between Burges and Sparke, per Curiam adjudged, and ſuch Judgment given in Plimouth reverſed accordingly. Intratur, Hill. 12 Car. Rot. 576.

(s) In the Original 'tis tanque Plea ſoit determine, & Judgment ſur ceo done come il doit per le Cuſtom mes in contempt del Court receſſit, & defaltam facit, uncore ceo neſt bon Cuſtom, &c. ſo that the Words there are miſplaced, or ſomething omitted.

21. It is a good Cuſtom in Briſtol, in the Court of Tolſy there, held before the Sheriffs and Bayliffs of the City, to maintain an Action upon the Caſe, (t) upon a conceſſit ſolvere, ſcilicet, that the Defendant conceſſit ſolvere to the Plaintiff 60 l. pro diverſis denariorum ſummis eidem Querenti per Defendentem prius debitis ſolvend', though this is not good at common Law, and though a Man cannot beforehand know upon what Contract this is brought

(t) For this, vide Godb. 49, 336. 2 Rol. Rep. 332. Lat. 134. Styl. 198, 228. 4 Leon. 105. —Whether it lies againſt an Executor, Styl. 145, 199. dubitatur. Et vid. 1 Leon. 2. Styl. 228.

till it comes to Trial. Mich. 15 Car. B. R. between Orchard and Jenkens, per Curiam, in a Writ of Error out of Briſtol, where this was aſſigned for Error, that it was againſt the Law, as to this Matter, but reverſed for another Cauſe, and the Judgment affirmed * accordingly. Intratur, Mich. 14 Car. Rot. 194. and ſo adjudged in a Writ of Error upon a Judgment in Briſtol. Hill. 11 Car. B. R. Rot. 1238, 1239. in Two Actions between Lawſord and Cooke, and the Judgments affirmed accordingly.

* Fol. 565.

22. It is no good (s) Cuſtom in *Sandwich*, that if the Goods of a Freeman of *Sandwich* come into the Hands of a Freeman of *London*, that the Mayor of *Sandwich* ſhall write to the Mayor and Aldermen of *London* to call the Party before them, and take Order for the Reſtitution, and if they refuſe, or return no Anſwer to the Mayor and Jurats, the Mayor of *Sandwich* ſhall write *alias & pluries*, and after give Judgment of *Withernam* againſt the Mayor and Commonalty of *London*, which ſhall be ſignified to the Mayor of *London*; and if he makes not Reſtitution in 15 Days, then thoſe of *Sandwich* may detain the Body of any *Londoner* that comes there till Reſtitution. *Mich.* 39 & 40 *Eliz.* between (t) *Paramour* and *Veral*, *Moor* 603. *Pl.* 834. adjudged by Three Judges, *Walmſly dubitante.*

(s) But admitting this Cuſtom was once good, yet it is taken away by 3 Edw. 1. cap. 23. by which it is provided, that in any City, &c. no Foreign Perſon of this Realm be diſtrained for any Debt whereof he is not Debtor or Pledge, and at that Time no Capias lying in Debt; but being given by 25. E. 3. this Statute extends to the Capias, which comes in lieu of the Diſtreſs. Vid. 2 Inſ. 204, 205. (t) 2 And. 151. S. C. adjudged, the Cuſtom being laid, that if a Citizen or Inhabitant of London is indebted to a Burgeſs of S. he may enter a Plaint againſt him in the Court of S. and if upon Proceſs againſt him it is returned that he hath nothing infra, &c. it hath been uſed to write to the Mayor and Aldermen of L. &c. and that if the Defendant came not, nor any Bar was ſent by the Mayor, &c. Et vid. Moor 588. Palm. 56. 1 Sid. 355, 356.

23. A Cuſtom in an inferior Court to give a Day to one that hath (u) made Default, is void and againſt Law. *Mich.* 12 *Jac.* between *Peplow* and *Rowly*, *Cro. Jac.* 357. adjudged.

(u) So a Cuſtom to give Judgment in a perſonal Action upon four Defaults before Appearance is void. Styl. 124. adjudged.

Cuſtom.

(A) Void for Uncertainty.

1. A Cuſtom ought to be certain.

2. Such Cuſtom ſhall be void for Want of Certainty, that in caſe of ſuch Grant would be void for Want of Certainty. Da. 1. Taniſtry 35. (Quære this, for there may be a Cuſtom which may not begin by Grant.)

3. A Cuſtom that when an Infant is of ſuch an Age that he can count 12 d. or meaſure an Ell of Cloth, that he may make a Feoffment, is void for the Uncertainty. (a) 13 E. 3. Fitz. dum fuit infra ætatem, 3 Da. 1. Taniſtry 33.

(a) 3 Leon. 82. S. C. Hob. 225.

S. C. cited, and ſaid, that ſuch Cuſtom is not good, but that it ought to be at a certain Age, that it may appear to be an Age of Diſcretion.

4. A Cuſtom that ſuch of the Tenants of the Manor who comes firſt to ſuch a Place, &c. ſhall have all the Wind-falls there, is not good for the Uncertainty. 14 E. 3. Fitz. (b) Bar 227. Da. 1. Taniſtry 33.

(b) This is miſprinted here as in the Original, and I ſuppoſe ſhould be Fitz. 277.

5. The Cuſtom of Taniſtry of Ireland, that the Land ſhall deſcend ſeniori & digniſſimo Viro Sanguinis & Cognominis of him that died ſeiſed, is not good for the Uncertainty of the Perſon and Eſtate. Da. 1. Taniſtry 35.

6. But a Cuſtom that it ſhall deſcend to the moſt worthy of the Blood is good. Da. 1. Taniſtry 35. b.

(B) In the Negative.

1. A Cuſtom may be in the Negative, (a) mix'd with an Affirmative. (b) 8 H. 6. 4.

(a) As in Bar of Dower of the Third Part the Tenant may plead that the Lands are Gavelkind, and that by the Cuſtom the Wife ſhall have the Moiety during her Widowhood, and not any Third Part according to the Common Law. Gouldſ. 108. 1 Leon. 133. (b) Br. Cuſtom 32. S. C.

2. So it ſeems a Cuſtom (c) meerly in the Negative is good. Contra, (d) 8 H. 6. 5.

(c) For Preſcriptions in the Negative, vid. 2 Rol. Abr. 270. Q. 1, 2. and the Notes there.

(d) Br. Cuſtom 32 S. C.

(C) Cuſtom

(C) (a) Cuſtom againſt Cuſtom.

(a) In caſe the Plaintiff declared, That he was Lord of the Manor of, &c. and had a Market, &c. and that all Butchers, &c. ought to ſell in the High-ſtreet upon the Stalls of the Plaintiff, paying 1 d. and that the Defendant was a Butcher, and ſold, &c. in his own * Fol. 566. Houſe, Decuſté, and the Defendant pleaded, That he was an Houſeholder, and that Time out of Mind every Houſeholder in, &c. had uſed to ſell, &c. in their own Houſes, 8 Co. 127. cited, and held no good Plea. (b) Cro. Car. 432. S. C. adjudged. 1 Jon. 375. S. C. adjudged.

1. If in an Action upon the Caſe a Man preſcribes, that he and all thoſe whoſe Eſtate he hath in the Manor of D. hath uſed Time out of Memory, &c. to have a Fold-Courſe, ſcilicet, Common of Paſture for Sheep, not exceeding 300, in certain Land, as Appurtenant to his Manor, and that the Defendant hath incloſed Part of the Land in which he ought to have the Common of Paſture for the ſaid Sheep, &c. and the Defendant pleads there is a Cuſtom Time out of Mind, &c. that the Owner of the Land in which the Common of Paſture for the ſaid Sheep is to be taken, had uſed Time out of Mind, &c. to incloſe any of the ſaid Land in which the Common of Paſture is to be had: This is not good without a Traverſe of the Preſcription, for this is a Cuſtom againſt a Cuſtom, which cannot ſtand together, ſcilicet, that one ſhould have the Fold-Courſe Time out of Mind, and the other might incloſe it, and exclude the Fold-Courſe. Trin. 11 Car. B. R. & Mich. 11 Car. between (b) Day and Spooner, per Curiam, over-ruled without Argument in a Writ of Error upon a * Judgment to the ſame Intent in Banco. Intratur, Mich. 6 Car. Rot. 183. Hill. 11 Car. it was adjudged per Curiam accordingly.

2. In an Action upon the Caſe for ſtopping ancient Lights, if the Plaintiff declares, That he was ſeiſed of an ancient Houſe in the City of York, and that he and all thoſe whoſe Eſtate, &c. have had Time, &c. 7 ancient Windows, and that the Defendant had erected a new Houſe upon his own Land next adjoining thereto, by which he ſtopped the ſaid Windows, and the Defendant pleads in Bar, that there is a Cuſtom within the ſaid City Time out of Mind, &c. that if any one hath Windows againſt the Land of his Neighbour, that he may ſtop the ſaid Windows and Lights upon his own Land at his Will and Pleaſure, by Force of which Cuſtom he ſtopped the ſaid Windows: This is no good Plea, for a Cuſtom againſt a Cuſtom is not good, for both are of equal Antiquity, and the one cannot have a Preſcription to have the Lights, and the other to (c) ſtop them, Time out of Mind. Tr. 29 El. B. R. between (d) Bland and Moſely, adjudged upon a Demurrer; cited, Co. 9. Aldred's Caſe 58.

(c) This is eſtoier in the Original, and ſo appears to be there miſprinted. (d) 1 Rol. Abr. 558. D. 1.

3. If one preſcribes to have a Way over the Land of B. to his Freehold, B. cannot preſcribe to ſtop it. Co. 9. Aldred's Caſe 58. b.

(D) Who ſhall be bound by a Cuſtom.

(a) The King.

1. A Cuſtom that exalts it ſelf upon the King's Prerogative is void againſt the King. Da. 1. Taniſtry 33.

(4) The King purchaſes Lands in Gavelkind, and dies, his eldeſt Son only ſhall inherit. Co. Lit. 15. b. Raym. 77. 1 Sid. 138.

2. It is no good Cuſtom, that when any Diſtreſs ſhall be taken for the King's Debt within the Precinct of ſuch a Manor, that it ſhall be brought to the Pound of the Lord, there to continue for Three Days, within which Time, if the Owner of the Diſtreſs pays it, he ſhall have back the Thing diſtrained, becauſe this is not any manner of Profit to the Lord, but of Service; and Uſage ſhall not bind the King without his Special Grant. 21 E. 3. 4. b. adjudged.

3. The Cuſtom of London to retain Goods put in Mortgage till Satisfaction be made of the Money upon them lent, extends not to the King's Jewels. (b) 35 H. 6. 26. Da. 1. Taniſtry 33. b.

(b) 2 And. 152. S. C. cited; and ſaid, That this Cuſtom ſerves not to detain the Goods of a Stranger, though the Cuſtoms of London are confirmed by Statute.

4. If a Man hath Toll or Wreck, or Strays, by Preſcription, this extends not to the King's Goods. Da. 1. Taniſtry 33. b.

5. It is a good Cuſtom of the County of Cheſter, that if the King's Tenant in Capite by Knights Service dies, his Heir being within Age, that the King ſhall not have the Lands held of other Lords by Knights Service; and this is there ſaid to be ſecundum Conſuetudinem ab antiquo ſemper per quandam Prerogativam hactenus in Comitatu pred' obtentam & uſitatam. 23 E. 1. Rotulo Clauſarum Membrana 9. the Cuſtom allowed, ſimile Membrana, 10 & 24 E. 3. 1. Membrana 3.

6. There is a Cuſtom in Cheſhire, that if a Debtor comes before the Chamberlain of Cheſter, and there takes his Oath that he is not able to pay the Debt, (c) but that he will as faſt as he can, that he ſhall have a Protection: And it is ordained by the (d) Statute of H. 8. that ſuch Protection ſhall not be allowed without the King's Warrant; and if an Action of Debt be brought here in B. R. and the Plaintiff hath Judgment, and ſues an Elegit, directed to the Chamberlain of Cheſter, to extend certain Lands within the County-Palatine of Cheſter, * he ought to execute it notwithſtanding the ſaid Cuſtom, for the Cuſtom cannot extend out of the County-Palatine to bind the King's Courts, for the Chamberlain is but a Miniſter in this to execute the Proceſs of the Court. P. 1 Car. between (e) Barny and Plaintiffs, againſt Sir Urian Leigh, adjudged, and a new Elegit awarded after the ſaid Matter returned.

(c) The Cuſtom laid in this Manner ſhould not be allowed, for as faſt as he can may be never, but when he pleaſes; but the Uſage is to give him a Day to pay his Debts, &c.

* Fol. 567.

and ſo it appears to have been done in this Caſe, by the Report thereof in 2 Rol. Rep. but by the Report in Palm. the Cuſtom was ſo laid, and therefore held naught; and that the Cuſtom was ſo, it appears by 34 H. 8. cap. 13. (d) 34 H. 8. cap. 13. (e) 2 Rol. Rep. 350, 436. S. C. Palm. 414. S. C. adjudged.

(K) What Perſons may do Things by Cuſtoms which they could not do at Common Law.

1. By Cuſtom an Infant may make a Feoffment at the Age of 15. Co. 9. Combe 76. b. (a) 5 H. 7. 41. Doctor and Student 21.

(a) Fitz. Cuſtom 9. S. C.

2. By the Cuſtom of a Town an Infant may bind himſelf Apprentice. (b) 9 H. 6, 7, 8. per Danby.

(b) Br. Cuſtom 63. S. C.

(L) What Perſons ſhall be ſaid to be bound by a general Cuſtom.

1. If a Cuſtom be, that a Deviſe made of Lands, and a Proclamation made thereof, and Nonclaim within a Year, ſhall bind all Men, yet an Infant ſhall not be comprehended within this Cuſtom, (a) for he is exempt by reaſonable Conſtruction of Law, becauſe he hath not Diſcretion to make his Claim. 37 Aſſ. 5.

(a) Lit. Rep. 274.

2. If a Cuſtom be, that when a (b) Copyhold deſcends to any Man, a Proclamation ſhall be made at Three ſeveral Courts, that he ſhall come to be admitted, and if he does not come at any of the ſeveral Courts, and pray to be admitted, it ſhall be forfeited to the Lord, yet an Infant is not comprehended within this Cuſtom, becauſe by Intendment of Law he cannot make Claim. Co. 8. Lechford 100 b. adjudged.

(b) So where a Surrender is made to the Uſe of another, and he dies before Admittance, his Heir being an Infant.

3 Mod. 221, 226. adjudged upon a Writ of Error, and the Judgment affirmed accordingly by Three Judges, con. the Chief Juſtice, who ſaid, That the Eſtate remaining in the Surrenderor till Admittance, the Infancy cannot protect an Eſtate which the Infant had not.

3. So for the Cauſe aforeſaid, Men of unſound Memory, in Priſon, and (c) (d) out of the Realm, are not within ſuch Cuſtom. Co. 8. Sir Richurd Leechford 100. b.

(c) Secus if he goes out of the Realm after a Diſcent. Cro. Jac. 101. 8 Co. 100. b.

(d) Underhill and Kelſy S. P. Cro. Jac. 226. per Curiam, con. Croke, who held it quaſi a Condition annexed to the Eſtate; but ſaid, there might be a Difference where he was in the Service of the King, &c. Godb. 268. adjudged. Et vid. 3 Mod. 226.

4. So if the Cuſtom of London be, that the Mayor may take Recognizances of any Perſon, being of full Age, or of Women unmarried; this Cuſtom ſhall not bind Ideots, Men of unſound Memory, or in Priſon, for they are excepted by the reaſonable Conſtruction of Law. Trin. 32 Eliz. B. R. between (f) Chamberlain and Thorp, dubitatur.

(f) Cro. El. 186, 187. S. C. & S. P. ſeems con. 1 Leon. 130. S. C.

(M) To

(M) To what Things it ſhall be ſaid to extend.

1. If a Cuſtom be, that every Tenant of ſuch an Honour hath uſed Time out of Mind, &c. to pay a Fine upon every Alienation; this Cuſtom ſhall not extend to (a) the Demeſn-Lands in the Hands of the Lord, but only to Tenements in the Hands of the Tenant. 14 H. 4. 8, 9.

(a) Where Inhabitants have uſed to have Common to their Houſes, this extends not to a new Houſe. Ow. 4.

2. If the Cuſtom be, that the Lord ought to have the beſt Beaſt of him that dies, his Tenant, and the Parſon of the Pariſh, the ſecond beſt Beaſt, as a Mortuary; if the Tenant holds Two ſeveral Tenements of the Lord, ſubject to the Cuſtom, within the Pariſh, it ſeems the Lord ſhall have the Two beſt Beaſts within the Intent of the Cuſtom, and the Parſon the Third. Dubitatur, (b) 7 H. 6. 26. b.

(b) Br. Cuſtom 22. S. C. Br. Heriot 3. S. C.

3. If the Inhabitants upon a Common have uſed Time out of Mind, &c. to dig Clay in the ſaid Common of their Lord, for the Reparation of their Houſes ſtanding upon the ſaid Common, and a Stranger digs Clay in the Common; the Inhabitants (c) cannot take this Clay * from him, for this is not within their Cuſtom. Mich. 37, 38 Eliz. B. R. between (d) Stile and Butt, adjudged.

* Fol. 568.

(c) For this, vid. 1 Part 807. Pl. 9. and the Notes there. (d) Cro. Eliz. 434, 435. S. C. adjudged. Moor 411. Pl. 561. S. C. adjudged.

(e) 3. If the Cuſtom of a Manor be, That when any Tenant ſells his Tenements, Three Proclamations ſhall be made in the next Court-day of the Manor, and that if any of the Blood of the Vendor will give ſo much Money for the Tenement as the Vendee will, that he ſhall have it; and a Tenant, in Conſideration of 100 l. in Money, and that the Vendee, being his Phyſician, had cured him of a great Malady, ſells the Tenement to him, and the next of the Blood comes to the next Court, and proffers 100 l. for the Tenement, yet he ſhall not have it, for this was given partly for the other Conſideration, which is not valuable, and ſo it is not within the Cuſtom, for by the Cuſtom it is to be intended where the Vendee comes in only for Money. H. 37 El. B. R. by Two Juſtices; but by this Means every one may evade the Cuſtom.

(e) This in the Original is Pl. 3. alſo; and ſo appears miſprinted.

4. So if he had ſold the Tenement in Conſideration of a Leaſe for Years of other Land, and 1 d. the next of Blood ſhould not have the Tenement upon the Proffer of the 1 d. H. 37 El. B. R. held.

5. (f) If the Cuſtom of the Manor be, That if any Copyholder in Fee ſurrenders out of Court, and he to whoſe Uſe it is ſurrender'd does not come in at the Court to take his Copyhold after Three Proclamations made, that then the Lord may ſeize the Copyhold as forfeited, and a Copyholder in Fee ſurrenders to the Uſe of another for Life, the Remainder over in Fee, and the Tenant for Life does not come into Court to take his Copyhold after 3 Proclamations made according to Cuſtom, upon which the Lord ſeizes the Copyhold as forfeited, and after Ceſtuy que uſe for Life dies; he in the Remainder ſhall not be bound by the not coming in of the Leſſee, for the Cuſtom being in Deſtruction of an Eſtate, ſhall be taken ſtrictly, and ſo it ſhall be intended only of Tenant in Fee in Poſſeſſion,

(f) Cart. 72, 73, 86, 87. S. P. debated.

Poſſeſſion, and not in Remainder, as this Caſe is, and ſo this is out of the Cuſtom. P. 44 El. B. R. between (f) Baſpoole and Long, adjudged.

(f) Cro. El. 789. S. C. adjudged.

Yelv. 1. S. C. adjudged; and a Quære put, viz. If a Surrender be made to A. and B. and their Heirs, and A. comes within the Time, but B. does not, whether A. ſhall have the whole, or a Moiety ſhall be forfeited? Noy 42. S. C. adjudged. Raym. 404. S. C. cited.

6. If there be a Cuſtom within a Manor, That if a Man takes to Wife any Cuſtomary Tenant of the Manor, and has Iſſue, and overlives his Wife, he ſhall be Tenant by the Courteſy; and a Man marries one to whom during the Coverture a Cuſtomary Tenement deſcends, and has Iſſue by her, and ſhe dies, yet he ſhall not be Tenant by the Courteſy. *Trin.* 29 *Eliz.* (g) Sir *John Savage's* Caſe, 2 *Leon.* 109. adjudged.

(g) 2 Leon. 208. S. C. cited to have been adjudged, becauſe the Cuſtom extended only where the Wife was a Copyholder at the Time of the Marriage.

7. If there be a Cuſtom in *London*, That none ought to intermeddle with the Art of a Weaver there but only thoſe who are free of the Guild: If a Stranger receives Silk in *London*, and carries it to *Hackney*, and weaves it there, and then brings it back again to *London*, and receives his Pay for it; this is not any Intermeddling in *London* againſt the Cuſtom, though the Contract was made in *London*. *Hill.* 43 *Eliz.* between the Warden and Corporation of Weavers in *London* and *Brown*, *Cro. El.* 803. adjudged.

8. If there be a Cuſtom in the Town of *Newcaſtle*, That the Owners of Houſes there, but not Tenants in Tail, may deviſe them by Parol, and a Man is ſeiſed of an Houſe there in Tail, Remainder to himſelf in Fee-Simple: He may deviſe the Remainder, for the Word *Owner* is general, and comprehends all Ownerſhips. *Hill.* 1650. between *Swan* and *Fenham*, *Styl.* 409. (h) debated, *& dubitatur.*

(h) Et vid. 1 Rol. Abr. 609. Letter F.

9. If there be a Cuſtom within a Manor, That the Wife ſhall be endowed of the Moiety of all ſuch Copyhold Lands as her Husband was ſeiſed of, and a Copyholder dies, and his Wife is endowed of a Moiety, and his Son and Heir, having the other Moiety, dies, the Wife of the Son ſhall be endowed of the Moiety of this Moiety, for this is directly within the Cuſtom. *Mich.* 14 *Car.* 2. between *Baker* and *Berisford*, *Raym.* 58. adjudged.

(N) What Act ſhall be ſaid a good (a) Purſuance of the Cuſtom.

(b) (c) Gavelkind.

(a) If a Man hath a Rent iſſuing out of Lands deviſable by Cuſtom, whether the Rent may be deviſed, 1 Rol. Abr. 609. Letter E. vid.

1. Where the Cuſtom of Gavelkind Land is, That an Infant of the Age of 15 may make a (d) (e) Feoffment, this ought to be taken ſtrictly; for if he is diſſeiſed, and releaſes to the Diſſeiſor, this is not within the Cuſtom, for it is not a Feoffment. (f) 11 H. 4. 33.

(b) As to a Deſcent by this Cuſtom, vid. 1 Rol. Abr. 623. D. (c) By the Cuſtom of Kent, if a Man be hanged for Felony, the King ſhall not have Annum, Diem, & Vaſtum, nor the Lord the Eſcheat of Lands there. 3 Bulſ. 215. —That it remains notwithſtanding the Statutes for Diſgavelling. 1 Sid. 137. Hard. 325. (d) This muſt be intended of Lands in Fee-Simple, and not of Lands in Tail. Cro. Jac. 80. (e) Extends not to Lands by him purchaſed within Age. N. Bendl. 33. Pl. 52. —And to a Feoffment upon a Conſideration only. N. Bendl. 33. Pl. 52. (f) Fitz. Cuſtom 11. S. C. Br. 15. S. C.

2. So if he releaſes to the Diſcontinuee, this is not within the Cuſtom. (g) 11 H. 4. 33. (g) Fitz. Cuſtom 11. S. C. Br. 15 S. C.

3. (h) So if he grants a Reverſion dependant upon an Eſtate for Life, it is not good. (i) 11 H. 4. 33. b. (h) N. Benl. 33. Pl. 52. S. P. (i) Fitz. Cuſtom 11. S. C. Br. 15. S. C.

4. But if he leaſes for Years, and releaſes to him, it is a Feoffment within the Cuſtom, becauſe the Freehold paſſes by the Releaſe. (k) 11 H. 4. 33. (k) Fitz. Cuſtom 11. S. C. Br. 15. S. C.

5. If an Infant after 15 makes a Feoffment with Warranty, the Warranty is not warranted by the Cuſtom. (l) 11 H. 4. 33. (l) Fits. Cuſtom 11. S. C. Br. 15. S. C.

6. If there be a Cuſtom within a Town to have 2 d. for every Hide of every Sheep, Cow, or Ox, that is killed or ſold within the ſaid Town, and for Non-payment thereof to ſeize the Hides, &c. the Party that is to have the 2 d. cannot by this Cuſtom juſtify the tanning the Hides, and converting them into Leather, which he took for the Non-payment of the 2 d. though he did it for Neceſſity, ſcilicet, becauſe they would * be putrefied, for this is only a Damage to the Owner, and he might have Debt for the 2 d. M. 42, 43 El. B. R. between (m) Duncon and Reeve, adjudged. * Fol. 569. (m) 2 Rol. Abr. 562.

Pl. 14. S. C. Cro. El. 783. S. C. adjudged; for by the Tanning the Property is quaſi altered, and the Marks taken away from the Owner, ſo as he cannot have it again. For this Caſe, with Notes upon it, vid. Title Diſtreſs. P. Pl. 11.

Cuſtom.

(a) Deſtruction or Alteration thereof.

(a) Vid. the Diviſions, Title Preſcription.

1. IF (b) Gavelkind Lands are held in Soccage, and the Tenure is after changed into Knights Service, yet the Cuſtom is not altered, for that goes with the Land, and not with the Tenure. 4 & 5 *Ph. & M. Dal.* 23. (b) 1 Sid. 138. S. P. per Twyſden. Et vid. Styl. 476.

2. If *A.* being ſeiſed in Fee of Gavelkind Lands, upon his Petition in Parliament, it is enacted, That his Lands ſhall be diſgavelled to all Intents and Purpoſes, and deſcendable as Lands at Common Law to the eldeſt Son only: By this Act, the Cuſtom to deviſe them is not taken away, for it is a meer collateral Cuſtom, and no Part of the Cuſtom of Gavelkind: And though by the Firſt Words they ſhall be diſgavelled to all Intents and Purpoſes, yet they are reſtrained by the ſubſequent Words, and ſhall deſcend as Lands at Common Law. *Hill.* 13 & 14 *Car* 2. between (c) *Wiſeman* and *Cotton*, 1 *Levin.* 97. adjudged. *Et per Curiam*, the Act being made upon the Petition of *A.* it cannot be preſumed he petitioned to deſtroy his Privilege of Deviſing, &c. (c) Raym. 59, 76. S. C. adjudged. 1 Sid. 135, 136. S. C.

adjudged; and reſolved per Curiam, That the Cuſtom of Deviſing was taken away by none of the diſgavelling Acts. Hard. 325. S. C. adjudged.

Pleader.

Vide the Pleadings after Title Preſcription.

1. THE Law takes Notice of the (b) Cuſtoms of Gavelkind and Borough-Engliſh, and therefore 'tis ſufficient to alledge generally, That the Lands are of the Cuſtom of Gavelkind, *&c.* but it ſhall not be preſcribed in. *Co. Lit.* 175. b.

(b) But as to ſuch Cuſtoms as are no Part thereof, but meerly collateral, they muſt be ſhewed in Pleading, as that the Lands are deviſable. 1 Levin. 80. Raym. 77. 1 Sid. 77, 138. Cro. Car. 562. per Curiam. —So if a Man would entitle himſelf to be Tenant by the Curteſy, without having Iſſue, or a Woman to have Dower of a Moiety, it ought to be ſhewed ſpecially that Time out of Mind, &c. 1 Sid. 77, 138. 2 Sid. 154.

Damages.

Damages.

Fol. 569.

(a) (O) Who ſhall recover Damages.

(a) This beginning a new Title, ſhould have been Letter A. but becauſe 'tis continued on, P. &c. 'tis printed here as in the Original.

1. THE Heir in a Plea of Land ſhall not recover Damages for Damages in the Time of his Anceſtors. (b) 17 E. 3. 45. b.

2. The Executor ſhall not recover Damages in Debt for Damages in the Time of the Teſtator. (c) 17 E. 3. 45. b.

(b) Fitz. Damages 85. S. C. (c) Fitz. Damages 85. S. C.

3. The Succeſſor ſhall recover Damages in Debt upon an Obligation for Damages in the Time of the (d) Succeſſor. (e) 17 E. 3. 45. b.

(d) I take it that this is miſprinted, and ſhould be Predeceſſor; for by the Year-Book he ſhall recover Damages de touts temps. (e) Fitz. Damages 85. S. C.

4. The Maſter of Saint-Croſs, who is Preſentative as a Parſon, ſhall not recover Damages in a Writ of Annuity for the Time of his Predeceſſor. (f) 26 Aſſ. 4.

(f) Br. Damages 108. S. C. Br. Garden ou Maſtre, &c. 5. S. C.

5. But otherways it would have been if he had been elective, for there he ſhould have recovered Damages for the Time of his Predeceſſor. (g) 26 Aſſ. 4.

(g) Br. Damages 108. S. C. Br. Garden ou Maſtre, &c. 5. S. C.

(P) Who ſhall recover Damages in an Action, in reſpect of his Eſtate.

1. (a) IF Leſſee for Years be ouſted, and he in the Reverſion diſſeiſed, and he in the Reverſion recovers in an Aſſiſe, yet he ſhall not recover Damages. D. 19 El. 354. Pl. (b) 15. (c) 15 H. 7. 4. b. 5 H. 7. 10. b. Co. 9. 105. b. 3 H. 6. 33. Contra, 12 H. 6. 4.

(a) 2 Inſt. 285. S. P. adjudged. (b) This is miſprinted in the Original as here, and ſhould be 35. (c) Br. Damages 81. S. C. Br. Aſſiſe 83.

2. So if after the Ouſter, he in the Reverſion enters upon the Diſſeiſor, (as he may by the Law to ſave a Diſcent) and after the Diſſeiſor re-enters upon him, and he recovers in an Aſſiſe, yet he ſhall not have any Damages; for the Re-entry of him in Reverſion reduces the Eſtate to the Leſſee, and then the Damages, for the Profits belong to him, and then he ſhall not be twice charged. Quære, D. 19 Eliz. 355. 15 H. 7. 5.

3. If

3. If Tenant for Life and he in the Reverſion join in a Leaſe for Life, they may join in an Action of Waſte, and Tenant for Life ſhall recover the Place waſted, and he in Reverſion Damages. *Co. Lit.* 42. a.

(Q) Damages againſt the Defendant.

How to be given.

In what Caſes they ſhall be joint.

1. IN an Action of Waſte, if Waſte be aſſigned in Domibus, ſcilicet, in Three Meſſuages, and in Gardens, ſcilicet, in cutting down 6 Pomos & 10 Piros in one Garden, & 10 Piros & 7 Pomos in another Garden, ſparſim creſcent', ſhewing the Value of every Particular; and upon the Default of the Defendant, a Writ of Enquiry of Waſte is awarded, and the Jury finds the Waſte in the Three Meſſuages, and in ſome of the Apples and Pear-Trees, to his Damage 50 l. This is a good Verdict, though the Damages are aſſeſſed entirely, though it was objected that the Damage of the Apple and Peer-Trees might be ſo ſmall, that the Place * waſted ſhould not be recovered; but they being alledged alſo to have been ſparſim creſcent' throughout, the Garden ſhall be recovered: (a) But if it was ſo ſmall, yet all being upon one Demiſe, if all the Waſte be of a conſiderable Value, though the Particulars are but ſmall, yet the Place waſted ſhall be recovered. Mich. 11 Car. B. R. between (b) Fitch and King, adjudged per Curiam, as to the Point, upon a Writ of Error, upon a Judgment in Banco. Intratur, Trin. 9 Car. Rot. 213.

* Fol. 570.

(a) For this vid. 2 Rol. Abr. 824. Letter D.

(b) Cro. Car. 414. S. C. adjudged.

(R) How to be given.

In what Caſes they (a) may be joint.

1. IF an Action upon the Caſe be brought (b) upon Two Promiſes, (c) and both are found for the Plaintiff, the Jury may give entire Damages for both, for this is at the Peril of the Plaintiff; for if the Action does not lie for either of them, the Plaintiff (d) ſhall not have Judgment for the other; but it is not any Inconvenience of the other Part if the Action lies for both. Mich. 14 Jac. B. R. (e) Payne and Selby adjudged.

(a) Where general Damages ſhall be intended for the whole Charge in the Declaration. 10 Co. 132.

(b) So in other Actions upon the Caſe. Moor 707. Pl. 987. Cro. El. 560, 866. Hob. 189. 10 Co. 130. Moor 281. —So in Debt. 1 Brownl. 70. —So in Treſpaſs. Styl. 174, 175, 182, 399. 3 Leon. 213. Cro. Car. 21. Godb. 57. —So in Covenant. Cro. El. 685. Cro. Jac. 439. 1 Saund. 155. —And for this, vid. 5 Co. 108. a. 10 Co. 130, 131. 3 Bulſ. 231. Hetl. 51, 53. Lit. Rep. 61. Styl. 198. Cro. El. 59, 560. Cro. Jac. 239. 1 Sid. 38. Moor 281. (c) So where the Plaintiff alledges Two Breaches of an Award, one of which is inſufficient, and entire Damages are given. Bedel and Moor, 1 Leon. 170. adjudged. 5 Co. 108. a. cited. 10 Co 131. a. cited. Bindy 59. cited; yet vid. Yelv. 35. (d) Where entire Damages ſhall hinder the Plaintiff's Judgment, vid. 2 Rol. Abr. 99. Letter E. and the Notes there. (e) 1 Rol. Rep. 423. S. C. adjudged 3 Bulſ. 258. S. C. the Judgment being given upon Demurrer, and entire Damages aſſeſſed upon a Writ of Enquiry.

2. The Law is the ſame in a Trover and Converſion for ſeveral Matters and Iſſue taken ſeverally, yet the Damages may be joint.

3. In an Action of Aſſault and Battery againſt 4. for two Treſpaſſes, ſuppoſed to be done at Two ſeveral Days, if one Defendant pleads Not guilty to both Treſpaſſes, and another Defendant pleads Not guilty to the firſt Treſpaſs, and juſtifies the Second Treſpaſs of the Plaintiff's own Aſſault, and the other Two Defendants plead not guilty to the Firſt Treſpaſs, and Judgment is given againſt them by non ſum informatus for the Second Treſpaſs, and upon theſe ſeveral Pleas, ſeveral Iſſues being joined, all are found for the Plaintiff: Though there are Two ſeveral Treſpaſſes, and divers ſeveral Pleas, yet the Jury (f) may aſſeſs one entire Damage againſt all, and for both Treſpaſſes; but it is at the Peril of the Plaintiff if he have no Cauſe of Action for any Part of his Damages being entire. Mich. 9 Car. B. R. between Eaſtcot & alios againſt Edwards, adjudged in a Writ of Error, and the Judgment in Banco affirmed accordingly. Intratur, Paſch. 9 Car. Rot. ultimo.

(f) They cannot aſſeſs ſeveral Damages where but one Treſpaſs, and the Defendants are jointly charged by the Plaintiff's Writ and Declaration; and if one in Fact was more malicious and did greater Wrong than the other, yet all coming to do an unlawful Act, the Act of one is the Act of all the Parties being preſent. 11 Co. 6. b. Cro. El. 860. Cro. Jac. 118, 384. 1 Rol. Rep. 31. Hob. 66. —But by 1 Bulſ. 157. per Curiam, in Treſpaſs for a Battery againſt Two, the Damages ſhall be ſeveral, for that the Battery of the one may be greater than the Battery of the other: Otherways in Treſpaſs for cutting down Trees, for that was a joint Act; but Q. of this Diverſity, for it ſeems not Law.

4. In a Decies tantum againſt ſeveral, if they are attainted, the Damages ſhall be given againſt them ſeverally, and not jointly, for there were ſeveral Takings. (44 E. 3. 36. b.

5. In Debt upon an Obligation againſt Two by ſeveral Precipe's, the Damages againſt them ſhall be ſeveral, according to the Writ, ſcilicet, that the Plaintiff ſhall recover all the Damages aſſeſſed againſt each. (h) 14 H. 4. 19. b.

(g) Br. Damages 30. S. C. Decies tantum 7. S. C.

(h) Br. Debt 71. S. C. Damages 57. S. C. Fitz. Damages 60. S. C. Br. Several Precipe's 8. S. C.

6. In Treſpaſs for a Battery, and carrying away his Goods, upon Not guilty pleaded, if one be found guilty only of the Battery, and the other of carrying away the Goods, the Damages ſhall be given ſeverally, and not in common. Contra, (i) 22 E. 3. 20. b. adjudged.

(i) Fitz. Judgment 188. S. C. the Treſpaſſes being found done at one Time.

7. In Treſpaſs, if one Defendant is found guilty at one Time, and the other at another Time, ſeveral Damages may be taxed. (k) 11 Co. 6. b. reſolved.

(k) 1 Brownl. 233. S. C. & S. P. per Curiam.

8. If in Treſpaſs againſt Two, one appears, againſt whom the Plaintiff counts *ſimul cum, &c.* who pleads, and is found guilty to Damage, after the other appears, and pleads, and is found guilty, he ſhall be charged with the Damages taxed by the Firſt Jury. (l) 11 Co. 6. b.

(l) 1 Rol. Rep. 31. S. C. & S. P. Et vid. 3 Leon. 122. Hob. 66. 10 Co. 119. a.

9. (m) If in Treſpaſs againſt *A. B.* and *C.* for a Battery and Wounding, *A.* appears, and the Plaintiff declares againſt him, *ſimul cum, &c.* and *A.* pleads Not guilty, and a *Venire* iſſues, *&c.* and after *B.* appears, and the Plaintiff declares againſt him, *ſimul cum, &c.* and *B.* pleads Not guilty, and a *Venire* iſſues, *&c.* and both theſe Iſſues are tried at the ſame Aſſizes, *viz.* that againſt *A.* is firſt tried, and 200 *l.* Damages given; and after that againſt *B* is tried, and 50 *l.* Damages given; and after *C.* appears, and confeſſes the Action, and a Writ of Enquiry is awarded upon

(m) Cro. Car. 192. like Point, in an Appeal of Mayhem.

upon the Roll, but none iſſues (n) the Plaintiff at his Election may have Judgment for the Damages given by either Jury, and this ſhall bind all, for in Judgment of Law the ſeveral Juries gave their Verdict at the ſame time. *Trin.* 10 *Jac.* (o) Sir *John Heydon*'s Caſe, 11 Co. 5. b. adjudged.

(n) In Treſpaſs againſt A. B. and C. A. and B. juſtifie, upon which there is a Demurrer, and C. pleads, and thereupon Iſſue is join'd, and the Demurrer is adjudged againſt A. and B. and upon a Writ of Enquiry Damages are given, and after the Iſſue is found for the Plaintiff, and Damages given, the Plaintiff may have his Election which Damages he will take. 1 Rol. Rep. 325. per Curiam. (o) Cro. Jac. 350. S. C. adjudged upon a Writ of Error, and the firſt Judgment affirmed accordingly, becauſe the Writ is entire, and the Defendants are all charged with one Battery, though the Declarations are ſeveral. 1 Rol. Rep. 30, 31. S. C. adjudged and affirmed upon a Writ of Error accordingly.

10. In Treſpaſs for an Aſſault, Battery, and Wounding the Defendant, *quoad* the Battery and Wounding, pleads Not guilty, and *quoad* the Aſſault juſtifies, and both Iſſues are found againſt the Defendant; ſeveral Damages ſhall not be found, for the Aſſault is included in the Battery and Wounding. *Mich.* 8 *Jac. Candiſh*'s Caſe, *Cro. Jac.* 251. and if Damages ſhould be found ſeverally, it would be double.

11. If in Trover and Converſion of 2000 Loads of Coal, upon Not guilty pleaded, the Defendants are (p) found ſeverally guilty for ſeveral Loads of Coal, and ſeverally Not guilty for the Reſidue, the Jury muſt aſſeſs ſeveral Damages. *Mich.* 2 *Car.* between *Player* and *Warn*, *Cro. Car.* 54. Judgment againſt them ſeverally for Damages, according to the Verdict, and entire Coſts, and this Judgment affirmed upon a Writ of Error in the *Exchequer* Chamber.

(p) So in Treſpaſs, if one Defendant is found guilty in Part only, and the other in all, the Damages ſhall be ſeveral. Cro. El. 860. 1 Brownl. 233. 1 Bulſ. 50.

12. In an Action upon the Caſe againſt *A. B.* and C. for impoſing the Crime of Felony on the Plaintiff, and for aſſaulting and impriſoning the Plaintiff, *A.* ſuffered Judgment by Default, and the other pleaded Not guilty, and were found guilty, and 1000 *l.* Damages given againſt *B.* and 50 *l.* againſt C. and the Plaintiff entered a *Nolle proſequi* againſt *A.* and C. and whether he ſhould have Judgment againſt *B. Paſch.* 2 *Jac.* 2. 3 *Mod.* 101. debated: It was ſaid, that ſeveral Damages ought not to have been aſſeſſed, and that the Plaintiff hath Election *de melioribus Damnis* only, where the Trials are at ſeveral Times; and *per Curiam*, this is but one Fact, of which they are all equally guilty: And it ſeems a Contradiction to ſay, That the Plaintiff is injured by one to the Value of 50 *l.* only, and by the other to the Value of 1000 *l.* But the Book ſays, that notwithſtanding this Opinion, (q) Judgment was after given for the Plaintiff.

(q) Cro. Car. 243. like Caſe, where it is ſaid, tho' Damages ought not to have been tared ſeverally, yet the Plaintiff relinquiſhing his Suit againſt the other, it is not material, no Advantage being taken thereof.

(S) How to be given.

In what Caſes jointly to the Plaintiffs.

To Baron and Feme.

1. IN an Aſſiſe by Baron and Feme, if it be found they were diſſeiſed, they ſhall recover Damages of the Iſſues in common. 11 H. 4. 16 b. 17. adjudged.

2. But if it be found that certain Goods of the Baron were taken upon the Land, the Baron only ſhall have Judgment for the Damages for them. (a) 11 H. 4. 17. adjudged. Fol. 571.

(a) Br. Damages 51.

S. C. Br. Joinder in Action 98. S. C. Br. Judgment 20. S. C. Fitz. 70. S. C.

3. In Treſpaſs by Baron and Feme, for impriſoning the Feme till a Fine paid, for all the Treſpaſs but the Fine they ſhall recover Damages in Common. (b) 11 H. 4. 16. b.

(b) Br. Damages 51.

S. C. Fitz. Judgment 70. S. C.

4. But for the Fine the Baron ſhall recover Damages only, (c) 11 H. 4. 16. b. becauſe it was his Chattel.

(c) Br. Damages 51.

S. C. Fitz. Judgment 70. S. C.

5. In Debt by Baron and Feme, upon a Bond made to the Feme *dum ſola*, they ſhall recover Damages jointly. *Mich.* 33 & 34 *Eliz.* between *Gurny* and his Wife and Sir *Edw. Clere*, *Cro. Eliz.* 259. adjudged.

6. In Trover by Baron and Feme, Executrix of *A.* for Goods of *A.* they ſhall recover Damages jointly; for the Poſſeſſion of the Wife as Executrix was alſo the Poſſeſſion of her Husband, and the Damages recovered ſhall be to the Eſtate of the Teſtator, and ſo may concern them both. *Mich.* 23 *Car.* between *Frembling* and *Clutherbrook*, *Styl.* 48. *per Rolle*, *ſed adjornatur.*

(a) (F) To Joint-Tenants.

1. If Two Joint-Tenants bring an Aſſiſe, and the one is ſevered, if it be found that the other had Goods taken upon the Land, he ſhall recover ſole Damages for them. (b) 11 H. 4. 17.

(a) According to the Courſe of the Letters, this ſhould have been T. but being continued on, G. &c. 'tis printed as in the Original.

(b) Fitz. Judgment 70. S. S.

(G) Againſt whom they ſhall be given.

1. If the Lord join himſelf to his Bailiff in an Avowry, the Plaintiff ſhall not recover Damages againſt the Lord, but only againſt the Bailiff, for the Bailiff only continued Party to the Iſſue. (a) 8 H. 6. 5. Curia. Brook Damages 68.

(a) Fitz. Damages 20. S. C.

2. In Detinue for a Writing againſt Executors, ſuppoſing it come into their Hands after the Death of the Teſtator, if the Executors have been at all Times ready to render it after it came into their Hands, &c. (b) 22 E. 3. 9. b.

(b) Fitz. Damages 103. S. C. 1 Rol. Abr. 574. Pl. 5. S. C.

3. By

3. By the Statute of *Glouceſter*, made 6 *Edw.* 1. *cap.* 1. Whereas before Damages were not awarded in Aſſiſes of *Novel Diſſeiſin*, (c) but only againſt the Diſſeiſors, it is provided, that if Diſſeiſors (d) alien the Lands, and (e) have not whereof Damages may be levied, (f) they to (g) whoſe Hands ſuch Tenements ſhall come, ſhall be charged with (h) the Damages; (i) ſo that (k) every (l) one ſhall (m) anſwer (n) for his Time, provided the Diſſeiſee ſhall recover Damages in a Writ of Entry, *&c.*

(c) Ow. 112. Hob. 98.

(d) So if diſſeiſed, for by Equity it extends to all that come under the Diſſeiſor by Right or Wrong. 2 Inſ. 284 —So if the Lord diſtrains for Rent, and a Stranger reſcues, tho' the Stranger is only a Diſſeiſor, in an Aſſiſe againſt him and the Tenant, if the Stranger is found inſufficient, the Tenant ſhall anſwer the Damages, though he claims not from the Diſſeiſor, 2 Inſ. 284. (e) The Tenant ſhall be charged only where the Diſſeiſor is inſufficient; but if able to pay Part, and not the whole, both ſhall be charged, therefore the Judgment is always given generally againſt both. 2 Inſ. 284. (f) Lands held in capite were aliened to J. S. who died, his Heir within Age, and the King committed his Cuſtody to B who took the Profits; the Heir was no Tenant within the Statute. 2 Inſ. 284. —Secus if aliened to an Infant, who took the Profits, or if coming in as Heir, he had been out of Ward. 2 Inſ. 284. (g) Yet theſe general Words ſhall not charge thoſe with Damages who have an Eſtate caſt upon them by Law, unleſs they conſent thereto; as the Heir of the Alienee, by refuſing to take the Profits, may diſcharge himſelf of Damages. 2 Inſ. 284. —So if Diſſeiſor enfeoffs A. and B. and makes Livery to A. only, and A. dies; if B. never aſſented, he may waive the Poſſeſſion. &c. 1 Inſ. 360. 2 Inſ. 286, 287. (h) And where by ſubſequent Statutes double or treble Damages are given in an Aſſiſe, they ſhall be anſwered by every mean Tenant accordingly, and for their Inſufficiency by the Tenant. 2 Inſ. 285. (i) In an Aſſiſe, but not in a Writ of Entry, for that is to be brought againſt the Tenant only; and this Clauſe refers only to the Aſſiſe. 2 Inſ. 286, 287. (k) If named in the Aſſiſe; otherways, if the Diſſeiſor is found inſufficient, the Tenant ſhall be charged with the whole. 2 Inſ. 285. —But if found that the Diſſeiſor is inſufficient, and that he enfeoff'd A. who enfeoff'd B. who enfeoff'd the Tenant, and that A. had it one Year, B. another, and the Tenant another, the Tenant ſhall be charged for his own Time only, and the Plaintiff ſhall loſe his Damage againſt A. and B. becauſe not named in the Writ. 2 Inſ. 285. (l) Tenant for Years, or by Statute, &c. is no mean Occupier within the Act, unleſs the Aſſiſe is brought by Tenant by Statute, &c. 2 Inſ. 284. (m) If they have ſufficient, otherways the Tenant muſt anſwer for the whole. 2 Inſ. 285. (n) Yet ſeveral Judgments ſhall not be given, but one Judgment entirely againſt all, according to the Uſage; but the Sheriff upon the Execution may uſe ſuch Indifferency as Juſtice requires. 2 Inſ. 285. —If the Sheriff returns that the Diſſeiſor is inſufficient, Proceſs ſhall iſſue to levy it of the Tenant. 2 Inſ. 285.

4. By the ſame Act, the (o) Diſſeiſee ſhall recover Damages in a Writ of Entry (p) againſt (q) him that is found (r) Tenant after the Diſſeiſor.

(o) This extends not to his Heir. 2 Inſ. 286.

But by a ſubſequent Clauſe in this Act, where he recovers the Land againſt the Diſſeiſor, he ſhall have Damage. (p) Extends not to him that has an Eſtate by Law caſt upon him, if he waives the Poſſeſſion. Co. Lit. 360. 2 Inſ. 286, 287. (q) If brought againſt Two Joint-Tenants, and one diſclaims, and the other takes upon him the whole Tenancy, and pleads, &c. he ſhall anſwer the whole Damages. 2 Inſ. 287 (r) The Diſſeiſor enfeoffs A. who enfeoffs B. and in a Writ of Entry in the per and cui, B. vouches A. who pleads, and loſes, Judgment ſhall be given againſt the Vouchee, becauſe he is found Tenant in Law. 2 Inſ. 287.

(H) Damages double.

By whom the Damage ſhall be taxed, by the Jury or Court.

1. IN a Rediſſeiſin double Damages are given by the Statute of Weſtminſter 2. cap. 26. the (a) Jury ſhall give ſingle Damages, and the Court ſhall encreaſe them to double. Co. Magna Charta (b) 116. the Words of the Statute are, adjudicentur de cætero damna in duplo.

(a) So if Treſpaſs is brought againſt Overſeers of the Poor, &c for any Act done by Authority of 43 Eliz. cap. 2. and there is a Verdict for the Defendant, the Jury ſhall aſſeſs the Damages, which ſhall be trebled by the Court. Yelv. 176. (b) This is miſprinted in the Original, and ſhould be 416.

2. If there be an Indictment before Justices of Peace, upon the 23 *H. 6. cap.* 10. for Extortion, by which treble Damages are given to the Party, and it is not found by the Jury that he hath sustained any Damage, the Justices have no Power to give treble Damages. *Hill.* 11 *Car.* (c) the King and *Lamferne*, 1 *Jon.* 379. adjudged; and said, That it was to be considered, whether Damages were to be recovered upon an Indictment, or whether the Party should not have an Action for the Recovery thereof.

(c) Cro. Car. 438. 439. 448. S. C. adjudged; and said, That admitting Damages were to be given, the Jury ought to have found the Damages, and the Court trebled them.

(I) In what Cases the Court may assess Damages.

1. IN a (a) Recordari for taking his Cattle, if upon Demurrer it is adjudged for the Plaintiff, the Court may award Damages without a Writ of Enquiry of Damages. (b) 14 H. 4. 9. b.

(a) In Replevin where the Plaintiff is nonsuit, the Court without a Writ of Enquiry may assess Damages, because they accrue not in respect of any local Matter; but 'tis the Delay in Nonpayment of the Rent. Secus where Judgment is given for the Plaintiff, for he ought to recover for taking his Cattle; and the Damages may be greater or less, according to the Value of the Cattle, and Circumstance of Taking. 3 Leon. 213. adjudged. (b) Br. Damages 56. S. C.

2. So for other Things. 3 H. 6. 29. b.

3. When a Man shall be condemned by (c) Judgment, the Justices may tax the Damages without awarding a Writ of Enquiry of Damages. (d) 8 H. 6. 5.

(c) In Trespass for Goods taken, where Judgment by non sum informatus, &c. Yelv. 152. 1 Brownl. 214, 215. (d) Br. Damages 68. S. C.

4. In an Audita Querela, if the Matter be found for the Plaintiff by Verdict, and they do not enquire of the Damages, the Court may refuse to tax the Damages; but they may award a Venire to the same Inquest to tax them. (e) 22 E. 3. 5.

(e) Fitz. Bet 283. S. C.

5. (f) If in Debt upon a Bill obligatory the Plaintiff hath Judgment (g) by Default, the Court, by the Assent of the Plaintiff, which is always entered upon Record, may tax the Damages *Occasione Detentionis debiti*; (h) but if he will not assent thereto, he may have a Writ of Enquiry; but this Election is in the Plaintiff, and not in the Defendant. *Trin.* 21 *Car.* 2. between *Holdip* and *Otway*, 2 *Saund.* 106, 107. adjudged in *B.* and that Judgment affirmed upon a Writ of Error in *B. R.* and said, that it was the Course and Practice of both Courts upon a Judgment (i) in Debt by Default or Confession to tax Damages as well as Costs.

(f) 1 Sid. 442. like Point.

(g) So if a Verdict is found for the Plaintiff, and the Jury assess not Damages, &c. for the Debt is certain, and the Loss of the Plaintiff apparent. N. Dyer 105. a. Margine. (h) Cro. Jac. 415. (i) So upon Demurrer. Lat. 113. —Though 'tis otherways in Case. Lat. 113.

(K) In what Caſes the Court may (a) mitigate or encreaſe Damages.

(a) Godb. 135.

1. DAmages are given at the Niſi Prius in a Action where Damages are the Principal, and the Court cannot have any certain Conuſance of the Cauſe, * neither by the Record, nor other Matter apparent, they cannot mitigate nor encreaſe.

* Fol. 572.

2. In Caſe for Slander, the Defendant juſtified in the Manner, and at the Niſi Prius Damages were given, the Court cannot mitigate them. D. 2. Ma. 105. 15.

3. But in Battery pro Amputatione manus Dextræ, the Court may encreaſe the Damages, for 'tis apparent to the Court by the Record and View of the Perſon. D. 2. Ma. 105. 15. Tripconey, (b) 22 E. 3. 11. b. adjudged.

(b) Fitz. Damages 105. S. C.

4. So in Battery upon View of Mayhem in Court. 39 E. 3. 20. b. adjudged.

(c) 1 Leon. 139. ſo done. (d) Br. Coſts 7. S. C. Br. Damages 40. S. C. Fitz. 54. S. C.

5. (c) So in Battery upon View of the Wound in Court. (d) 3 H. 4. 4.

6. So in an Appeal of Mayhem, upon View of the Mayhem. (e) 8 H. 4. 22. 30 Aſſ. (f) 31.

(e) Fitz. Damages 57. S. C. Br. 47. S. C.

(f) This is miſprinted in the Original as here, and ſhould be 30. which vide, Br. Damages 111.

7 Mich. 14 Jac. B. R. In an Appeal of Mayhem by Freeman againſt Trevers, the Jury gave 20 Marks Damages, and upon View in Court, and Information of the Surgeons there preſent, the Court encreaſed the Damages to 100 l. becauſe he loſt the Uſe of his Hand.

(*) But vide poſt 452. Pl. 4. and the Notes there.

8. But if in an Appeal of Mayhem, the Juſtices of Niſi Prius upon View thereof certify, That he had ſuſtained Damages to ſuch greater Sum, yet the Juſtices of the Court out of which it iſſues cannot encreaſe Damages without their View. (g) 8 H. 4. 23.

(g) Fitz. Damages 57. S. C. Br. 47. S. C.

9. But upon a View in Pais by any of the Juſtices of the Court into which the Niſi Prius is returned, they may encreaſe Damages. (h) 8 H. 4. 23.

(h) Br. Damages 47. S. C.

10. In Conſpiracy for indicting for a Treſpaſs, Damages may be mitigated by the Court. (i) 7 H. 4. 31. b. Curia.

(i) Br. Abridgment 6. S. C. 23. S. C. Br. Conſpiracy 13. S. C. Br. Damages 44. S. C.

11. In Debt upon an Obligation, the Defendant denies the Deed, and it is found againſt him, the Court may encreaſe the Damages aſſeſſed. (k) 14 H. 4. 19. b.

(k) Bt. Abridgment 35. S. C.

12. In Treſpaſs for entering into his Park, and taking a Doe, the Court may (l) mitigate the Damages given by the Jury. (m) 9 H. 6. 2. b.

(l) Where by the Statute 3 Ed. 1. cap. 20. it is enacted, That if a Treſpaſſer in Parks and Ponds is attainted at the Suit of the Party, great and large Amends ſhall be awarded according to the Treſpaſs. 2 Inſ. 200. In the Explanation of that Statute it is ſaid, That if the Damages are too ſmall, the Court hath Power to encreaſe them, for that the Word Award properly belonged to the Court. 2 Inſ. 200. (m) Fitz. Judgment 10. S. C.

13. In

13. In Treſpaſs for cutting his Trees, upon Not guilty pleaded, the Court cannot (n) encreaſe the Damages given by the Jury, becauſe it lies not in their Conuſance. (o) 3 H. 4. 4.

(n) Nor can they diminiſh them, becauſe the Treſpaſs is local, and it cannot appear to them what the Damage was. 1 Brownl. 204. adjudged. —So in Caſe for Words, though the Court thought the Damages exceſſive, yet they would not mitigate them. Palm. 314. And though at firſt they inclined to do it, yet upon great Conſideration they reſolved to leave ſuch Matters of Fact to the Trial of the Jury, who beſt know the Quality and Eſtate of the Perſon, and the Damages he hath ſuſtained. (o) Br. Coſts 7. S. C. Br. Damages 40. S. C. Fitz. 54. S. C.

14. The Law is the ſame in Treſpaſs for taking his Goods. 19 H. 6. 10. b.

15. In an Appeal of Robbery, if the Defendant be acquitted, and it is enquired of the Damages, and it is found to 20 s. the Court cannot (p) encreaſe the Damages, becauſe they know the Appellee was long in Priſon, when the Inqueſt had taxed the Damages before. (q) 42 Aſſ. 19.

(p) For this, vid. 1ſt Part 500.

(q) Br. Damages 115. S. C. Br. Abridgment 30. S. C. Poſt Letter N. 1.

16. In ſuch Action where the principal Demand is certain, the Court may encreaſe Damages. (r) 10 H. 6. 24. b. Curia.

(r) Fitz. Damages 31. S. C.

17. As in Debt upon the Arrearages of an Account, if the Jury finds it arrear, and gives Damages, yet the Court may encreaſe it, becauſe the Demand is certain. (s) 10 H. 6. 24. b. adjudged.

(s) Fitz. Damages 31. S. C.

18. The Court may abridge Coſts of Suit by the Jury. (t) 19 H. 6. 42. b. 43.

(t) Fitz. Damages 26. S. C. Br. Abridgment 8.

19. In Treſpaſs for an Aſſault and Battery againſt *A.* and *B.* *A.* appeared, *&c.* and a Verdict was given againſt him, and Damages taxed to 30 *l.* and the Court, upon View of the Mayhem, encreaſed the Damages to 40 *l.* and after a Verdict was given againſt *B.* and Damages taxed; and then it was moved, that the Court, upon another View of the Wound, would encreaſe Damages againſt *B.* for that *A.* had murdered the Officer that came to ſerve the Execution upon him for the 40 *l.* ſo that poſſibly the Plaintiff might recover nothing againſt *A.* but it was denied by the Court, for that they could have the View but once in the ſame Action, though if he had brought ſeveral Actions, it would have been otherways. *Mich.* 3 *Car. Anonymus. Lit. Rep.* 51, 52. but the Court directed the Plaintiff to ſtay till *A.* was hanged, and then they might have the View, and encreaſe the Damages.

20. In Treſpaſs, *quare inſultum fecit & maletractavit* the Wife of the Plaintiff, *& Equam,* upon which the Wife rode, *percuſſit,* ſo that the Wife was thrown, and another Horſe trod upon her, *per quod* ſhe loſt the Uſe of Three Fingers, *&c.* there was a Verdict for the Plaintiff, and 8 *l.* Damages; and the Court refuſed to encreaſe the Damages upon the View of the Mayhem, and hearing Surgeons, becauſe there was no Mayhem or Wounding directly done by the Party, but rather by Accident, *viz.* by the coming, *&c.* of another Horſe; which whether he came, *&c.* or the Wife might have avoided him, is Matter of Evidence. *Mich.* 21 *Car.* 2. (u) *Burford* and his Wife againſt *Dodwell,* 1 *Sid.* 433. adjudged.

(u) 1 Mod. 24. S. C. adjudged, but not ſo fully reported.

(L) In

(L) In respect of the Plea.

1. IN Treſpaſs for taking his Goods, to the Damage of 20 l. if the Defendant pleads an Arbitrament made in another County, and this is tried againſt the Defendant, and Damages aſſeſſed for the Treſpaſs, yet inaſmuch as this Foreign Jury could not have full Conuſance of the Treſpaſs, and the (a) Defendant hath not denied the Damage to be according to the Count, the Court with the Aſſent of the Plaintiff may encreaſe the Damages, and to ſo much as the Plaintiff hath counted. 13 H. 4. 7. b.

(a) 1 Rol. Abr. 578. Pl. 4, 5. Et vid. All. 88.

Fol. 573.

2. In an Action (b) for taking his Goods, if the Defendant avows, upon which it is demurred, and adjudged for the Plaintiff, or upon Default and Damage found upon the Writ of Enquiry of Damages, the Court may encreaſe them, for the Court (this being upon Demurrer) (c) might have awarded Damages without Enquiry, therefore the Inqueſt is but for their Information. (d) 14 H. 4. 9. b. 3 H. 6. 29. b.

(b) But in an Aſſumpſit, where, upon a Demurrer to the Declaration, Judgment was given for the Plaintiff, and upon a Writ of Enquiry Damages found, the Court refuſed to mitigate them, for that as Judges they could not know what Damage the Plaintiff had ſuſtained. Tooly and Bliſton, 3 Leon. 150. Godb. 135. ſeems by the Time to be S. C. and ſaid, it was holden for Law, That the Juſtices might encreaſe but not decreaſe Damages, becauſe the Party may have an Attaint: But note, contrary per Anderſon and Periam Juſtices. (c) Yelv. 152. 1 Brownl. 214. (d) Br. Damages 56. S. C.

3. So in this Caſe the Court may mitigate the Damages for the ſame Reaſon. 3 H. 6. 29. b.

4. So in Treſpaſs, if Judgment be given upon nil dicit, and a Writ of Enquiry of Damages ſerved, the Court may encreaſe or (e) diminiſh the Damages found by the Inqueſt, for that they might have awarded Damages according to their Diſcretion without any ſuch Writ. (f) 19 H. 10. b. adjudged. Mich. 1651. between (g) Ley and Lord Folliot, in an Action of Aſſault, Battery, and Wounding, (h) the Manner of the doing thereof being ſpecially laid in the Declaration, though the Inqueſt gave 200 l. Damages, yet upon Examination of Surgeons, and upon View of the Wound in Court, and for the Heinouſneſs of the Fact, being done in the High-Street, in the Day-time, with a Stilletto, with an Intent to kill him, and the Surgeon by Agreement being to have 150 l. for the Cure, the Plaintiff being in great Danger of Death, and having loſt a Pottle of Blood, as the Surgeons ſaid, the Court encreaſed the Damages to 400 l. in toto, and Judgment given accordingly.

(e) Judgment in Battery by non ſum informatus, and upon a Writ of Enquiry, Damages found, &c. and upon a Motion to mitigate the Damages the Court ſaid, that in ſuch Caſes they never alter the Damages. Stanley's Caſe, Lit. Rep. 150. Hetl. 93. (f) Fitz. Damages 24. S. C. Br. Abridgment 7. S. C. (g) Davies and Lord Folliot S. C. Styl. 310. adjudged; but it does not appear by this Report, that the Manner of the Wounding was ſpecially laid in the Declaration. (h) Otherways if the Wounding be not particularly expreſſed in the Declaration, that the Court may judge thereof by the Record; for it ought to appear, that the Wounding was by this Battery, and the Party is not to be viewed in Court upon a bare Averment at Bar. Jervis and Lucas, Styl. 345. adjudged. —So in an Appeal of Mayhem, where the Particulars of the Mayhem are not expreſſed in the Declaration, the Court, upon View of the Mayhem, cannot encreaſe Damages, unleſs the Judges of Niſi Prius before whom tried, certify the Particulars of the Mayhem to the Court, or where tried, before a Judge of the ſame Court, who affirms, That theſe are the Mayhems that were proved upon Evidence, otherways non poteſt conſtare Curiæ, that theſe are the ſame Mayhems for which the Plaintiff has declared. Lat. 223. 1 Sid. 108. Et vid. Hard. 408.

(M) Damages encreaſed or decreaſed.

By what (a) Court it may be.

(a) Not by inferior Court.

1. THE Juſtices of Niu Prius have no Power to encreaſe Damages, but only to enquire of that which is affirmed by the Inqueſt. (8) 8 H. 4. 23.

1 Vent. 153. per Curiam; but 2 Jon. 183. adjudged con.

(b) Fitz. Damages 57. S. C. Br. 47. S. C.

(N) For what Cauſes they ſhall be recovered.

Not for the Delay of the Court.

1. IF a Man appealed of Robbery continues long in Priſon, and after is acquitted, he ſhall not have Damages for the long Continuance in Priſon, becauſe it was the Default of the Juſtices that they did not deliver him at the Firſt general Delivery. (a) 42 Aſſ. 19. per Knivet.

(a) Br. Abridgment 30. S. C. Br. Damages 115. S. C. Ante, Letter K. Pl. 15. S. C.

2. If the Conuſee of a Statute-Merchant takes the Body of the Conuſor in Execution, without any Extent of the Land, after he hath releaſed the Statute, yet in an Audita Querela, the Conuſor ſhall recover Damages for the Impriſonment of his Body without Cauſe. Quære, (b) 47 E. 3. 1. b.

(b) Fitz. Audita Querela 2. S. C. Br. Damages 34. S. C. 1 Part 643. Pl. 1. S. C.

(O) In what Actions Damages ſhall be ſaved by the Confeſſal.

1. IN an Admeaſurement of Dower, if the Defendant comes the Firſt Day, and ſays, that he is ready to admeaſure, the Plaintiff ſhall not recover his Damages. (a) 42 E. 3. 19. b.

(a) Fitz. Damages 71. S. C. Br. 24. S. C. Br. Admeaſurement 1. S. C. 2 Inſ. 368. S. C. cited.

2. In Detinue if the Garniſhment be prayed, and the Garniſhee comes, and cannot deny the Conditions to be broke, the Plaintiff ſhall not recover any Damages againſt him. 8 H. 6. 11.

3. So if he makes Default, for Damages are given againſt the Garniſhee for Delay. 8 H. 6. 11.

4. If a Man will avoid the Damages becauſe he hath been at all * Times ready to render the Thing in Demand, he ought to come at the firſt Day. 17 E. 3. 71.

* Fol. 574.

5. In detime for a Writing against an Executor, supposing it to come to his Hands after the Death of the Testator, the Defendant may come at the grand Distress, and say, that he hath at all Times been ready to deliver the Writing after the Time that it came to his Hands, and thereby save Damages against him. (b) 22 Ed. 3. 9. b. adjudged.

(b) Fitz. Damages 103. S. C.

6. In an Annuity, if the Defendant be returned summoned, and does not come, but afterwards comes by Attachment, he shall not save Damages by saying that he hath been at all Times ready, for he shall not have such Plea, inasmuch as he did not come upon the Summons. 29 E. 3. 40. adjudged.

(c) But the Feoffee of the Heir cannot at the first Day plead touts temps prist, because he had not the Land at all

7. If a Woman brings a Writ of Dower, and the (c) Heir comes into Court upon Summons the First Day, and pleads that he hath been always ready, and yet is to render Dower: If she hath not requested her Dower, she shall lose the mean Values and her Damages; but if she hath requested her Dower, she may plead it, and Issue may be thereupon taken, for the Heir holdeth by Title, and doth no Wrong till a Demand is made. *Co. Lit.* 32. b. 33. a.

Times since the Death of the Ancestor. Co. Lit. 33. a.

8. But in a Writ of Ayel, Cousinage, *&c.* where the Land and Damages are to be recovered, there such a Plea is not good, for there the Tenant of the Land hath no Title, but holdeth by Wrong. *Co. Lit.* 33. a.

(P) In what Actions Damages shall be recovered.

Upon a Penal Statute.

1. IN an Action of Debt upon the Stat. of 1 & 2 Ph. & Ma. for 5 l. by the Party grieved, for taking more than 4 d. for a Distress, by which Act it is enacted, That if any takes more than 4 d. for impounding a Distress, he shall forfeit 5 l. to the Party grieved, over and above the Sum that he took more than 4 d. and it is found against the Defendant, the Plaintiff shall have Damages, though it be upon a penal Law, because this is a Debt of 5 l. certain given by the Statute, and not as Damages, and the Damages are to be given for the Delay, in not rendring the Debt upon the Return of the Summons; for this is not like to penal Laws that give treble Damages, for there it appears, that they intend it for Damages, nor to the Statute of 2 E. 6. where Debt is given for the treble Value, for that there the Value is uncertain till the Recovery; but here the 5 l. is a certain Debt by the Statute, and it should be a small Remedy for the Party grieved to bring an Action for 5 l. without Damages or Costs. Mich. 15 Car. B. R. between (a) North and Musgrave, per Curiam, adjudged upon a Writ of Error upon such Judgment in Banco, where Damages were given by the Direction of the Court upon good Advice. Intratur, Trin. 15 Car. Rot. 975.

(a) Cro. Car. 559, 560. S. C. adjudged. March 56, 61. S. C. adjorned. 1 Jon. 447. S. C. adjudged.

2. Damages shall be given to the Party grieved, in an Action upon the Statute of the 13 El. cap. 5. of Forgery of false Deeds. (b) New Entries 163.

(b) Co Entr.

3. Damages shall be given to the Party grieved, in an Action upon the Statute of 21 H. 8. cap. 6. of Mortuaries. New Entries 164.

4. If a common Informer brings an Information, or Action of Debt, tam quam, &c. upon a Penal Statute, for a Sum certain given by the Statute, he shall not recover his Damages. M. 15 Car. B R. (c) in the said Case of North and Musgrave. per Curiam, and the Clerks agreed it to be the common Course and Practice.

(c) March 58. S. C. & S. P. agreed accordingly: But vid. 3 Levin. 374.

5. In Writs of Execution no Damages shall be recovered. (d) 50 E. 3. 23. b.

(d) Br. Damages 36. S. C. —No Costs, Lat. 101.

6. In a Scire Facias no Damages shall be recovered. (e) 2 H. 6. 15.

7. In a Formedon no Damages shall be recovered. (f) 3 H. 4. 15.

(e) Br. Damages 3. S. C. (f) Br. 167. S. C.

8. In Detinue Damages shall be recovered. 2 H. 6. 15.

9. In an Attaint of a Freehold Damages shall be recovered at the Common Law. (g) 3 H. 4. 15.

(g) Fitz. Damages 55. S. C. Br. 87. S. C.

10. In a Warrantia Chartæ, if the Plaintiff recovers pro Loco & Tempore, he shall not recover Damages, and yet he counts of Damages. 21 E. 3. 57. b. Quære, 18 E. 3. (h) 43. b.

(h) This is misprinted in the Original as here, and I suppose should be 42. b.

11. (i) In a Writ of Warrantia Chartæ, although the Defendant delays him by Issue, yet no Damages shall be recovered where no Land is lost. (k) 42 E. 3. 7. b. (it (l) seems this is to recover pro Loco & Tempore)

(i) Hob. 23. S. P. (k) Fitz. Damages 69. S. C. Br. 183. S. C. (l) In the Original 'tis semble.

Fol. 575.

12. But otherways where the Land is lost. (m) 42 E. 3. 7. b.

13. A Man shall not recover Damages in a Writ of Mesn, if it be brought for the Acquittal (n) before Distress in his Default.

(m) Br. Damages 69. S. C. Br. 183. (n) But if after, vid. the Statute of Westminster 2. cap. 9. 2 Inst. 375.

14. The Law is the same though the Defendant delays him by denying his Deed. Contra, (o) 42 E. 3. 7. b.

15. (p) In a Nuper obiit he shall not recover Damages. (q) 7 H. 6. 35. b. 21 E. 3. 57. b.

(o) Fitz. Damages 69. S. C. (p) Secus by the Statute of Gloucester, 2 Inst. 288. a. (q) Fitz. Damages 19. S. C. Br. 66. S. C.

16. Nor in a Perambulatione facienda, (r) 7 H. 6. 35. b.

17. (s) Nor in a Writ of Account, for the Auditors (t) (u) give a Consideration for it, yet he counts of Damages. (w) 7 H. 6. 35. b. 21 E. 3. 57. b. (x) 10 H. 6. 18. b.

(r) Br. Damages 66. S. C. adjudged. (s) Dal. 18. 1 Leon. 302. —But where upon the last Judgment Damages shall be given, ratione interplacitationis compoti, vid. Cro. El. 84. 1 Leon. 302. 3 Leon. 170, 230. March 92. (t) In the Original 'tis doneront consideration pur ceo. (u) For this, vid. 1 Part 228. (w) Fitz. Damages 19. S. C. Br. 66. S. C. (x) Fitz. Damages 30. S. C. Br. 136. S. C.

18. So no Damages shall be recovered in an Account as a Receiver, &c. where the Auditors (y) give not any Consideration for the Profit thereof. 14 E. 3. Account 109. adjudged. 2 R. 2. Accompt 45.

(y) In the Original 'tis ne doneront ascun consideration pur le profits de ceo.

19. In

19 (z) In a Writ of Partition by one Coparcener against the other, no Damages shall be recovered, though the Defendant hath not been at all Times ready to make Partition. 21 E. 3. 57. b. adjudged. Contra, (a) 7 H. 6. 35. b.

(z) 2 Inſ. 289. S. P. Et vid. Noy 68, 243.

(a) Fitz Damages 19. S. C. Br. 66. S. C.

20. In an Appeal of Mayhem he cannot count of Damages, and yet he ſhall recover Damages. (b) 10 H. 6. 18. b.

(b) Fitz. Damages 30. S. C. Br. 136. S. C.

21. In an Audita Querela Damages ſhall be recovered. (c) 26 E. 3. 37. b. per Thorp.

(c) Fitz. Audita Querela 36. S. C.

22. In an Audita Querela for ſuing Execution upon a Statute againſt his own Releaſe, Damages ſhall be recovered. 17 E. 3. 39. b.

23. In a Writ of Deceit, upon a Recovery by Default, by which the Judgment ſhall be reverſed, and the Plaintiff reſtored to the meſn Iſſues, no Damages ſhall be recovered. 18 E. 3. 28.

24 In a Prohibition to the Eccleſiaſtical Court, for a Matter triable at the Common Law, if the Plaintiff declares upon a Prohibition, and alledges, that the Defendant hath proſecuted the Suit in the Spiritual Court after the Prohibition granted, and the Defendant pleads thereto, and ſeveral Iſſues are joined upon ſeveral Cuſtoms, and one Iſſue alſo joined, whether he proſecuted in the Court Chriſtian after the Prohibition granted, and at the Niſi Prius this Iſſue is found for the Plaintiff, viz. that the Defendant had proſecuted there after the Prohibition granted, the Plaintiff (d) ſhall have Damages, to be taxed by the Jury, as well upon this Declaration, as upon an Attachment upon a Prohibition. Mich. 15 Car. B. R. between (e) Facy and Lang, adjudged per Curiam, and then was vouched a Precedent in Banco, between Ball and Berry, Tr. 7 Car. where it was ſo reſolved per Curiam, upon the View of many ancient Precedents.

(d) He ſhall not recover his Coſts and Damages, where the Matter in the Prohibition is found againſt the Defendant. Otherways for the Contempt in proſecuting after the Prohibition. Junger and Brogan, 2 Jon. 128. Raym. 387. 1 Vent. 348, 350. Et vid. 3 Lev. 360. (e) 1 Rol. Abr. 516. Pl. 1. S. C. 1 Jon. 447. S. C. adjudged. Cro. Car. 559. S. C. adjudged; but appears to have been upon an Attachment upon a Prohibition. 3 Levin. 360. S. C. cited. Et vid. 2 Inſ. 644.

25. In a Prohibition, Quare ſecutus eſt in Curia Chriſtianitatis de laico feodo, as for Tythe-Hay of Black-Acre, where he had White-Acre in Satisfaction of Tythes Time out of Mind, &c. if this be found againſt the Defendant, the Plaintiff ſhall have Damages, Co. Magna Charta 490.

26. In a Writ of Ward of the Body and Land Damages ſhall be recovered. (f) 27 E. 3. 79. b.

(f) Fitz. Gard. 22. S. C.

27. In a Writ of Account, as Receiver to merchandize, he ſhall render Damages for the Profit that he had or might have made of the Money.

28. In a Writ of Account, as Receiver to deliver over to another, or to re-deliver, and not to merchandize, there no Profit ſhall be given in Nature of Damages. 2 R. 2. Accompt 45.

29. In a Writ of Account, as Receiver of 20 l. if the Defendant comes the firſt Day, and is ready to account, and accounts, and is found in Arrearages, yet he ſhall not pay any Damages nor Coſts. Tr. 4. Ja. B R. in a Nota per Curiam. (g) 14 E. 3.

(g) Vid. Fitz. Accompt 72.

30. But if he pleads never his Receiver, and after accounts, and is found in Arrearages, * he ſhall render Damages. Tr. 4 Ja. B. R. in a Nota adjudged. 5 E. 3. 160. b.

* Fol. 576.

31. In an Account as Receiver, (as it ſeems) if the Defendant be adjudged to account, and he will not account, but lies in the Fleet for Two or Three Years, and then the Plaintiff prays his Judgment according to what he has counted, and has it, yet he ſhall recover nothing of the Profits, for the mean Time he was in Priſon,

Prison, and this proves, he shall not recover Damages in an Account. 14 E. 3. Accompt 109.

32. No Damages could be recovered by the Common Law, (h) but against the Wrong-Doer by him to whom the Wrong was done. 2 *Inst.* 284.

(h) In no Action at Common Law could a Man have recovered his Land and Damages, but only in an Assize against the Disseisor. 8 Co. 50. a. 10 Co. 116. a.

33. At Common Law no Damages were recovered in any real Action. 10 *Co.* 116. a.

34. Otherways in mixt Actions, as in Assise, Entry in Nature of an Assise, *&c.* 10 *Co.* 116. a.

35. So in personal Actions, as Trespass *quare clausum fregit, &c.* 10 *Co.* 116. a.

36. Damages shall be recovered in a Writ of Admeasurement of Dower. 2 *Inst.* 368.

37. But not in a Writ of (i) Admeasurement of Pasture. 2 *Inst.* 368.

(i) Otherways in a Writ de secunda superoneratione by the Stat. West. 2. cap. 8. which vid. 2 Inst. 369.

38. By the Statute of *Glouceſter*, made 6 *Edw.* 1. whereas before Damages were not awarded in a *Mortdanceſter*, (k) unless upon a Recovery against the chief Lord) (l) they shall be awarded in all Cases where a Man recovers in a *Mortdanceſter:* (m) So in Cosinage, Ayel, and Besaiel.

(k) For which, vid. 52 H. 3. cap. 6.

(l) From the Death of the next immediate Ancestor, as in a Writ of Ayel from the Death of the Grandfather, if he survived the Father, else from the Death of the Father only. 2 Inst. 288. —The Aunt and Neece join in a Mortdanceſter, the Aunt recovers Damage till the Death of her Sister, and both after. 2 Inst. 288. —The Grandfather dies seised, a Stranger abates, the Father dies, his Wife priviment enseint with a Son, which is after born, he shall recover Damages from the Death of his Father, for now he is immediate Heir to the Father. 2 Inst. 288. (m) Note, the Examples are all of Actions, Ancestrel-possessory, not Droiturel. 2 Inst. 287.

39. And by the same Statute, every (n) one shall render Damages where the Land is recovered against him upon his own Intrusion or (o) Act.

(n) So that if the Heir of the Disseisee recovers against the Disseisor, he shall have Damages for his own Time. 2 Inst. 286. (o) Viz. Wrong, for if one Parcener refuses to make Partition, in a Writ against her, no Damages shall be recovered, because this is a Writ of Right in its Nature, and she has a Right per my & per tout to all the Profits. 2 Inst. 289.

(a) (F) For (b) what Things the Damages shall be said to be given.

(a) This is misprinted here as in the Original, and should be Q.

(b) Godb. 343, 344.

(c) Moor 141. Pl. 283. 708. Pl. 987. Cro. El. 329, 788. 1 Bulst. 37. 3 Bulst. 283. Cro. Car. 237, 328. March 48. 1 Sid. 38. Winch. 33.

1. (c) IF an Action upon the Case be brought for speaking of Words all at one Time, and upon Not guilty pleaded a Verdict is given for the Plaintiff; though some of the Words will not maintain an Action, if any of the Words will maintain the Action, the Damages may be given entirely, for it shall be intended that the Damages were given for the Words, which will maintain the Action, and only encreased for the other Words, and that they are mentioned only for Aggravation.

(d) Moor 708. Pl. 987. Cro. El. 329. 1 Bulſ. 37. 3 Bulſ. 283. Cro. Car. 237, 328. Hut. 131.

2. (d) But if the Action be brought for ſeveral Words ſpoke at ſeveral Times, and the Action will not lie for the Words ſpoke at one Time, but will lie for the Words ſpoke at another Time, and upon Not guilty pleaded, a Verdict is found for all the Words, and entire Damages given, this is not good.

3. In an Action upon the Caſe for Words ſpoke at one Time, if the Defendant pleads Not guilty as to Part of the Words, which Words will not maintain an Action, and he juſtifies the other Words, and the Plaintiff replies of his own Wrong, without ſuch Cauſe, and a Verdict is found for the Plaintiff; in this Caſe entire Damages may be given, becauſe now in Part by the Confeſſion of the Party, and in Part by the Jury, it is found that he ſpoke the Words as they are alledged in the Declaration, ſcilicet, at one Time, and then it ſhall be intended the Damages were given for the Words, which will maintain the Action, and that the other Words were but for Aggravation. Tr. 17 Car. B. R. between Lambell and Hancock, per Curiam adjudged, this being moved in Arreſt of Judgment after a Verdict, and entire Damages given for the Plaintiff.

4. In an Action upon the Statute of Monopolies, if the Plaintiff declares, That the Defendant, colore cujuſdam Proclamationis &c. 7 Jan. 20 Car. procured the Plaintiff to be taken and impriſoned, and to be detained in Priſon for 20 Weeks next enſuing, and certain (e) Wines of the Plaintiff till he made a Fine for the Deliverance, and by Colour aforeſaid, after, ſcilicet, 14 Jul. 20 Car' ſupradict' tales & tantas minas de impriſonamento corporis Querentis, adtunc & ibidem ei intulerunt, quod Querens per longum tempus, ſcilicet, a pred' 14 Julii, Anno 20 ſupradicto, uſque diem impetrationis hujus billæ, ſcilicet, 14 Junii, Anno 21 Caroli Regis, circa negotia ſua neceſſaria palam intendere non audebat, and upon Not guilty pleaded, a Verdict is given for the Plaintiff, and entire Damages: In this Caſe the Declaration is repugnant as to the Menace of Impriſonment, if it be interpreted according to the Words, inaſmuch as it is alledged before he procured him to be impriſoned. 7 Jan. 20 Car. and then it is ſaid, that afterwards, ſcilicet, 14 Jul. 20 Car. he menaced, &c. which was before Jan. 20 Car. and after ſays, that he durſt not go about his Buſineſs, a pred' 14 Jul. 20 Car. till the Bill exhibited ſo in Words repugnant, yet inaſmuch as in Law, when he alledges the Day, and after ſays, that afterwards, ſcilicet. 14 Jul. 20 Car. (f) this which comes after the ſcilicet, * being contrary to that before alledged, ſhall be void, and a void Allegation, and then the Reference thereof, as to not daring to go about his Buſineſs, having Reference to the ſaid void Allegation of the 14 Jul. till the Bill exhibited, is alſo void, and then by Law it ſhall be taken as if no more had been alledged but that he after menaced him, by which he durſt not go about his Buſineſs for a long Time, which would be ſufficient of it ſelf without more; and then in this Caſe it ſhall be taken and intended by the Law, that the Jury gave Damages for that as it was alledged in Law materially, and not as it is alledged under the ſcilicet, and ſo that they gave Damages for menacing him, by which he durſt not go about his Buſineſs, and ſo the Damages well aſſeſſed. Mich. 23 Car. B. R. between (g) Sims and Gregory, adjudged for the Plaintiff, after ſeveral Motions in Arreſt of Judgment. Intratur, P. 23 Car. Rot. 274.

(e) In the Original 'tis Vines.

* Fol. 577.

(f) Cro. El. 368, 464. But for this, vid. Title Repugnancy.

(g) All. 22. S. C. adjudged; and

that the 14 Jul. 20 Car. being firſt brought in by a ſcilicet, is void in both Places, and ſhall be taken to have been out of the Conſideration of the Jury in taxing Damages.

5. In an Action upon the Caseupon a Promise, if the Plaintiff declares, That whereas the Defendant was possessed of a Shop in B. and of several Goods and Chattels in the said Shop, in which Shop the Defendant adtunc exercuit the Art or Mystery of a Grocer, the Defendant, in Consideration the Plaintiff would marry C. the Daughter of the Defendant, assumed and promised to pay so much Money for her Portion, and so much for Apparel, and that she would transfer [Anglice, would turn over,] to the Plaintiff negotiationem suam, [Anglice, her Trade,] in B. pred', and the said Shop of the Defendant there, and so much of the Goods and Chattels of the Defendant in the said Shop which should be worth 10 l. and that she would not at any Time after exercise her said Trade in B. aforesaid, and that she would lend to the Plaintiff 10 l. till a certain Time, and assigns a Breach in all; and among other Things, that she non transtulit [Anglice, did not turn over] to the Plaintiff negotiationem suam pred' in B. aforesaid, nor the Shop pred'; and all found for the Plaintiff, and entire Damages given: And though it is impossible to assign suam negotiationem, scilicet, her Trade, yet it shall be intended, if it be void and impossible, and signifies nothing, and is of no Sense or Meaning, that the Jury did not give any Damage for it. Trin. 24 Car. B. R. between (h) Gosse and Pragnell, adjudged in a Writ of Error upon a Judgment in Banco, and the Judgment affirmed. Intratur, P. 24 Car. Rot. 217.

(h) Styl. 111. S. C. adjudged. All. 67. S. C. adjudged.

6. In an Action upon the Case if the Plaintiff declares, That whereas the Defendant had bargained and sold 40 Tun of Currants, at the Rate of 46 s. 8 d. for every 100 Weight, to be delivered to the Plaintiff within Three Months then next ensuing, discomputando ex eodem pretio pro quatuor mensibus, the Defendant, in Consideration the Plaintiff had then paid to him in Hand 400 l. in Part of Payment, and assumed to pay the Residue to be due, discomputando ut prefertur, for the Currants upon the Delivery of the Currants to the Plaintiff; the Defendant, in consideratione inde, assumed to deliver to the Plaintiff the Currants within Three Months then next ensuing, and assigns a Breach for the Non-delivery of the Currants at the End of 3 Months, according to the Promise; and upon Not guilty pleaded, a Verdict is found for the Plaintiff, and Damages assessed generally: And tho' it was objected, that it is not known what is intended by the Words in the Bargain, to pay 46 s. 8 d. for every 100 lib. discomputando ex pretio pro 4 mensibus, yet although the Court does not know what is intended thereby, yet it is well known to the Merchants, and all is to be given in Damages; and if it be not of any Sense, nor is known what is intended thereby, then it shall be intended by the Court, that the Jury did not give any Damages for it. Mich. 23 Car. B. R. between (i) Brewer and Southwood, adjudged per Curiam. Intratur, Hill. 22 Car. Rot. 1372.

(i) All. 27, 58, 63. S. C. adjourned Styl. 27, 58, 63. adjourn'.

7. If the Plaintiff declares, That he bought of the Defendant *diversa bona & catalla, viz. unum fulcrum lecti*, [*Anglice, a Field-Bedstead,*] with a Testern and Curtains of Say; *unum Canopium*, [*vocat' a Canopy,*] *&c.* and that the Defendant assumed to deliver *bona pred'*, but had not, *&c.* and there is a Verdict for the Plaintiff, and general Damages given, it shall not be presumed that any Damage was given for the Testern and Curtains, which (k) where not alledged *positivé*, but only *expositivé*; and this Exposition is too extensive, for *fulcrum* signifies the Bedstead only; and by 36. *Edw.* 3. all Pleadings ought to be entered in Latin. *Mich.* 11 *Jac.* between *James* and *Osborn*, 10 *Co.* 130. a. 132. b. adjudged.

(k) Trover de uno risco, [Anglice, a Trunk full of Linen, &c.] and Damages intended to be given for the Trunk only. Bancroft and Coo, Cro. Jac. 665. adjudged by Three Judges against One.

8. If

8. If in an Action upon a Covenant, divided into Two Branches, the Breach is assigned in one Part only, *&c.* and the Jury assess Damages generally *pro fractione conventionis pred'*, this shall have Relation to that Part only in which the Breach was assigned. *Trin.* 18 *Jac.* between *Steel* and *Spight*, 2 *Rol. Rep.* 178.

9. If in Debt upon 2 E. 6. for not setting forth Tithes growing upon 70 Acres of Land, *&c.* the Jury as to 66 Acres give Damages, *&c.* and as to the Five Acres residue give Damage, *&c.* whereas it ought to have been as to the Four Acres residue, yet this being only a Miscounting of the Jury, and no Damage to any thereby, the Plaintiff shall have his Judgment. *Mich.* 1651. between *Cressit* and *Burgis*, *Styl.* 161. adjudged.

10. If in Trespass for an Assault, Battery, and Wounding, the Defendant *quoad* the Force pleads Not guilty, and *quoad* the Assault and Battery, that he was removing a Market-Cross to a more convenient Place, and the Plaintiff interrupted him, *per quod molliter manus imposuit*, *&c* and thereupon they are at Issue, and the Jury find the Defendant guilty *de injuria sua propria*, and (l) so recite the entire Declaration of the Assault, Battery, and Wounding, (though the Wounding was not in Issue) and assess Damages *occasione transgressionis illius* to 20 *l.* it must be intended that Damages were given for all in the Declaration, *viz.* the Wounding, though not in Issue. *Mich.* 14 *Car.* 2. between *Calvert* and *Arnold*, 1 *Sid.* 96. adjudged *per totam Curiam.* There is the same Mischief where the Jury find (m) more than the Plaintiff hath declared for, and assess Damages for it. *Mich.* 14 *Car.* 2. 1 *Sid.* 96. *per Curiam.*

(l) Otherwise, I suppose, they would not have presumed Damages given for what was not in Issue. Vid. Hob. 187. Cro. Jac. 353.

(m) So when they give Damages for what they have not found. 1 Bulst. 64.

11. If in Trover, *inter alia*, *de una Salsura*, [*Anglice*, *a Salting-Trough*,] there is a Verdict for the Plaintiff, and entire Damages, the Declaration as to the Trough being meerly in *English*, the Damages shall be intended given for the other Particulars. *Mich.* 14 *Car.* between (n) *Maihu* and *Flower*, 1 *Sid.* 98. adjudged upon a Motion in Arrest of Judgment, and Judgment given for the Plaintiff accordingly; but said that if the Defendant had been acquitted of the other Things, and expresly found guilty of this, it would have been otherwise,

(n) 1 Levin. 99. S. C. and by this Report Judgment was arrested, because the Damages were given for every Thing in particular, and among them, pro salsura pred', and yet they were given for all the Particulars together. Vid. the Report, which I take to be a little obscure; and it was said, that salsura signified seasoning; so that it was altogether uncertain what was intended thereby. —In Trespass, inter alia, de una satagine, [Anglice, a Frying-Pan] Ray. 15. after a Verdict for the Plaintiff, it was moved, that it ought to have been sartagine, for that satago signified nothing; but then per Curiam no Damages shall be intended to be given for it: And it was said, that where the Word signified another Thing it was naught. Secus where insignificant. Et. vid. 10 Co. 133. —Trover, inter alia, de una amphora saporis, &c. and Damages intended to be given pro amphora only, for saporis signifies Savour. 3 Levin. 336. adjudged.

12. (o) In case the Plaintiff declared, That *J. S.* 19 *Sept.* 16 *Car.* 2. was retained as an Apprentice to serve the Plaintiff for 9 Years, and continued in his said Service till the 31 *Oct.* 21 *Car.* 2. when the Defendant procured the said *J. S.* to leave the Plaintiff's Service, *&c.* (p) *per quod* the Plaintiff *totum proficuum quod ratione servitii pred' J. S. per totum residuum termini recipere potuisset totaliter perdidit*, *&c.* and (q) after a Verdict for the Plaintiff, and general Damages given, though it appeared the Term was not expired, it was intended that Damages were given for all the Term, as well the Time to come as past, for the Damages must be intended to be taxed according to the Declaration; and if it should be intended otherwise, it would be uncertain to what Time they

(o) Harbin and Green like Point, Hob. 189. adjudged. Moor 887. Pl. 1247. adjudged.

(p) The Plaintiff declared for a Battery of his Servant, 19 Jan. &c. per quod he lost his Service for a long Time, viz. for the Space of six Months then next following, &c. Hob. 284. After a Verdict for the Plaintiff, though the Original bore Teste before the End of the six Months, yet the Plaintiff had his Judgment, for the viz. was more than needed, being not of the Substance of the Action, but for Aggravation of Damages only. All. 23. per Curiam: But yet vid. Cro. Jac. 619. Yelv. 94. (q) Where upon a Demurrer it may be help'd, for the Plaintiff may take Damages for the Departure only. 1 Mod. 271.

were taxed, whether to the Exhibition of the Bill, or Verdict given. *Trin.* 21 *Car.* 2. between (r) *Hambleton* and *Veere*, 2 *Saunders* 169, 170. Judgment arrested accordingly.

(r) 1 Levin. 299. S. C. adjudged.

(G) How much Damage shall be recovered.

Fol. 578.

1. (a) IN Trespass the Plaintiff shall not recover more Damages than the Plaintiff hath counted of, though the Jury give more; for the Plaintiff knows how much he is damaged better than any other. (b) 2 H. 6. 7. 8 H. 6. 5. Co. 10. (c) Pilford (d) 166.

(a) Ow. 45. S. P. per Curiam. Kelw. 21. b. Yelv. 45. Cro. El. 544. 568. 1 Bulst. 49.

(b) Fitz. Damages 16. S. C. Br. 2. S. C.

(c) Cro. Jac. 297. S. C. adjudged.

(d) This is misprinted here as in the Original, and should be 116.

2. If the Tenant vouches, the Demandant shall not recover more Damages against the Vouchee than he hath counted of, for the Vouchee comes in lieu of the Tenant, and the Judgment is given against the Tenant. 8 H. 6. 11.

3. But the Plaintiff in Detinue may recover more Damages against the Garnishee than he hath counted of; for his Count was not against the Garnishee, but against the Defendant, and Damages against him are for the Delay after the Count. (e) 8 H. 6. 5. 11.

(e) Fitz. Damages 21. S. C. Br. 68. S. C.

4. In Trespass for rescuing a Distress, to his Damage so much, if the Defendant justifies the Rescous upon special Matter, upon which it is demurred for the Plaintiff, and adjudged for him, he shall have Damages as he hath counted; (f) for the Defendant hath acknowledged the Trespass, and (g) hath not denied the Damages. 21 E. 3. (h) 4. b.

(f) In Debt for 200 l. upon the 2 Ed. 6. for not setting forth Tythes, if the Defendant pleads the 31 H. 8. and that the Lands were discharged in the Hands of the Prior of B. at the Time of the Dissolution, &c. and thereupon Issue taken, and at the Trial the Defendant cannot make good his Plea, the Value shall be taken as confessed, because the Issue is joined upon a collateral Point, and the Defendant took not the Value by Protestation. All. 88. ruled upon a Trial at Bar, and a Verdict given for 200 l.

(g) 1 Rol. Abr. 572. L. 1.

(h) This is misprinted here as in the Original, and should be 40. b.

5. So in an Attachment upon a Prohibition, if the Defendant acknowledges all the Trespass counted against him, the Plaintiff shall recover Damages as he hath counted. 21 E. 3. 40. b. adjudged.

6. In a Writ for substracting his Suit to his Mill, in the debet and solet, to his Damage 40 l. if the Defendant says he cannot deny it, the Plaintiff shall recover Damages to 40 l. as he has counted, because this Acknowledgment is as much as if he had said that he cannot deny that there is as much Damage as as hath counted. 29 E. 3. 13.

7. In a Writ of Ward, if the Defendant acknowledges that the Plaintiff hath a Right to the Ward, the Plaintiff shall recover the Ward and Damages as he hath counted. 38 E. 3. 21. adjudged. Vide contra, 1 E. 3. 4. Annuity.

8. In an Action of Waste, if the Defendant demurs upon the Declaration, and it is adjudged against him, yet a Writ shall issue to enquire of the Damages. 34 H. 6. 8.

(i) Cro. Eliz. 568. S. P. adjudged. 2 Rol. Rep. 447. S. P. adjudged.
(k) 2 Inſ. 288, 289. S. P. con.
(l) Cro. Jac. 69. S. C. adjudged. Yelv. 70. S. C. adjudged.

9. (i) The Jury may give as much Damage to the Plaintiff as he hath counted, and (k) further give to him Coſts by itſelf, though the Coſts exceed the Damages named in the Declaration; for the Damages are given for the Wrong for which the Action is brought, and the Coſts for the Charge of Suit, the one before the Suit, and the other in and for the Suit. Tr. 3 Jac. B. R. between (l) Eagles and Vales, per Curiam, in an Action upon the Caſe upon an Aſſumpſit. Co. 10. Robert Pilfold 115. b. adjudged in Treſpaſs. Contra, H. 39 Eliz B. R. per Curiam. 12 H. 7. Kelleway 21. b. dubitatur.

(m) Cro. El. 886. S. P. adjudged.
(n) Cro. El. 544. S. C. adjudged.
(o) Cro. El. 568. S. P. adjudged.
(p) Br. Damages 203. S. C.

10. (m) So a Fortiori, the Court may encreaſe Coſts beyond the Sum of the Damages mentioned in the Count. Trin. 3 Ja. B. R. between Eagles and Vales, per Curiam. Co. 10. Pilfold 115. b. adjudged. Hill. 39 Eliz. B. R. (n) Morgan Woolfe's Caſe, adjudged in a Writ of Error.

11. (o) But the Jury in the Caſe aforeſaid cannot tax the Damages and Coſts together to more than is contained in the Count, for then it will not be known how much they gave for Damages, and how much for Coſts, for perhaps they might give more for Damages than the Plaintiff had counted. (p) 13 H. 7. 16, 17. Co. 10. Robert Pilfold 117. b.

12. In an Action of Debt upon a Bill, if the Plaintiff declares to his Damage of 10 l. and the Judgment is given for the Plaintiff by nihil dicit, and the Judgment is, That the Plaintiff ſhall recover debitum ſuum pred', & damna ſua occaſione detentionis debiti illius ad 12 l 10 s. eidem * Querenti ex aſſenſu ſuo per Curiam hic adjudicat', &c. Though here are more Damages than he hath counted for, yet becauſe it is the uſual Courſe for the Court in ſuch Caſes to tax Damages and Coſts, 'tis good; for it may be that all was for Coſts, and it ſhall not be intended that the Court hath done otherways than they ought. Mich. 8 Car. B. R. between Sir Richard Greenville and Sandwich, adjudged in a Writ of Error upon a Judgment in Banco. Intratur, Paſch. 8 Car. Rot. 280. Trin. 24 Car. between Parſons and Batchelor, adjudged in a Writ of Error upon a Judgment in Banco. Intratur, Paſch. 22 Car. Rot. 381.

* Fol. 579.

13. In perſonal Actions the Plaintiff ſhall recover Damages only for the Tort done before the Action brought, and therein the Plaintiff counts to his Damage. 10 *Co.* 117. a.

14. But in a real Action he recovers his Damages pending the Writ, and (q) therefore never counts to his Damage. 10 *Co.* 117. a.

(q) The old Form remains, though Damages given by Statute. 2 Inſ. 286.

15. If in a Writ of Entry *ſur Diſſeiſin*, or in Nature of an Aſſiſe, a Writ of Enquiry of Damages is awarded, the Plaintiff ſhall recover his Damages but from the Time of the Diſſeiſin to the Time of the Award of the Enquiry of Damages and not after, though the Writ of Enquiry be not ſerved till Seven Years after. 10 *Co.* 117. a. And if in ſuch Writ an Iſſue is joined triable by Verdict, he ſhall recover Damages but from the Time of the Diſſeiſin to the Time of the Verdict. 10 *Co.* 117. a.

16. But in a *Præcipe quod reddat* of a Rent of the Poſſeſſion of the Demandant himſelf, he ſhall recover the Arrears, as well pending the Writ as before, *uſque Diem Judicii redditi.* 10 *Co.* 117. a.

17 The Diſſeiſee in an Action of Treſpaſs may recover Damages for the firſt Entry, without any Regreſs. *Co. Lit.* 257. a.

18. But after Regreſs (r) he may have Treſpaſs with a *continaando*, and therein recover for all the mean Occupation, as well as for the firſt Entry. *Co. Lit.* 257.

19. So in an Action upon 5 *R.* 2. *cap.* 7. for entring into Land, *ubi ingreſſus non datur per Legem*, the Plaintiff ſhall recover Damages for the firſt tortious Entry only, but not for the mean Profits. *Co. Lit.* 257. a.

20. But in an Action upon 8 *H.* 6. *cap.* 9. where one enters by Force, or enters peaceably, and detains with Force, or when one enters with Force, or detains with Force, the Plaintiff without any Regreſs ſhall recover treble Damages, as well for the mean Occupation, as for the firſt Entry. *Co. Lit.* 257. b.

(r) But for this, vid. 2 Rol. Abr. 550. Letter K. and the Notes there.

By (a) whom the Damages (b) ſhall be (c) taxed.

1. (d) IF there be a Demurrer upon Evidence, tho' the Jury are thereby diſcharged of the Iſſue; yet they may tax Damages conditionally, *viz.* if Judgment ſhall be given for the Plaintiff, *&c. Mich.* 4 *Car.* between *Damoſe* and *Newbot*, *Cro. Car.* 143. *per Curiam.*

(a) Where there is a Demurrer to Part, and Iſſue to Part. 2 Rol. Abr. 722. Pl. 20.

(b) Where an Omiſſion of taxing Damages by the Jury cannot be ſupplied by the Writ of Enquiry, but a Venire facias de novo ſhall go. 2 Rol. Abr. 321. Pl. 12. 722. Pl. 15. (c) The Jury find the Defendant guilty of taking a Load of Wheat, ad valentiam 20 s. Lane 98. this is not enough, but it ought to be found to what Damage expreſly. (d) Styl. 22. S. P. and ſo done.

2. Or when the Demurrer is determined, it may be done by (e) Writ of Enquiry. *Mich.* 4 *Car. Cro. Car.* 143. and it was ſaid to be the moſt uſual Courſe where there is a Demurrer to Evidence to diſcharge the Jury without further Enquiry.

(e) Where upon a Writ of Enquiry the Plaintiff is not bound to prove his Property. Goodwin and Welſh, Cro. Jac. 220. Yelv. 151. 1 Brownl. 214.

Damages.

How to be given.

To Parceners.

1. IF the Aunt and Neece join in an Action of Waſte, for Waſte done in the Life of the other Siſter, the Aunt ſhall recover the Damages only, becauſe the ſame belong not by Law to the Neece. *Co. Lit.* 198. a.

2. But if for Waſte done in the Life of the other Siſter, and for other Waſte done after her Death, Judgment ſhall be given for both for the Place waſted, and treble Damages for the Waſte done in their own Time, and the Aunt ſhall have a ſole Judgment for the whole Damages for the Waſte done in the Time of her Siſter, by Survivor. 2 *Inſ.* 305.

3. If a Man has Iſſue Two Daughters, and dies ſeiſed of Lands, and a Stranger abates, and one of the Daughters has Iſſue, and dies, the Aunt and Neece may join in a Mortdanceſter, and the Aunt only ſhall recover Damages till the Death of the Siſter, and both of them from her Death. 4 *Inſ.* 288.

What (a) (b) (c) Damages ſhall be given and (d) for (e) what.

(a) Where Money laid out in Repairs, &c. ſhall be recouped in Damages. Godb. 53. (b) Where in Treſpaſs for breaking his Cloſe, &c. the Court refuſed to grant a new Writ of Enquiry, becauſe the Damages were too ſmall, the ſuing forth the Writ being the Plaintiff's own Act, 2 Leon. 214. though it was ſaid, that ſometimes where exceſſive Damages have been given, or ſome Miſdemeanor alledged in procuring or executing the Writ of Enquiry, the Defendant hath been relieved by procuring a new Writ: But vid. 1 Mod. 2. (c) In Treſpaſs the Jury gave the Plaintiff half a Farthing Damage, and held good. 2 Rol. Rep. 21, 22. per Curiam. Et vid. 2 Jon. Rep. 138. (d) When upon the alia enormia Matter ariſing ex turpi cauſa may be given in Evidence, 1 Sid. 225. (e) Gouldſ. 33. Godb. 98. Ray 77. (f) For Damages upon ſuch extravagant Bargains, vid. Moor 419. Pl. 576. 3 Leon. 150. Ow. 34.

1. THE Plaintiff declared upon an *Aſſumpſit* to pay for an Horſe a Barley-Corn a Nail, doubling every Nail, and avers, that there were 32 Nails in every Shoe, which, doubling every Nail, came to 500 Quarters of Barley, *&c.* 1 *Levin.* 111. being tried before *Hide*, he directed the Jury to give the (f) Value of the Horſe in Damages.

(a) For this Writ, vid. F. N. B. 171.

(a) Decies tantum.

(A) For what Act or Thing it lies.

What ſhall be ſaid a Taking.

(b) Br. Decies tantum 4. S. C. Fitz. 9. S. C.

1. A Man buys Lands of one Party, and has the better Bargain to maintain the Suit, this is a Taking, for which he ſhall be puniſhed by this Writ. Adjudged, (b) 41 Ed. 3. 9. b.

Default.

Fol. 580.

(a) (b) Appearance.

(A) What ſhall be ſaid an Appearance.

1. If the Tenant or Defendant be in Court, yet if he ſays that he will not appear, this is not any Appearance. (c) 8 H. 6. 7. b. 8. (d) 7 H. 6. 38. b. 8 H. 6. (e) 8. adjudged.

(a) Where his being in Court makes no Appearance, unleſs recorded. Kelw. 180. Cro. El. 466. —And how the Appearance ſhall be recorded, though the Writ is not returned, or no Court is held, or Juſtices come not, &c. 1 Leon. 90. Yelv. 207. Cro Jac. 282. 1 Bulſ. 156. Gouldſ. 67. (b) Where an Appearance recorded after the Day, but in the ſame Term, is a good Appearance at the Day, the whole Term being but as one Day. 2 Bulſ. 255. adjudged. (c) Fitz. Default 2. S. C. Br. 36. S. C. (d) Fitz. Default 1. S. C. Br. 33. S. C. (e) I ſuppoſe this ſhould be 16.

2. As in an Aſſiſe, the Tenant makes Default, and one appears for him as his Bailiff, and the Tenant comes and diſavows him as his Bailiff; this is not any Appearance, for he does not come to appear, but to diſavow the Bailiff. (f) 8 H. 6. 7. b. adjudged.

(f) Fitz. Default 2. S. C. Br. 36. S. C.

3. If a Man brings (g) an Action againſt an Officer of a Court, he ought of Neceſſity to anſwer, otherways he ſhall be condemned, for he is always in Court. 8 H. 6. 16.

4. So of a Sheriff upon his Account. 8 H. 6. 16.

(g) So upon an Information againſt him. 1 Sid. 134, 135.

5. So if an Action be brought againſt a Man that is a Priſoner (h) in the ſame Court, he cannot but appear, or ſhall be condemned. 8 H. 6. 16.

(h) A Priſoner in the Fleet was brought to the Common-Pleas Bar by Habeas Corpus, to the intent to have him appear to an Original in Debt; and though he confeſſed himſelf the ſame Perſon, yet he refuſed to appear to the Action, Gouldſ. 118. per Curiam, this is no Appearance; and he was remanded, and the Plaintiff proceeded to the Outlawry againſt him.

6. But it is otherways of him that is a Priſoner in another Court. 8 H. 6. 16.

7. If a Man comes in by Cepi Corpus to Two Writs, and to Three other Writs he hath Day by Diſtreſs, he ought to anſwer to thoſe to which he comes in by Cepi. 12 H. 6. 2.

8. So he ought alſo to anſwer to thoſe in which he hath Day by Diſtreſs, for he is in Ward by the Return of Cepi Corpus. 12 H. 6. 2.

9. But if upon the Capias the Sheriff had returned non eſt inventus, and he had come in gratis, he might have anſwered to the Writ out of which the Capias iſſued, and not have anſwered to the reſt. (i) 16 H. 6. 2.

(i) This is miſprinted in the Original as here, and ſhould be 12.

10. In an Action of Debt against Baron and Feme, (k) for the Recusancy of the Feme, the Baron cannot appear by Superſedeas only, for either both ought to appear, or both be outlawed. Hobart's Reports (l) 24 Loveden's Case, resolved per Curiam.

(k) So in Debt against Baron and Feme, Executrix, &c. Bilford and For, Cro. El. 118. adjudged. 1 Leon. 138, 139. adjudged: Yet vid. Dal. 38. (l) I suppose this is misprinted, for in the Fol. Hob. 'tis 179.

11. If an Action be brought against an Attorney de B R. and his Wife, and he declares against the Baron, being an Attorney of the Court, in proper Person, and against the Feme in Custodia Mareschalli, upon Bail filed for the Feme only, this is not good, because Bail cannot be filed only for the Feme, without Bail for the Husband, and the Baron (m) cannot have his Privilege in this Case when the Action is brought against him and his Wife. Trin. 1650. between (n) Morthwaite and Elsy, adjudged, this being moved in Arrest of Judgment. Mich. 23 Car. B. adjudged accordingly for an Attorney in Bank, between Smith and Smith.

(m) But for this, vid. under Title Privilege.
(n) Styl. 226. S. C. adjudged.

Fol. 581.

(B) What shall be said an Appearance.

(a) *In Custodia Mareschalli.*

(a) Where a Declaration is delivered to a Man in Custodia Mareschalli, and he after removes himself to the Fleet, yet the Party may proceed upon the Declaration, and after Judgment remove him again thither by Habeas Corpus. 1 Sid. 100. (b) 1 Rol. Rep. 217. (c) Cro. El. 605. S. C. & S. P. per Curiam.

1. (b) There shall never be a Declaration against a Man in Custodia Mareschalli, but where there is a Committitur made of the Party, or Bail put in for him. Pas. 40 El. B. R. in (c) Holland's Case, by Popham.

2. Upon an Appeal, if the Sheriff returns Cepi Corpus, the Plaintiff cannot declare against the Defendant in Custodia Mareschalli, without declaring against him upon the Original upon which the Cepi Corpus is returned, for there is no Reason to commit the Defendant to Prison when he is ready to answer the Writ upon which he was taken. Pasch. 40 El. B. R. (d) Holland's Case adjudged.

(d) Cro. El. 605. S. C. adjudged; but vid. Cro. El. 695. & 1 Rol. Abr. 536. K. 1.

(C) Who are demandable.

1. If an Attorney of the Common-Pleas sues an Action there, he shall not be demanded, because he is supposed always present aiding the Court. (a) 20 H. 6. 44. b.

(a) Fitz. Jour 33. S. C.

(D) At what Time the Parties are demandable.

1. (a) IN an Action of Debt, after a Demurrer upon the Plea in Bar, the Plaintiff is demandable. (b) 20 H. 6. 44. b.

(a) If after Demurrer joined, the Court gives a Day over, at that Day the Plaintiff or Demandant is demandable. Co. Lit. 139. b.

(b) Fitz. Jour 33. S. C.

2. If the Bishop certifies a Man to be a Bastard or a Mulier, he is not demandable, (c) but Judgment shall be given. (d) 20 H. 6. 44. b.

(c) At the Common Law, upon every Continuance, or Day given over before Judgment, the Plaintiff was demandable, and upon his Non-appearance might have been nonsuit. Co. Lit. 139. b. But vid. 2 H. 4. cap. 7. & 2 Rol. Abr. 131. Letter D.

(E) To what Appearance.

1. IN Replevin, if the Process continue till a Pluries issue out of Chancery, and the Sheriff thereupon returns in Bank, that the Defendant claims Property; though by this Writ no Day is expressly given to the Parties, but to the Sheriff only, to excuse his Contempt for not serving the Process before, yet upon the Return of this Writ the Parties may appear and plead, scilicet, the Plaintiff may declare, and the Defendant plead thereto; and this will not be erroneous, for there is no other Writ to be sued after this Writ; and therefore if the Parties cannot plead thereto, they would be at great Mischief. Trin. 38 El. B. R. between (a) Gawen and Ludlow, adjudged. Quære, D. 8 El. 246, 67.

(a) 1 Rol. Abr. 485. B. 2. S. C. which vid. and the Notes there.

2. So in this Case, if the Pluries be returned Tres Michaelis, and nothing is done this Term, nor till Easter after, yet at this Term the Parties may appear and plead if they will. Trin. 38 El. B. R. between (b) Gawen and Ludlow, adjudged.

(b) 1 Rol. Abr. 485. B. 2. S. C. which vid. and the Notes there.

(F) Appear-

Fol. 582.

(F) Appearance.

At what Time.

In what Caſes a Man may appear where the Proceſs is not ſerved.

Where an Inheritance is to be loſt, or other Thing.

1. Where a Man is to loſe an Inheritance if he does not appear, he ſhall appear (a) without a Return of the Sheriff gratis by the Day in the Roll. (b) 10 H. 7. 11. b.

(a) Where he that has a Day by the Roll ad reſpondendum may appear, as well upon the Roll as upon the Writ; but where ad ſatisfaciendum, he ſhall not be received to render himſelf to Priſon, unleſs the Writ be returned. Kelw. 166. b.
(b) Br. Jour 93. S. C.

2. As in a Sequatur ſub Periculo againſt a Vouchee, he may appear at the Day of the Return, though no Writ be returned, for that otherways he ſhould loſe in Value. (c) 22 E. 3. 4. adjudged. 7. b. adjudged. 29 E. 3. 40. b. 2 E. 3. 40.

(c) Fitz. Voucher 135. S. C.

3. If the Defendant be outlawed in Debt, and after hath a Charter of Pardon, and ſues a Scire facias againſt the Plaintiff, if the Writ be not returned, the Plaintiff cannot appear by the Roll, for he is to loſe nothing. 39 E. 3. 7. b. Contra, (d) 27 E. 3. 77.

(d) Fitz. Reſponder 85. S. C.

4. But if the Writ be returned tarde, the Plaintiff may appear. (e) 27 E. 3. 77.

(e) Fitz. Reſponder 85. S. C.

5. When a Man is to have a corporal Pain if he appears not, he may appear without the Return of the Sheriff gratis by the Day in the Roll. (f) 10 H. 7. 11. b. Curia. 39 E 3 7 b.

(f) Br. Jour 93. S. C.

6. In Treſpaſs, if after the Exigent is iſſued, the Defendant render himſelf, and hath a Superſedeas; though the Sheriff does not return the Exigent at the Day, yet he may appear by the Roll. 30 Edw. 3. 20. b. adjudged.

7. In a Scire facias againſt a Garniſhee, if the Sheriff returns nihil, &c. and ſo upon the alias, the Garniſhee cannot appear gratis by the Day in the Roll, becauſe he is not to have corporal Puniſhment. Contra. (g) 8 H. 6. 16.

(g) Br. Default 37. S. C. Fitz. Jour 31. S. C.

8. In a quod permittat againſt a Bailiff and Commonalty, if at the Return of the great Diſtreſs no Writ is returned, the Bailiff cannot appear gratis by the Day in the Roll without the Commonalty, (for they are but one Corporation.) 29 Ed. 3. 40. b. adjudged.

9. In an Audita Querela, if the Defendant be returned nihil per quod poteſt ſummoniri, yet he may appear gratis. 21 E. 3. 13. b. adjudged.

10. In a Writ of Debt, if no Original be returned, or any Return made, yet the Defendant may appear by the Roll. 29 E. 3. 18.

11. But he cannot compel the Plaintiff to count againſt him, becauſe perhaps there is no Original. 29 E 3. 18.

12. In a Writ of Debt, if the Sheriff returns the Original nihil, &c. yet the Defendant may appear for fear of the Capias. H. 10 Ja. B. R. between Dame Slaney and Vawtry, adjudged.

13. If the Sheriff returns mandavi Ballivo Libertatis, qui nihil inde fecit, yet the Defendant may appear gratis. (h) 27 E. 3. 78.

(h) Fitz. Proceſs 13. S. C.

14. If

14. If upon an Arreſt the Defendant enters into a Bond, conditioned for his Appearance in the *King's-Bench* at the Day of the Return of the Proceſs; though the Proceſs is not returned, yet he may (i) cauſe his Appearance to be entered and recorded, and thereby ſave the Forfeiture of his Obligation. *Mich.* 29 *El.* 1 *Leon.* 90. *per Anderſon* Chief Juſtice; and the Form of ſuch Entry *vid.* there.

(i) Vid. Yelv. 207. Cro Jac. 282. 1 Bulſ. 156. Goulſ. 67.

(G) In what Caſes a Man ſhall be compelled to appear where the Proceſs is not ſerved.

1. IF a Man ſues Execution upon a Statute, and the Conuſor ſues an Audita Querela upon the Acquittance of the Conuſee returnable now, which is not ſerved, and the Conuſee comes and prays Execution, he ſhall be put to anſwer to the Acquittance upon this Writ, for he hath Day by the Roll, though the Writ is not ſerved. 30 E. 3. 21. b. adjudged.

(H) In what Caſes the Husband ſhall be obliged to appear for his Wife.

Fol. 583.

1. IN an Action againſt Baron and Feme in B. R. if the Baron appears upon the Exigent, he ſhall remain in Priſon till he puts in Bail for his Wife. Hill. 37 El. B. R. by Popham.

2. As in an Action of Debt againſt Baron and Feme, for the Debt of the Feme, if the Baron be taken by Capias or Exigent, he ſhall remain in Priſon till he hath put in Bail for his Feme. Hill. 37 El. (a) B. R. by the Clerks this is the common Courſe.

(a) Cro. El. 370. ſeems to be S. C. and ſaid this was the Courſe. Goulſ. 147. ſeems to be the ſame Caſe; and ſaid by Kemp, Secondary, that he had known this to be the Courſe for 40 Years.

3. But in an Action againſt Baron and Feme in B. if the Baron comes upon the Capias or Exigent, he ſhall not be compelled to put in Bail for his Wife. Hill. 37 El. B. R.

4. If the Baron appears upon the Original in B. R. where it is againſt him and his Feme, he ought to put in Bail for his Wife. Hill. 37 El. B. R.

5. In an Action of Debt againſt Baron and Feme in B. R. upon the Statute of of Recuſants, for the Recuſancy of the Feme, the Baron, who is in Cuſtodia Mareſchalli, ſhall remain in Priſon till he hath put in Bail as well for his Wife as for himſelf. Hill. 37 El. B. R. adjudged, the Caſe of (b) Philpot and Young and their Wives.

(b) Cro. El. 370. S. C. adjudged, being upon an Indictment for Recuſancy. Et vid. Cro. Jac. 445.

6. But it is in the Election of the Court whether they will compel him to give Bail for his Wife or not, for all Bails are in the Diſcretion of the Court. Hill. 37 El. B. R. (c) Philpot and Young and their Wives.

(c) Cro. El. 370. S. C. Et vid. Cro. Jac. 445.

7. In an Action of Debt brought against Baron and Feme in Banco, if the Baron appears, and the Feme makes Default (d).

(d) This is according to the Original, but the Sense is imperfect, and something omitted.

8. If Process issues de B. R. scilicet, a Latitat against Baron, and Feme, and the Feme is arrested, (e) but not the Baron, the Baron in this Case shall not be compelled by the Course of the Court to appear for himself and his Wife, the Baron not being arrested. Mich. 10 Car. B. R. between Story and Smith, per Curiam, and Clerks; but they said, That if the Baron had been arrested, and not the Feme, the Baron should have been compelled to appear for himself and his Wife.

(e) In such Case the Wife shall be discharged upon common Bail. Cro. Jac. 445. 1 Mod. 8. Et vid.

Dyer 271. Lit. Rep. 18. Lat. 224. Hut. 86. Cro. Car. 58, 59. Styl. 475. 1 Sid. 20, 21. 1 Levin. 216, 217. 1 Vent. 49.

(l) (a) Departure in Despite of the Court.

In what Cases it is.

1. (b) If the Defendant or Tenant imparl (c) to another Day in the same Term, and make Default at the Day, this is a Departure in Despite of the Court. (d) 9 H. 6. 58. b.

(a) When the Tenant, after Appearance and being present in Court, upon Demand makes Departure in Despite of the Court, and the Entry is, Et pred' tenens, licet solemniter exactus, non revenit, sed in Contemptum Curiæ recessit, & Defaltum fecit, &c. Co. Lit. 139. a. (b) Cro Jac. 293. S. P. per Curiam. 1 Bulf. 161. vid. (c) By Yelv. 211. there is a Diversity where the Imparlance is general, and where to a Day certain. 1 Bulf. 161. (d) Br. Departure in Despite of the Court 2. S. C.

2. If a Man imparls till another Term, if he makes Default at the Day of Appearance, this is a Departure in Despite of the Court. (e) 7 H. 6. 39. b. 41. b.

(e) Br. Bill 6. S. C.

3. (f) But if the Court gives Day to the Defendant till another Term, if the Defendant makes Default at this Day, this is no Departure in Despite of the Court, for he departed by Leave of the Court (g).

(f) Cro. Jac. 293. S. P. per Curiam.

(g) I suppose 7 H. 6. 41. b. is omitted here, which vid. Br. Bill 6.

4. In a real Action, if the Tenant vouch, and the Demandant has Leave to imparl upon the Voucher, and returns, and the Tenant is demanded, if he makes Default, this is a Departure in Despite of the Court. 38 E. 3. 13. b.

5

(K) What

(K) What ſhall be ſaid a Departure in Deſpite of the Court.

Fol. 584.

1. If at the return of a Capias ad Valentiam the Vouchee makes Default, and the Attorney of the Tenant is eſſoined, and the Demandant prays Seiſin of the Land, and after the Attorney of the Tenant appears, and prays that the Eſſoin be drawn, which is done, and preſently he departs from the Bar, and then the Tenant is demanded, and no Body anſwers for him, yet this is not any Departure in Deſpite of the Court, though the Preſence of the Attorney be recorded, for he did not appear upon any Demand of the Demandant, and when he appeared, the Demandant ſaid nothing againſt him. (a) 22 E. 3. 2. b. adjudged.

(a) Fitz. Retraxit 9. S. C.

(L) *Retraxit.*

By whom, and (a) in what Manner, and by what Words, one may make a *Retraxit.*

(a) Not to be entered before the Plaintiff hath declared; and if entered before, it hath but the Effect of a Nonſuit. Dal. 78. 3 Leon. 19. —Whether a Retraxit may be entered after a General Verdict. Cro. El. 465. dubitatur. (b) Co. Lit. 138. b. 139. a.

1. A Retraxit is always of (b) the Part of the Plaintiff or Demandant. Co. 8. Beecher 59.

2. If the Plaintiff ſays (c) he will not ſue, this is a Retraxit. (d) 8 H. 6. 8. Brook Departure in Deſpite 13. 21 E. 4. 43.

(c) Co. Lit. 139. a.

(d) Br. Departure in Deſpite of the Court 7. S. C.

3. But if he ſays he will not appear, this is not a Retraxit, but a Nonſuit. (e) 8 H. 6. 8. contra.

(e) Br. Departure in Deſpite of the Court 7. S. C.

4. A Retraxit cannot be unleſs the Plaintiff or Demandant be in Court in proper Perſon. Co. 8. (f) Beecher 58. reſolved.

(f) Cro. Jac. 211. S. C. adjudged.

(M) The Effect thereof.

1. A Retraxit is a Bar (a) for ever, becauſe it is a voluntary Acknowledgment that he will not purſue further, &c. Co. 8. (b) Beecher 59. 15 E. 3. Aſſ. 36. 3 E. 3. Itinere North 180. 21 E. 4. 39. Brook Departure in Deſpite 13.

(a) Of all other Actions of the like or of an inferior Nature, Co. Lit. 139. a. Et vid. 1 Rol. Abr. 601. Pl. 5. (b) Cro. Jac. 211. S. C. adjudged.

2. Debt

2. Debt was brought upon a Bond againſt *A.* wherein *A.* and *B.* were jointly and ſeverally bound, and after Plea pleaded the Plaintiff enter'd a *Retraxit*, and in an Action after brought againſt *B.* upon the ſame Bond, whether this ſhould be a Bar, *Trin.* 15 *Car.* between (c) *Dennit* and *Pain*, *Cro. Car.* 551. *dubitatur & adjornatur*; it was ſaid, that a *Retraxit* was in Nature of a Releaſe, and a Releaſe to one Joint Obligor diſcharged the other; but on the other Side it was ſaid to be a Bar only by Way of Eſtoppel between the Parties, whereof no other ſhould take Advantage.

(c) 1 Jon. 451. S. C. and Judgment given for the Plaintiff becauſe of a Defect in the Plea.

March 95. S. C. dubitatur, but varies in the ſtating it, for by this Report Debt was brought both againſt A. and B. and the Plaintiff entered a Retraxit againſt A. and whether this was a Diſcharge of B. is made the Queſtion. Vid. Cro. El. 762. —But whether the Plaintiff may enter a Nolle proſequi againſt one, and have Judgment againſt the reſt, vid. 2 Rol. Abr. 101. Letter G.

(N) What ſhall be ſaid a Default.

1. If a Man be eſſoined of the King's Service, and does not bring his (a) Warrant at the Day which he hath by the Eſſoin, this is a Default by the Common Law. 21 E. 3. 37. (b) 62. b. 29 E. 3. 36. adjudged. 30 E. 3. 19. b.

(a) For the warranting an Eſſoin, vid. 1 Rol. Abr. 827. Letter A.

(b) Fitz. Inqueſt 8. S. C.

(O) In what Caſes the Default of the one ſhall be the Default of the other, Baron and Feme.

1. Where the Baron is to have a corporal Puniſhment for the Default, there the Default of the Feme ſhall not be the Default of the Baron. (a) 11 H. 4. 72. (b) 9 H. 6. 8.

(a) Br. Baron and Feme 38. S. C. Fitz. Default 10. S. C.

(b) Br. Baron and Feme 5. S. C. Br. Proceſs 8. S. C. Fitz. Proceſs 84. S. C.

2. As if at the Pluries Capias the Baron appears, and the Feme makes Default, this ſhall not be the Default of the Baron for the corporal Puniſhment. (c) 11 H. 4. 72. Contra, (d) 3 H. 6. 19.

(c) Br. Baron and Feme 38. S. C. the Appearance of the Baron being upon the Pluries Cap'. Fitz. Default 10. S. C.

(d) Br. Baron and Feme 1. S. C.

3. So upon the Capias, if the Baron makes Default, and the Feme appears, this ſhall not be the Default of the Feme. (e) 12 H. 4. 1. Placito 1. (f) 3 H. 6. 19.

(e) Fitz. Default 11. S. C.

(f) Br. Baron and Feme 1. S. C. Br. Proceſs 6. S. C. Fitz. Proceſs 65. S. C.

4. At the Exigent returned against the Baron and Feme, if the Baron appears, and the Feme makes Default, this shall not be the Default of the Baron for the corporal Punishment. (g) 9 H. 6. 8. b. (h) 44 E. 3. 1. b. adjudged. 39 E. 3. 18. b. adjudged.

(g) Br. Baron and Feme 5. S. C. Br. Process 8. S. C. Fitz. Process 84. S. C. (h) Fitz. Responder 33. S. C. Br. Baron and Feme 18. S. C.

5. So if upon the Exigent the Baron and Feme have a Supersedeas, and notwithstanding this they are returned outlawed, and at the Return the Baron appears, and the Feme makes Default, this shall not be the Default of the Baron for the corporal Punishment. (i) 9 H. 6. 8.

Fol. 585.

(i) Br. Baron and Feme 5. S. C. Br. Process 8. S. C. Fitz. Process 84. S. C.

6. But otherways it is where the Baron is not to have any corporal Punishment by the Default. (k) 11 H. 4. 72.

(k) Br. Baron and Feme 38. S. C. 65. S. C. Fitz. Default 10. S. C.

7. As in a Plea of Land, if the Baron appears, and the Feme makes Default, a Grand Cape shall issue of the whole. (l) 11 H. 4. 72. (m) 28 E. 3. 91. b. adjudged.

(l) Br. Baron and Feme 38. S. C. Fitz. Default 10. S. C. (m) Fitz. Grand Cape 21. S. C.

8. So if Issues be returned against Baron and Feme, the Default of the Feme is of both. (n) 11 H. 4. 72. 12 H. 4. 1. Placito 1. (o) 14 H. 6. 14.

(n) Br. Baron and Feme 38. S. C. Fitz. Default 10. S. C. (o) Br. Default 52. S. C.

9. So if Baron and Feme are attached in a Trespass, the Default of the Feme is the Default of both, and so the Issues forfeited. (p) 14 H. 6. 14. Contra, (q) 22 Ass. 46. adjudged.

(p) Br. Default 52. S. C. Fitz. Respond. 43. S. C. (q) Fitz. Respond. 40. S. C. Br. Respond. 32. S. C. Br. Default 61. S. C.

10. If Aid be granted of Baron and Feme in Reversion, the Default of the Baron shall not be of both. 21 E. 3. 13. adjudged.

11. In an Assise the Default of the Feme shall be the Default of the Baron. (r) 29 Ass. 67.

(r) Fitz. Assise 293. S. C.

12. In a quod permittat against a Bayliff and Commonalty, the Default of the Commonalty shall be the Default of the Bayliff at the Grand Distress, for both are but one Corporation, and so one Defendant. 29 E. 3. 40. b. admitted.

13. So where there are Two Bayliffs and one Commonalty, the Default of one Bayliff shall be the Default of all. 30 E. 3. 1.

14. In a *Precipe quod reddat* against Two, (One of which was within Age) they made Default, and upon the Grand Cape the Infant was shewed in Court, and appeared to be within Age, and it was prayed, that if the Demandant would insist upon the Default, that the Writ should abate in the whole. *Trin.* 19 *Hen.* 7. *Kelw.* 51. b. *dubitatur.* But it was said by *Frowicke*, that where a Grand Cape is awarded against Two Tenants of full Age, and one excuses himself by a Flood, and the other says nothing, the Writ shall abate as to the first, and stand as to the other.

15. If upon an Information against Six for an Assault they all plead Not guilty, and upon the Trial all but one makes Default, the Default of the rest shall not bind him; for though they joined in the Plea of Not guilty, yet being in a criminal Case, 'tis *quasi* several Pleas. *Pasch.*

8 Car. the King and Sir *James Wingfield, &c. Cro. Car.* 251. adjudged; and the Inqueſt taken by Default only againſt thoſe that did not appear.

(P) Of the Plaintiffs.

1. If Two Obligees ſue one Bailee of the Obligarion, if one of the Plaintiffs makes Default, this is the Default of both. (a) 2 H. 4. 16.

(a) Br. Default 14. S. C. Fitz. Enterpleader 12. S. C.

2. But if divers Obligors are warned, and one makes Default, this is not the Default of all, although upon the Matter all are Plaintiffs, for they claim not a Duty, but a Diſcharge. (b) 2 H. 4. 16. 3 H. 4. 7. b.

(b) Br. Default 14. S C. Fitz. Enterpleader 12. S. C.

(Q) In (a) what Caſes the Inqueſt ſhall be taken by Default.

(a) 52 H. 3. c. 13. which vid. explained, 2 Inſ. 126.

(b) 2 Inſ. 127.

1. (b) In ſuch Actions which deſcend in the Realty, if the Parties plead to Iſſue, the Inqueſt cannot be taken by Default upon Default of the Defendant, but a Diſtringas ſhall iſſue in lieu of a Petit Cape. 30 E. 3. 29.

2. As in a Writ of Cuſtoms and Services, the Inqueſt ought not to be taken by Default, for this is to affirm the Seigniory. 30 E. 3. 29.

3. So in a Writ of Meſne, if the Seigniory be denied, 30 E. 3. 29. will prove it.

4. In a Precipe quod reddat, if after the Petit Cape the Tenant pleads Impriſonment in another County, ſcilicet, in Middleſex, upon which they are at Iſſue in Middleſex, and there tried againſt the Tenant, and he brings an Attaint in Middleſex, and the Sheriff returns that he hath nothing to be ſummoned, the Inqueſt ſhall not be taken by his Default, but a Writ ſhall iſſue to the County where the Land is. (c) 42 Aſſ. 14. adjudged.

(c) Br. Proceſs 104 S.C. Br. Attaint 81. S.C.

5 If an Attaint had been brought at the Common Law againſt the Petit Jury, and they had been returned attached, and yet had made Default, yet the Inqueſt ſhould not be taken by Default, but Proceſs ſhould be awarded.

6. So at Common Law, in this Caſe if ſome of the Jurors had appeared, and others had made Default, yet the Inqueſt ſhould not be taken by Default, but Proceſs ſhould have been awarded till all had appeared. * (d) 27 H 6. 8 b And ſo is the Statute de Attinctis of 13 E. 2. (e) but this is now aided by (f) the Statute upon the Grand Diſtreſs returned. 21 H. 6. 42.

* Fol. 586.

(d) Br. Attaint 5. S. C. Fitz. Attaint 5. S. C. (e) Vid. Dal. 52 (f) Vid. 23 H. 8. c. 3.

(R) In

(R) In Reſpect of the Iſſue in the Action.

1. IN a Writ of Meſne, if the Iſſue be whether the Plaintiff was diſtrained in Default of the Defendant, and after the Defendant makes Default, the Inqueſt may be taken by Default, becauſe by the Iſſue the Acquittal, which makes the Action real, is acknowledged, and the Iſſue is only in Right of Damages. 30 E. 3. 28. b. adjudged.

(S) In what Caſes upon a Default Judgment ſhall be given, or the Inqueſt taken by Default.

1. (a) IN an Aſſiſe, if the Tenant makes Default at the firſt Day, the Inqueſt ſhall be taken by Default. (b) 30 Aſſ. 17. adjudged.

(a) 2 Levin. 120. S. P.

(b) Fitz. Aſſiſe 302. S. C.

2. In an Aſſiſe, if the Tenant be attached and makes Default, Judgment ſhall not be given, but the Inqueſt ſhall be taken by Default. 8 H. 6. 2. 7. b.

3. In Debt or other Action, if the Defendant pleads he owes him nothing, upon which they are at Iſſue, and after he is eſſoined de Servitio Regis, and does not bring his Warrant at the Day, it ſeems the Inqueſt ſhall be taken by Default, though the Statute of Glouceſter, cap. 8. hath given a Penalty for it. (c) 21 E. 3. 62. b. But quære 29 E. 3. 36. adjudged.

(c) Fitz. Inqueſt 8. S. C.

(T) In what Caſes upon a Default an Inqueſt ſhall be taken by Default, or Judgment is to be given.

1. IT ſeems that where before Iſſue upon Default Proceſs ſhall iſſue, and Judgment is not to be given, there after Iſſue upon Default, the Inqueſt ſhall be taken by Default. 11 H. 4. 32.

2. If by the Iſſue the Action is confeſſed, and a Matter ſubſequent in Diſcharge in Trial, if the Defendant makes Default, Judgment ſhall be given without taking the Inqueſt, but otherways econtra. (a) 11 H. 4. 32.

(a) Br. Default 20. S. C. Br. Inqueſt 16. S. C.

3. If in Debt upon an Obligation, the Defendant ſays he made it by Dureſs, upon which they are at Iſſue, if the Defendant afterwards makes Default, the Inqueſt ſhall be taken, for the Obligation was never acknowledged. (b) 11 H. 4. 32.

(b) Br. Default 20. S. C. Br. Inqueſt 16. S. C.

4. But in Debt upon an Obligation, if the Defendant pleads the Releaſe of the Plaintiff, upon which they are at Iſſue upon the Denial thereof, and after the Defendant makes Default, Judgment ſhall be given againſt the Defendant, for by the pleading of the Releaſe he hath acknowledged the Debt. 14 (c) H. 4. 2. 12 H. 6. 7.

(c) This is miſprinted in the Original, for there 'tis H. 42.

5. If a Man, in Execution upon a Condemnation in Treſpaſs, ſues a Scire Facias againſt the Recoveroz upon his Releaſe, who denies it, upon which they are at Iſſue, if the Recoveroz makes Default at the Trial, Judgment ſhall be given upon the Default, that the Plaintiff ſhall be quit, and the Inqueſt not taken upon the Default. (d) 12 H. 6. 7. adjudged.

(d) Fitz. Scire Facias 148. S. C.

6. In Detinue, if the Garniſhee and Plaintiff are at Iſſue, and the Garniſhee makes Default at the Niſi Prius, Judgment ſhall be given againſt him upon the Default, and the Inqueſt ought not to be taken by Default. (e) 8 H. 6. 5.

(e) Fitz. Default 35. S. C.

7. In Debt upon an Obligation, if the Defendant denies the Deed, and after Iſſue makes Default, the Inqueſt ought to be taken by Default, and not Judgment given, for he does not acknowledge the Obligation by the Plea. 12 H. 6. 7.

8. In Account as Receiver, if the Defendant traverſes the Receipt, upon which the Parties are at Iſſue, and after the Defendant makes Default, no Judgment ſhall be given, but a Capias to hear the Jury; and if he makes Default * thereupon, the Inqueſt ſhall be taken by Default. 30 Ed. 3. 12. adjudged.

* Fol. 587.

8. In a Quid Juris clamat, if the Defendant claims a Fee, upon which they are at Iſſue, and after the Defendant makes Default, the Inqueſt ſhall not be taken by Default, but the Plaintiff ſhall recover the Land. 30 E. 3. 29.

9. So in a Quid Juris clamat, if the Iſſue be upon any Matter preter the claiming a Fee, and after the Defendant makes Default, the Inqueſt ſhall not be taken by Default, but a Diſtreſs ſhall iſſue againſt the Defendant to attorn. 30 E. 3. 29.

10. In a Quare impedit, if the Defendant comes at the grand Diſtreſs returned, and pleads to the contrary, and after makes Default, the Writ ſhall be awarded to the Biſhop, without taking the Inqueſt. 12 E. 2. Quare impedit 68.

(V) In (a) what Caſes Judgment ſhall be given upon a Default.

(a) Where Judgment by Default againſt an Infant in a Writ of Dower is not erroneous, vid. 1 Rol. Abr. 796. Pl. 30.

1. In Debt, if there be a Demurrer in Judgment upon a Plea in Bar, and after the Plaintiff makes Default, a Writ ſhall iſſue againſt him ad audiendum Judicium. (b) 20 H. 6. 44. b.

(b) Fitz. Jour 33. S. C.

2. In an Audita Querela the Defendant appears, and the Plaintiff declares, and was let to Mainprize, and after the Defendant made Default, the Plaintiff ſhall not have Judgment againſt him, becauſe he never pleaded, but a Diſtreſs ſhall iſſue. (c) 47 E. 3. 1. b.

(c) Fitz. Audita Querela 2. S. C. Br. Audita Querela 7. S. C.

3. But if he pleads, and after makes Default, a Writ ad audiendum Judicium ſhall iſſue. (d) 47 E. 3. 1. b.

(d) Fitz Audita Querela 2. S. C. Br. Audita Querela 7. S. C.

4. If the Defendant after Appearance departs in Deſpite of the Court, Judgment ſhall be againſt him. 7 H. 6. 39. b.

(e) Diverſity between an Imparlance and a Dies datus, N. Bendl. 153. Pl. 214. Moor 79. Pl. 209. 3 Leon 14.

5. If the Defendant appears, and the (e) Court gives a Day to another Term, at which Day he makes Default, yet no Judgment ſhall be given. (f) 7 H. 6. 39. b. 41. b.

(f) Br. Bill 6. S. C.

6. But

6. But Process shall be awarded in this Case. (g) 7 H. 6. 41. b. dubitatur.

(g) Br. Bill 6. S. C.

7. In a Writ of Annuity, if the Defendant makes Default after Appearance, the Plaintiff shall recover the Annuity. 2 H. 4. 4.

8. But (h) 2 H. 4. 1. b. per Curiam, a Writ shall issue to hear Judgment.

(h) Br. Default 82. S. C. Fitz. Process 116. S. C.

9. In a Writ of Annuity, if the Defendant hath Aid of the King Patron, and of the Ordinary, and after a Procedendo comes, and the Defendant and the other Praiees make Default, no Writ shall issue ad audiendum Judicium, but he shall be summoned to answer. 29 E. 3. 3.

10. Where no certain Thing is demanded, if the Defendant after Appearance makes Default, no Judgment shall be given, for it cannot be adjudged by the Justices. Otherwise where the Thing demanded is certain. (i) 2 H. 4. 23.

(i) Br. Default 15. S. C.

11. As in Trespass, if the Defendant pleads a Release, and after makes Default, the Plaintiff shall not have Judgment. (k) 2 H. 4. 23.

(k) Br. Default 15. S. C. Br. Enquest 11. S. C.

12. But in Debt it is otherways, for there the Demand is certain (l). 2 H. 4. 23.

(l) Br. Default 15. S. C. Br. Enquest 11. S. C.

13. When an Issue is found for the Demandant, if the Tenant makes Default after, Judgment shall be given, for after Issue nothing remains but to give Judgment. (m) 4 H. 6 28.

(m) Br. Default 45. S. C. Fitz Judgment 7. S. C.

14. In a Writ of Cosinage, if Bastardy is pleaded in the Demandant, and returned by the Bishop that he is a Mulier, if at this Return the Tenant makes Default, the Demandant shall recover, and no Petit-Cape shall issue, for the Issue is found for him. (n) 4 H. 6. 28.

15. So if after Issue found for the Plaintiff at the Nisi Prius, if a Day be given in Banco, and the Defendant makes Default, Judgment shall be given against him. (o) 4 H. 6. 28.

(n) Br. Default 45. S. C. Br. Judgment 108. S. C. Fitz Judgment 7. S. C.

(o) Fitz. Judgment 7. S. C.

16. (p) If in a Writ of Right after the Mise joined the Tenant makes Default, the Court (q) shall give a final Judgment for the Demandant. *Co. Lit.* 295. a.

(p) 1 Bulst. 162. S. P. per Curiam; and the Authority to the contrary in 5 Co. denied: But yet vid. 1 Levin. 105.

(q) 5 Co. 86. a. S. P. resolved con. and that a Petit Cape shall issue, for that perhaps he may save his Default. But vid. Dyer 56. Pl. 17. 98. Pl. 52. 104. Pl. 12. Yelv. 211. 1 Bulst. 159.

17. If in a Writ of Right the Tenant appears and imparls, and after several Days of Imparlance makes Default, what Judgment ought to have been given. *Mich.* 9 *Jac.* between (r) *Lilburn* and *Heron*, *Cro. Jac.* 292. *dubitatur*, upon a Writ of Error.

(r) Yelv. 211. S. C adjudged, that Judgment final ought not to have been given, but a Petit Cape only awarded, the Default being upon an Imparlance to a Day certain; but it was said per Curiam to be otherways where the Tenant took a general Imparlance, and not to a certain Day, for by the general Imparlance the Tenant undertook to be always ready to defend his Right; and upon his Default final Judgment shall be given, quia tenens recessit in contemptu Curiæ. 1 Bulst. 15,9 &c. S. C. but no Judgment, because the Parties agreed.

Fol. 588.

(X) In what Caſes after Plea pleaded Judgment ſhall be given upon Default, without a Writ *ad audiendum Judicium.*

1 IF the Defendant makes Default after ſuch Plea pleaded, which is a Confeſſion of the Action, and only a Matter of Diſcharge ſubſequent, Judgment ſhall be given upon the Default, but otherways econtra. (a) 11 H. 4. 32.

(a) Br. Default 20. S. C. Br. Enqueſt 16. S. C.

2. As in an Action of Debt, if the Defendant pleads an Acquittance or Releaſe, and after makes Default, Judgment ſhall be upon the Default, becauſe the Duty is acknowledged. (b) 11 H. 4. 32. (c) 1 H. 7. 1. (d) 2 H. 4. 23. 12 H. 6. 7.

(b) Br. Default 20. S. C. Br. Enqueſt 16. S. C. (c) Br. Default 62. S. C. Br. Condemnation 5. S. C. (d) Br. Default 15. S. C.

3. In Replevin, if the Defendant avows, and after makes Default, Judgment ſhall be thereupon for the Damages, becauſe the Taking and Detinue are acknowledged. (e) 11 H. 4. 32. (f) 14 H. 4. 2.

(e) Br. Default 20. S. C. (f) Fitz. Condemnation 11. S. C.

4. But otherways it is econtra.

5. As in Debt upon an Obligation, the Defendant pleads that he made it by Dureſs, and after makes Default, no Judgment ſhall be, but Proceſs ſhall iſſue for it, becauſe here the Deed was never acknowledged. (g) 11 H. 4. 32.

(g) Br. Default 20. S. C. Br. Enqueſt 16. S. C.

6. In Account as Receiver, if the Defendant traverſes the Receipt, and after makes Default, no Judgment ſhall be, but Proceſs. 30 E. 3. 12. adjudged.

(Y) After Default where a Writ is to be awarded *ad audiendum Judicium*, what Proceſs there ſhall be.

1. IN a Writ of Debt, if the Defendant comes by Exigent, and pleads in Bar, and after makes Default, a Capias ſhall be awarded. (a) 11 H. 4. 32.

(a) Fitz. Condemnation 10. S. C.

2. And if he makes Default upon the Capias, what Proceſs ſhall be awarded, quære, (b) 11 H. 4. 32.

(b) Fitz. Condemnation 10. S. C.

(Z) Who ſhall be put to anſwer.

1. IF a Man comes in Bank upon a Cepi Corpus, and I have a Writ depending againſt him there, he ſhall be put to anſwer thereto. (a) 9 H. 6. 55. for there he is in the Award of the Court.

(a) Br. Reſpond. 48. S. C. Fitz. Corpus cum Cauſa 2. S. C.

2. If a Man be committed to the Fleet by the Common Pleas, and another ſues a Writ againſt him, the Warden of the Fleet ſhall be commanded to bring him in, and when he comes into Court he ſhall be put to anſwer thereto without Writ. (b) 9 H. 6. 55.

(b) Br. Corpus cum Cauſa 2. S. C.

3. If a Man impriſoned in B. R. be brought in Banco by Habeas Corpus to anſwer a Writ there depending, when he comes he ſhall be put to anſwer thereto, for he was brought there for this Purpoſe; yet he is not committed in Banco. 9 H. 6. 54. b.

4. If a Man brought in Banco upon an Habeas Corpus to have his Privilege because he was arrested coming to Court, if another hath a Writ against him, he shall not be put to answer thereto, because he is not in Ward of the Court, but in the Custody of the Serjeant who brings him in; and the Question only is, Whether he is to be delivered, or to be remanded? 9 H. 6. 54. b.

5. If a Man is brought by the Warden of the *Fleet* to the *King's Bench* upon an *Habeas Corpus*, a Stranger cannot declare against him, if he is remanded, and not committed to the Marshal. *Trin.* 13 *Jac. Hildersham's* Case, 1 *Rol. Rep.* 217. *per Coke.*

(A) To what Thing the Answer ought to be made.

1. If a Bill be in B. R. de Placito Transgressionis & de insultu, & verberatione vi & armis, and the Plaintiff declares of an Assault and Battery, and that the Defendant at the same Time took of him extorsivé 10 s. &c.

(B) At what Time he shall be put to answer.

Fol. 589.

1. In a Precipe quod reddat against Two, if one appears, and the other makes Default, by which the Grand Cape issues of a Moiety, he that appears shall not be put to answer till the Grand Cape be returned, because that at this Day he that made Default may accept the entire Tenancy, and save his Default. 12 H. 6. 6. b.

2. In a Writ of Ward against Two, if one appears, and the other makes Default, he that appears shall not be put to answer before the other comes, because the Ward is entire. 17 Ed. 3. 70. b.

3. But otherwise it is in an Ejectment of Ward, because this is but in Nature of a Trespass. 17 E. 3. 70. b.

4. The same Law is for the same Reason in a Ravishment of Ward. 17 E. 3. 70. b.

5. In Trespass against Baron and Feme, if the Baron appears, and the Feme makes Default, admitting this is not the Default of both, the Baron shall be put to answer presently, (a) 22 Ass. 46. adjudged.

6. In an Action of Trespass against Baron and Feme, if the Baron comes by the Exigent, and the Feme does not come, and because it appears to the Court that the Exigent was discontinued against the Feme, they award a new Exigent against her, yet the Baron shall be put to answer presently, and shall not stay till the Feme comes, though he ought to make answer again with the Feme when she comes, and when he has pleaded, he shall have idem dies with the Feme. 39 E. 3. 18. b. adjudged.

7. In Trespass against Baron and Feme, if the Baron makes Default, and the Feme appears, the Feme shall not be put to answer till the Baron comes or be outlawed. (b) 22 Ass. 46.

(a) Fitz. Respond 40. S. C. Br. Respond 32. S. C. Br. Default. 61. S. C.

(b) Fitz. Respond 40. S. C. Br. Respond 32. S. C. Br. Default 61. S. C.

8. In

8. In an Action of Debt against Baron and Feme, if the Baron appears, and the Feme makes Default, the Baron shall not be put to answer, but Process shall issue against the Feme, & idem dies given to the Baron. Mich. 11 Ja. B. between Throwgood and Dunnam.

9. In all real Actions where the Process is by Attachment and Distress, and the Action is brought against Two, and one comes by the Distress, yet he shall not be put to answer without the other, which did not appear, for the other shall not lose his Freehold by his Plea. 39 E. 3. 15. b.

10. As in a Quod permittat against Two, if one comes by Attachment and Distress, yet he shall not be put to answer without the other. 39 E. 3. 15. b.

11. In an Action against Two, if the Process be determined against one, and the other appears, he shall be put to answer. 39 E. 3. 15. b.

12. As in an Action of Waste against Two, if at the Great Distress returned one makes Default, and the other appears, he shall be put to answer, because by the Statute the Process is determined against the other. 39 E. 3. 15. b. adjudged.

Fol. 590.

Defeasance.

(A) What Persons may make it.

1. If an Obligation be made to a Prior, his Defeasance is a good Discharge without the Convent, without an Averment that the Thing in the Defeasance was for the Advantage of the House. (a) 47 E. 3. 23. b. adjudged, for it is in Nature of an Acquittance.

(a) Fitz. Defeasance 2. S. C.

2. If a Statute be acknowledged to Baron and Feme, the Defeasance made by the Baron is a good Discharge. ( ) 48 E. 3. 12. b.

(b) Br. Defeasance 3. S. C.

3. So where a Statute is acknowledged to Two, and one makes a Defeasance, it is a good Discharge. (c) 48 E. 3. 12. b.

(c) Br. Defeasance 3. S. C.

(B) To whom it may be made.

1. If the Obligee afterwards by Indenture between him and a Stranger grants, That if a Stranger performs certain Conditions, then the Obligation shall be void, this is no good Defeasance, although the Stranger perform the Conditions, (a) because the Obligor is a Stranger to this Indenture, and therefore cannot put it in Trial. Dubitatur, (b) 3 H. 6. 18. b. 26. b.

(a) But who shall be charged, or take Advantage of an Indenture, vid. 2 Rol. Abr. 22. Letter F. (b) Fitz. Debt 13. S. C. Br. Estranger al fait 1. S. C.

(C) Of what (a) (aa) Things.

1. If a Man makes a Feoffment with Warranty againſt all Men, and the Feoffee by collateral Indenture regrants for him and his Heirs, that if the Feoffee be vouched by Force of the Warranty, then the Warranty ſhall be void, (b) this is a good Defeaſance of the Warranty. 7 H. 6. (c) 34. by all the Juſtices.

(a) Diverſity between Inheritances executed and executory, Co. Lit. 236 b. 237. a. Et vid. Co. Lit. 146. b. 2 Saund. 48.

—An Obligation or Judgment is but executory, and may at any Time by a Deed ſealed be releaſed or defeated. 2 Saunders 48. in Fowel and Fozeſt's Caſe. Said by Saunders to be clear Law, without any Doubt, contrary to the ſudden Opinion given by the Court in that Caſe. And vid. Cro. El. 623. Moor 573. Pl. 787. (aa) Where a Power of Revocation in a precedent Indenture was reſtrained and limited by a ſubſequent Indenture, vid. 1 Jon. 411. (b) For he may have a Warrantia Chartæ, or rebut. Moor 811. Pl. 1097. (c) This is printed here as in the Original; but I ſuppoſe it ſhould be 44; which vid. Br. Defeaſance 4.

2. (d) If a Man releaſes all his Right to another, and the Releaſee after grants, that if the Releaſor does ſuch a Thing, the Releaſe ſhall be void, this is not a good Defeaſance to avoid the Releaſe. Contra, (e) 17 Aſſ. 2. 7 H. 6. (f) 34.

(d) Co. Lit. 236. S. P. (e) Br. Condition 103. S C. (f) This is printed here as in the Original; but I ſuppoſe ſhould be 44.

3. If *A.* enters into a Statute to *B.* it may be defeaſanced in this Manner, *viz.* That if the Lands of *B.* in the County of *H.* be extended by this Statute, then the Statute ſhall be void; and it is not repugnant, for he may ſue Execution of his Land in other Counties, or againſt his Goods or Perſon. *Mich.* 8 *Jac.* between *Trot* and *Spurling*, *Moor* 811. *Pl.* 1097. adjudged.

(D) At what Time it may be made.

1. If a Defeaſance be made to avoid a Judgment before the Judgment given, this is not good to be pleaded in a Scire Facias to have Execution, though ſuch Judgment be confeſſed upon an Agreement when the Defeaſance was made. Tr. 43 El. B. R. between (a) Cage and Shurland, per Curiam.

(a) Cro. Eliz. 837. S. C. adjudged; and that he had no Remedy but by Covenant upon the Deed.

2. If a Defeaſance of a Statute be made, and after another Defeaſance is made, the firſt Defeaſance is made void thereby, and the ſecond only in Force as in a Will. Paſch. 8 Jac. B. agreed.

Fol 591.

Deputy.

(A) (a) Who may make a Deputy.

(a) What Officer may make a Deputy, vid. 2 Rol. Abr. 154. Letters I, K, L.

1. A Conſtable may make a Deputy, and he may execute the Warrants directed to the Conſtable, and do other Things belonging to the Office of a Conſtable, though he is not ſworn to execute it well, as the Conſtable himſelf is. M. 13 Ja. B. R. between (b) Phelps and Winſcombe, for this is not any judicial Office.

(b) Moor 845. Pl. 1141. S. C. adjudged. 3 Bulſ. 77, 78. S. C. and the Court enclined accordingly, but no Judgment was given, being ended by Agreement, 1 Rol. Rep. 274. S. C. adjournatur. 1 Sid. 355. S. C. & S. P. cited and doubted.

Debt.

(A) For what Things it lies.

(a) 3 Leon. 260. 4 Leon. 46. S. P. per Curiam; but ſaid he ſhall not have Judgment to have the Corn, but ſo much Money as the Corn was worth every ſeveral Year. And vid. Ow. 32. Lat. 271. 1 And. 308. (b) 1 Part 27 S. C. which vid. with the Notes there.

1. (a) If a Man leaſes for Years, reſerving ſo many Quarters of Wheat yearly, an Action of Debt lies for the Wheat, if it is Arrear. Tr. 3 Ja. B. R. between the Lord Denny and Parnell, admitted and adjudged.

2. If Two ſubmit to an Award, and they award a collateral Matter to be done, and not any Money, no Action of Debt lies upon this Award. (b) M. 10 Ja. B.

(c) Wilſhage and Davidge S. P. 1 Leon. 41 adjudged upon Demurrer. Cro. El. 536. cited. Et vid. Pierſon and Pointer, Yelv. 135. 1 Brownl. 102.

3. (c) If a Man ſells certain Cloths for 66 *l. Flemiſh* Money, current at *Middleburgh*, to be paid upon Requeſt, he may bring an Action of Debt for 39 *l.* 12. *s.* ſetting forth the ſpecial Matter, and averring, that the 66 *l. Flemiſh*, *tempore venditionis*, *&c.* amounted to 39 *l.* 12 *s.* *Monetæ Angliæ*, and that the Defendant has not paid, *&c.* and if he values the Foreign Money otherways than in Truth it is, the Defendant may plead in Abatement, and ſo help himſelf. *Mich.* 3 *Jac.* between (d) *Raſtal* and *Draper*, *Cro. Jac.* 88. adjudged after a Verdict for the

(d) Yelv. 80. S. C. adjudged, and ſaid, it was made good by the Verdict by which the Debt is found; but that if the Contract had been for ſo many Ounces of Flemiſh Money, or for a Piece of Silver or Gold, it could not be demanded by the Name of ſuch a Sum, becauſe not coined, or uſed in Trade or Merchandizing. 1 Brownl. 90. S. C. adjudged, and the ſame Difference taken as in Yelv. and indeed ſeems to be only a Tranſlation of that Caſe. Moor 775. Pl. 1071. S. C. but by the Report the Action was brought upon an Obligation for Payment of Flemiſh Money; and upon an Exception taken to the Count, by which Engliſh Money was demanded, it was ruled good per Curiam.

Plaintiff;

Plaintiff; and said, that it being found that he owed what is demanded, there ought to be no (e) further Enquiry of the Value.

(e) But in Debt against an Executor for 47 l. 8 s. 8 d. Monetæ Flandriæ, attingent' ad Valentiam 40 l. English, the Defendant pleaded plené administravit, and it was found against him, and Judgment given quod recuperet Debitum; but upon a Writ of Error between Bagshaw and Plain, Cro. El. 536. it was reversed, because it should have been quod recuperet the 47 l. 8 s. 8 d. Flemish, and a Writ have been awarded to enquire the Value. Moor 704. Pl. 980. reversed, because the Jury had not enquired of the Value of the Flemish Money; and the Affirmation of the Plaintiff that it attained 40 l. was not a sufficient Warrant for the Court to give Judgment upon.

(B) Debt for Rent.

Who shall have the Action, and against whom.

Who shall have it.

1. He that is privy in Estate shall maintain an Action of Debt for the Rent.

2. (a) If a Man leases for Years, rendring Rent, and after grants over the Reversion, and the Tenant attorns, the Grantee shall have an Action of Debt, for the Rent incurred after. Dubitatur, 9 H. 6. 16. b. (a) 3 Co. 22. b. S. P.

3. So if the in Reversion dies, his Heir shall have an Action of Debt, for the Rent incurred after. (b) 14 H. 6. 26. Dubitatur, 9 H. 6. 16. b. (b) Br. Debt 123. S. C. Br. Rents 10. S. C.

4. If the Baron leases for Years the Land of his Wife, rendring Rent, and after the Feme dies, he shall not have Debt for the Rent incurred after, for his Reversion is gone, (& semble the Lessee is become Tenant at Sufferance.) (c) 9 H. 6. 43. b. Contra, (d) 14 H. 6. 26. (c) Fitz. Debt 30. S. C. (d) Br. Debt 123. S. C. Br. Rents 10. S. C.

5. But if a Feme having a Rent for Life takes Husband and dies, the Baron shall have Debt after the Death of his Wife, for the Rent incurred during the Coverture. (e) 10 H. 6. 12. 11. (e) Fitz. Debt 33. S. C. 1 Part 705. Pl. 1. S. C. which vide, with the Notes there; and Ow. 3. Gouldf. 30.

6. If Baron and Feme join in a Lease for Years, rendring Rent of the Land of which the Wife is seised for Life, and after the Feme dies within the Term, it seems the Baron shall not have the Rent, because the Reversion is gone. My Reports, 14 Ja. between (f) Smalman and Agburrough, per Curiam. Contra, (g) 9 H. 6. 26. (f) 1 Rol. Rep. 442. S. C. & S. P. agreed per Curiam. 3 Bulf. 272. S. C. but S. P. does not appear. Cro. Jac. 417. S. C. but S. P. does not appear. (g) I suppose this is misprinted, and should be 14 H. 6. 26. which vid. Br. Debt 123. Br. Rents 10. S. C.

Fol. 592.

(C) Debt

(C) Debt for Rent.

Againſt (a) whom it lies.

(a) For Arrears of a Rent-Charge for Life, after Determination thereof, lies not

1. IF Leſſee for Years grants over his Term, an Action of Debt lies againſt the Grantee for Rent incurred after. 9 H. 6. 52. b. 10 H. 6. 11. b.

againſt him alone that received the Profits of Part of the Land charged, but againſt all, that received the Profits of any Part thereof. 1 Saund. 284.

2. If Leſſee for Life, rendring Rent, grants over his Eſtate, and after dies, Debt lies againſt the Grantee for Rent incurred after the Grant. 10 H. 6. 11. b.

3. If Feme Leſſee for Life takes Huſband, and dies, Debt lies againſt the Huſband (b) for Rent iſſuing out of the Land incurred during Coverture, for he took the Profits out of which the Rent iſſued. 10 H. 6. 11. Curia. 26 E. 3. 64. adjudged.

(b) It lies againſt him or his Executors for the

Arrears of a Rent-Charge incurred during ſuch Time as he took the Profits. 4 Co. 49 b.

4. If an Annuity was granted by a Biſhop before the Statute of 1 Eliz and confirmed by the Dean and Chapter, and after Arrearages incur, and the Biſhop dies, an Action of Debt lies for the Arrearages againſt the Succeſſor. Tr. 10 Ja. B. between Edwards and the Biſhop of Ely.

5. If Leſſee for Years aſſigns all his Intereſt to another, yet the Leſſor may have Debt (c) againſt the Leſſee for the Arrears incurred after Aſſignment; for the Privity of Contract remains, and the Leſſee by his own Act ſhall not prevent the Remedy of the Leſſor againſt him upon his Contract. *Hill.* 29 *Eliz.* (d) *Walker's* Caſe, 3 Co. 22. adjudged *per totam Curiam.*

(c) Or Aſſignee at his Election. 4 Leon. 17, 18. 3 Co. 24. b. —But if he once accepts

the Rent from the Aſſignee, he ſhall not after charge the Leſſee for Rent due after the Aſſignment. 3 Co. 24 b. Marrow and Turpin, Moor 600. Pl. 829. Cro. Eliz. 715. 2 And. 133. Et. vid. 1 Sid. 402. —For in the Acceptance of the Rent from the Aſſignee, Notice of the Aſſignment is implied. March and Brace, Cro. Jac. 334. adjudged. 2 Bulſ. 152, 153. adjudged. Et vid. 2 Rol. Rep. 366. —But though he refuſes to accept the Aſſignee as his Tenant, yet he may after charge him in an Action for the Rent if he pleaſes. Devereux and Barlow, 2 Saund. 181. (d) Moor 351. Pl. 472. S. C. adjudged. Cro. Eliz. 556. S. C. cited; 715. S. C. cited, and denied by Three Judges to be Law. 1 Sid. 266. S. C. cited, and agreed to be Law, though ſeveral of the Caſes there put, as there reported, were denied to be Law. Lat. 260. S. C. cited; and ſaid it was not adjudged, as appears by the Book of Entries. Vid. Coke 122. Poph. 120. ſeems to be S. C. cited. Et vid. Dal. 16.

(e) Humble and Oliver, Poph. 55. S. P. adjudged.

6. (e) But if after ſuch Aſſignment of the Leſſee, the Leſſor grants over his Reverſion to another, the Grantee ſhall not have Debt againſt the Leſſee, for the Privity of Contract holds only between the Leſſor and Leſſee. *Walker's* Caſe, *Hill.* 29 *Eliz.* 3 Co. 22. b. *per Curiam.*

1 Brownl. 56. ſeems to be S. C. though as to the Time to be miſprinted. Poph. 120. cited. Cro. El. 556. cited. Moor 351. cited. Et vid. Cro. El. 636.

(f) So where the Adminiſtrator of the Leſſee aſſigns. Marrow and Turpin, Cro. Eliz. 715. adjudged. Moor 600. Pl. 829. adjudged per totam Curiam. 2 And. 133. adjudged. Lat. 260. cited, and ſaid no Judgment was ever given, as appears by the Roll; but Q. 1 Vent. 210. cited, and ſaid, that Acceptance of Rent from the Aſſignee was pleaded, &c. 3 Mod. 326. cited, and ſaid the late Reſolutions have been contrary. (g) By the Report of the Caſe in Popham the Leſſee aſſigned.

7. If a Prebend leaſes for Years, rendring Rent, and this is confirmed by Dean and Chapter, and the Leſſee dies, and his (f) Executor (g) aſſigns over the Term, and after the Prebend reſigns, and a new Prebend is made, he ſhall not have Debt againſt the Executor of the Firſt Leſſee for Rent due after the Aſſignment, for the Succeſſor was no Par-

ty to the Contract, but privy in Law only; and (h) by the Aſſignment of the Term the Cauſe of the Charge is removed. *Paſch.* 39 *Eliz.* between (i) *Overton* and *Sydal*, *Cro. Eliz.* 555. adjudged upon Demurrer.

(h) That the Executor is liable notwithſtanding. Ironmonger and Nuſam, Noy 97. Lat. 260, 261. 2 Vent. 209. cited to have been ſo reſolved. Helyar and Casbord, 1 Sid. 240, 266. adjudged. 1 Levin. 127. adjudged; but by this Report the Action was brought againſt an Adminiſtrator. (i) Poph. 120. S. C. and the Court divided. Goulſ. 120. adjudged by Three Judges con. Poph. who held the contrary, and that the Succeſſor was privy to the Contract of the Predeceſſor. 3 Co. 24. a. S. C. cited to have been adjudged by Popham Chief Juſtice, and all the Court, whether the Aſſignment were by the Leſſee himſelf, or his Executor: Vet vid. the Report of the Caſe in the Books before. 1 Sid. 266. S. C. cited from 3 Co. 24. and denied to be Law as there cited. 1 Levin. 127. S. C. cited to have been adjudged, becauſe the Privity of Contract did not go to the Succeſſor more than to an Heir, and the Heir of the Leſſor ſhall not have Debt againſt the Leſſee after Aſſignment, becauſe the Privity of Eſtate only deſcended to him. Lat. 262. S. C. cited, and ſaid, that the Leſſor being a ſole Corporation, the Privity of Contract was determined.

8. If *A.* leaſes Three Acres to *B.* rendring Rent, and *B.* aſſigns all his Eſtate in one Acre, and after *A.* grants the Reverſion of the Three Acres to *C.* he may have Debt againſt (k) *B.* for the whole Rent, for the Entire Eſtate remaining in Part, the entire Privity, and Action for the whole, remains againſt the Firſt Leſſee. *Mich.* 40 *Eliz.* between (l) *Broom* and *Hore*, *Cro. Eliz.* 633.

(k) Cro. Jac. 411. ſaid, the Leſſor in ſuch Caſe may have a joint Action againſt the Leſſee and Aſſignee. (l) 3 Co. 24. a. S. C. cited. But vid. Lit. Rep. 53.

9. (m) If the Aſſignee of a Term aſſigns to another, yet he may be charged in Debt for Rent growing due after, before Notice (n) given to the Reverſioner. *Paſch.* 19 *Car.* 2. between (o) *Keighly* and *Bulkly*, 1 *Levin.* 215. adjudged upon Demurrer by *Kelynge* and *Wyndham*, *con. Twyſden*; and that the Action being brought for Three Years Rent, due at *Lady-day* 1664. and the Defendant having pleaded, that before *Lady-day*, 1664, *ſcilicet* 1 *June* 1661. he aſſigned it, was held by all Three Judges a bad Plea; for he ought to have pleaded that he aſſigned before any Rent grew due, for the *ſcilicet* the 1 *June* 61. is not traverſable.

(m) Tongue and Pitcher, 3 Levin. 295. S. P. (the Action being brought by the Leſſor) adjudged by Pollexfen and Rokesby, con. Powel, who held, that after Aſſignment there was no Privity remained upon which the Action could be maintained; but the other Two held the Aſſignment was not compleat till Notice; but upon a Writ of Error this Judgment was reverſed in B. R. upon the Matter in Law. (n) Lat. 261. —Where Acceptance of Rent from the Aſſignee implies Notice of the Aſſignment, March and Brace, Cro. Jac. 334. 2 Bulſ. 152. Et vid. 2 Rol. Rep. 366. (o) Knight and Buckly, Raym. 162. S. C. adjudged by the ſame Two Judges againſt One, the Action by this Report being brought by the Aſſignee of the Reverſion againſt the Leſſee, who pleaded, &c. 1 Sid. 338. S. C. adjudged by the ſame Two Judges againſt one, the Action by this Report being brought by the Aſſignee of the Reverſion againſt the Aſſignee of the Term, who pleaded, &c.

10. If Leſſee for Years aſſigns his whole Term in the Moiety of the Land, the Leſſor may have an Action againſt the Aſſignee for the Moiety of the Rent, for the Aſſignee having the entire Eſtate in the Moiety of the Land, he hath a ſufficient Privity of Eſtate to be charged by the Leſſor, if he pleaſes, with the Moiety of the Rent. *Mich.* 30 *Car.* 2. between *Gamon* and *Vernon*, 2 *Levin.* 231. adjudged.

(D) Debt.

The Gift of the Action.

In what Cases an Action of Debt lies, or Covenant.

1. If in a Deed ſealed and delivered by A. it be recited, That whereas by Obligation of ſuch Date, B. C. D. and E. ſtood bound in the penal Sum of 160 l. to the ſaid A. for the Payment of 86 l. 18 s. at a certain Day: Now this Writing witneſſeth, That he, ſcilicet the ſaid A. ſuſcepiſſet & promiſiſſet to the ſaid B. C. D. and E. in Conſideration of the Sum of 40 l. to the ſaid A. paid by the ſaid B. and C. in Part of the ſaid 86 l. 18 s. with Intereſt and Coſts, not to proſecute the ſaid B. C. D. and E. or any of them, in any Action or Proceſs before ſuch a Day after the Date of this Writing, omnia quæ ſupra mentionata ſunt per ipſum performari, & in defectu inde, vel alicujus rei inde mentionatæ per ipſum performari, idem A. forisfaceret to the ſaid B. and C. pred' ſummam 80 l. If the ſaid A. before the Day mentioned in the ſaid Writing, ſues the ſaid B. C. D. and E. upon the ſaid recited Obligation, the ſaid B. and C. only may have an Action of Debt upon this laſt Writing for the 80 l. for this is a diſtinct Clauſe by it ſelf, by which the 80 l. is limited to be forfeited to the ſaid B. and C. only, for it appears the 40 l. was paid to him only by B. and C. ſo that it appears it was intended that the Recompence ſhould be forfeited to them alſo, though the Promiſe by the firſt Part of the Deed was made to all Four, (a) upon which they might have had an Action of Covenant, but none preter the ſaid B. and C. may have Debt for the 80 l. to whom the Forfeiture is limited. Tr. 22 Car. B. R. between Harriſon and Cheſton, adjudged upon Demurrer. Intratur, P. 21 Car. Rot.

(a) In an Indenture between A. and B. of the one Part, and C. of the other Part, among other Covenants, there is one thus, viz. It is agreed between the Parties, That C. ſhall enter into a Bond to B. to pay him 100 l. at a Day; in an Action for Non-performance A. and B. muſt join. Yelv. 17?. But where a Covenant is joint or ſeveral, vid. 2 Rol. Abr. 149. and the Notes and Additions under that Head.

Debt.

Fol. 593. (E) What will be a good Conſideration to raiſe a Debt.

The Gift of the Action, *ſcilicet*, whether he ſhall have an (a) Action of Debt, an Action upon the Caſe, or Covenant.

(a) 1 Part 26. Letter N. vid.

1. If a Man promiſes another 20 l. in Conſideration that he will marry his Daughter or Couſin, this is a good Conſideration, and after Marriage he ſhall have an Action of Debt. (b) My Reports, 14 Jac. 27 E. 4. 4. b. 22 Aſſ. Placito 70.

(b) 1 Rol. Rep. 433. S. P. arguendo.

2. (c) If a Man promiſes another 20 l. in Conſideration that he will marry A. S. a Stranger, Debt lies for it after Marriage. Mich. 12 Ja. B. R. between (d) Freeman and Freeman, adjudged that an Action upon the Caſe lies.

(c) All. 6. S. P. per Curiam.

(d) 1 Rol. Rep. 61. S. C. adjudged. 2 Bulſ. 269. S. C. adjudged, the Action being brought for not ſettling Land according to Promiſe.

3. If

3. If a Man says to a Physician or Surgeon, that if he will go to J. S. who is sick, and make him well and sound, he will give him so much, &c. Debt lies for the Surgeon if he makes him well and sound. 37 H. 6. 9. per Moile.

4. (e) So if a Man promises a Physician or Surgeon a certain Sum to cure such a poor Man, an Action lies if he cures him. 17 E. 4. 5.

(e) Cro. Jac. 521. S. P. per Cutiam. Et vid. Cro. Car. 194.

5. So if a Man promises a Labourer certain Money for repairing such a Way, which is an Highway, an Action of Debt lies. 17 E. 4. 5.

6. If A. at the Request of B. and for the proper Debt of B. delivers Money to J. S. to be repaid to A. by B. upon Request, A. may have an Action of Debt for the Money against B. for this is a plain Contract between them, scilicet, that if he will pay at his Request a Debt that he owes J. S. he will repay him. Mich. 18 Car. B. between Adrian Henrick and Inigo de Tasses comes. Quare. adjudged per totam Curiam, this being moved in Arrest of Judgment after a Verdict for the Plaintiff. Intratur, Tr. 18 Car. Rotulo 366. and after affirmed in a Writ of Error in Banco Regis.

7. If I promise to J. S. a certain Sum (f) for the Commons of J. D. an Action of Debt lies for it, 17 E. 4. 5. for the Law intends that J. S. is such an one by whose Service I have Advantage.

(f) So for the bringing up and teaching of Children. All. 6. dubitatur.

8. If A buys of me certain Cattle for a certain Sum, and B. at the same Time undertakes to pay it if A. does not pay it at the Day, if A. does not pay it, yet Debt lies not against B for it sounds in Covenant. 18 E. 3. 13. it seems is so to be intended.

9. (g) If I retain a Carpenter to build an House, and that he shall have 40 s. for the doing thereof, an Action of Debt lies for the 40 s 37 H. 6. 8. b.

(g) Cro. Jac. 521. S. P. per Curiam.

10. If C. recovers 10 l. against A. and B. comes to C. and says, that if he will release the 10 l. to A. that he will be his Debtor, and he accordingly releases the 10 l. to A. yet no Action of Debt lies, for that it sounds in Covenant. 9 H. 5. 14.

11. If I retain a Counsellor for a Year for 40 s. Debt lies for this 40 s 37 H. 6. 8. b.

12. If a Stranger comes to an Attorney, and retains him to be Attorney for J. S. in an Action between him and J. D. and he is his Attorney accordingly, he may well maintain an Action of Debt against J. S. for his Fees, tho' this Retainer by the Stranger was Maintainance in the Stranger, for between J. S. and the Attorney this is lawful, and so the Consideration not against Law. H. 28 El. B. R. between Trussel and Monslow, adjudged upon Demurrer.

13. If a Sollicitor of J. S. comes to an Attorney de Banco, and retains him to prosecute a Suit in Banco for the said J. S. against J. D. capiendo of the Sollicitor pro feodo quolibet Termino 3 s. 4 d. ultra alias misas & expensas per ipsum circa Prosecutionem sectæ pred' deponendas; in this Case an * Action of Debt lies by the Attorney against the Sollicitor for his Fees and Expences disburst in this Suit, for that the Contract is made between the Sollicitor and Attorney, in the Name of the Sollicitor himself, and not in the Name of his Master. P. 16 Jac. B. R. Rot. 416. adjudged in a Writ of Error between (h) Woodhouse and Bradford. I have a Copy of the Record.

* Fol. 594.

(h) 2 Rol. Rep. 76, 77. S. C. adjudged accordingly. Cro. Jac. 520.

14. So if J. S. a Stranger for any thing that appears by the Record, comes to an Attorney de Banco, and retains him to prosecute a Suit in Replevin for J. N the Plaintiff against W. S. the Defendant then depending in Bank, capiendo de J. S. pro feodo & expensis, &c. as in Bradford's Case before; in this Case an Action of Debt lies by the Attorney against J. S. because he made the Contract in his own Name, and it shall be intended

S. C. adjudged accordingly. Cro. Car. 194. S. C. cited.

that he ſhall have Benefit by it, and it cannot lie in the Conuſance of the Attorney how he is concerned that retains him. Contra, Tr. 6 Car. B. R. between (i) Trevillian and Sands in a Writ of Error, reſolved per Curiam, againſt the Opinion of Jones, that Debt did not lie, but that he is put to his Action upon the Caſe, and they gave a peremptory Rule for the Reverſal of the Judgment; but this was afterwards ſtay'd, upon Information that the Parties were about a Compoſition, which intratur, Mich. 4 Caroli. Rot. 96. I my ſelf was of Counſel with Trevillian the Attorney.

(i) Cro. Car. 107, 193, 194. S. C. adjudged upon a Writ of Error in B. R. accordingly, that the firſt Judgment ſhould be reverſed; and the Juſtices of the Common-Pleas being moved therein, ſaid, That this Point was never ſtirred before them, and that they were of the ſame Opinion. All. 6. S. C. cited, and ſaid by Rolle, That the Judgment was not reverſed upon the Roll, and that it was his Opinion that the Judgment was good.

15. If *A.* retains *B.* to embroider a Sattin-Gown of a Maid-Servant of the Daughter of *A.* taking for the ſame 40 s. *B.* may have Debt againſt *A.* for the Money, for embroidering the Gown of another at the Requeſt of *A.* is a ſufficient Conſideration to charge *A.* and it is at the Election of *B.* to bring Debt or an *Aſſumpſit*. *Trin.* 43 *El.* between *Shandois* and *Simpſon*, *Cro. El.* 880. adjudged upon a Writ of Error, and the Firſt Judgment affirmed accordingly.

(F) (a) Conſideration paſſed.

(a) 1 Part 34. Letter Q.

1. If I promiſe my Bayliff, upon his Account to me, to pay him 5 l. at a Day certain for his Service paſt, this is no good Conſideration to maintain an Action of Debt, becauſe the Service was ended before. 29 E. 3. 26.

2. In an Action upon the Caſe, if the Plaintiff declares, That the Defendant was indebted to him in 20 l. pro parte pretii diverſorum mercimoniorum & merchandizarum by the Plaintiff to J. S. being a Stranger, at the Inſtance and Requeſt of the Defendant, ante tempus illud venditorum & deliberatorum, & pro quibus mercimoniis & merchandizis the Defendant ante tunc promiſerat to the Plaintiff to ſee the Plaintiff ſatisfactum; & ſic indebitatus exiſtens, he promiſed to pay him at a certain Day; this is no good Conſideration, for upon his own ſhewing it appears that this was not any Debt, nor could he have an Action of Debt for it, but only an Action upon the Caſe upon the Promiſe, inaſmuch as this is a collateral Promiſe, and not in Nature of a Debt; for the Debt was made upon the Sale of the Goods to J. S. and between them; and though this was at the Requeſt of the Defendant, yet this Requeſt without more did not make any Debt in the Defendant, without the Promiſe, which was made at another Day; and tho' the Requeſt was ſufficient with the Promiſe to maintain the Action upon the Promiſe, yet this did not make it a Debt in the Defendant; and alſo this is but a conditional Promiſe, ſcilicet, that if the ſaid J. S. did not pay, that he himſelf would. Tr. 22 Car. B. R. between (b) Cogan and Green, adjudged per Curiam, this being moved for Error upon a Judgment in Banco; which intratur in Banco, Tr. 21 Car. Rot. 390. and now the Firſt Judgment was (c) affirmed.

(b) Ward and Coggin, Styl. 6. S. C. adjudged.

(c) By the Report of this Caſe in Style the Firſt Judgment was given for the Plaintiff; and though by that Report it appears not whether upon the Writ of Error that Judgment was reverſed or affirmed, I conceive it muſt be intended to have been reverſed.

(G) Where Debt lies.

The Gist of the Action.

1. (a) For Arrearages of Rent of a Freehold (aa) during the Time of the Continuance of the Freehold, Debt does not lie. 6 H. 4. 7. b. adjudged. 19 H. * 6. 29, 47. 17 E. 3. 48, 72. b. 39 E. 3. 22. agreed. Contra, 38 E. 3. 10. admitted. Contra, 26 E. 3. 64. admitted.

(a) 4 Co. 49. a. Co. Lit. 162. a.

* Fol. 595.

(aa) But by the 8 Ann. it is enacted, That any Person having any Rent in Arrear, or due on any Lease for Life or Lives, may bring Debt for such Arrears in the same Manner as they might have done if such Rent was reserved upon a Lease for Years.

2. Where a Man may have an Annuity, he shall not have an Action of Debt. 8 H. 6. 6. b. agreed.

3. If a Man grants to another 10 l. every Year he shall be resident within such a Parish, the Grantee cannot have Debt for it, but an Annuity, for this is annual at his Will. (b) 4 H. 6. 91. b. 8 H. 6. 7.

(b) 1 Part 482. Pl. 1.

4. If a Man makes a Feoffment in Fee, reserving a Rent for 10 Years to him and his Heirs, Debt lies for this Rent, for it is but a Chattel.

5. So if a Man leases for Life, rendring a Rent for one Year, Debt lies for it, for this is but a Chattel.

6. So if a Man leases for 10 Years, rendring 10 l. Rent to him and his Heirs, upon Condition to have a Fee, and if he performs the Condition, reserving 20 l. per Annum; though the Fee passes presently, yet it seems Debt lies for the Rent before the Condition performed, for before that it is but a Chattel. (c) 7 E. 3. Det. 147. adjudged.

(c) Co. Lit. 217. a. S. C. and the Reason given by Herle Chief Justice, That during the Term the Lessee had but for Years cited, but that the Fee passes immediately. Mid. Co. Lit. 217, 218.

7. If an (d) Annuity be granted, and a Nomine Pœnæ every Day that it is Arrear, if the Nomine Pœnæ be forfeited, Debt lies for it. 20 H. 6. 6. Contra, 8 H 6. 6. b. Dubitatur, 7 H. 6. 40.

(d) So if a Rent is granted with a Nomine Pœnæ. Co. Lit. 162. b.

8. If by Prescription the Burgesses of a Town ought every Year to elect a Man to collect the Rents of the Lord, and that he ought to pay to the Lord 22 s. for the Profit of the Market, an Action of Debt lies for every 22 s. by the Lord, for that though this be an Inheritance, yet it is a particular Duty by every Collector. 11 H. 6. 14. b. it is, that the Executor of the Lord shall have an Action.

9. Debt lies for the Arrearages of the (e) Rent of a Freehold, scilicet, for Life, after the Estate determined. 10 H. 6. 11. 11 H. 6. 15. 19 H. 6. 25.

(e) As if a Woman be endowed of a Rent, or a Rent be granted for Life, and the Tenant attorns, and the Rent determines by Death, the Executors of the Tenant in Dower, or of the Grantee for Life, should have had an Action of Debt by the Common Law, because by Possibility the Testator himself might have had an Action of Debt, as if he had surrendred his Estate to him in Reversion. 4 Co. 49. a.

10. If a Man takes a Seigniores to his Wife, who dies, the Baron shall have Debt for Relief fallen during Coverture. 10 H. 6. 11. b.

11. (f) If a Man grants an (g) Annuity for Two Years, an Action of Debt may be brought for the Arrears during the Years, for being a Grant for Years, 'tis by the Deed as a Contract. *Trin.* 33 *Eliz.* between *Brown* and *Pendlebury*, *Cro. Eliz.* 268. adjudged.

(f) Cro. El. 3. S. P. con. agreed by all the Justices, 1 Bulst. 151.

S. P. said to be adjudged. (g) So if a Man grants an annual Rent for Years, issuing out of Lands. Cro. El. 895. by Yelverton Justice, who held there was a Diversity where a Rent for Years was granted originally, and where the Grantee of a Rent in Fee grants the same for Years, for that in the last Case Debt lay not during the Years; but Fenner doubting, adjornatur.

(H) Where Debt lies in reſpect of the Eſtate by Matter ſubſequent.

1. IF the Rent of the very Tenant be Arrear, and after the Lord aliens the Seigniory, (a) yet he ſhall not have Debt for the Arrearages, becauſe the Freehold of the Rent continues. 19 H. 6. 42. b.

(a) Nor if he die ſhall his Executor, by 32 H. 8. cap. 37. for that Act gives no Remedy where the Teſtator himſelf hath diſpenſed with the Arrears, or had no Remedy when he died. Co. Lit. 162. b. —So if a Man hath a Rent-Charge in Fee, and it is in Arrear, and he grants over the Rent. March 103.

2. So if a Man leaſes for Life, rendring Rent, and after Arrearages incur, and the Leſſor grants over the Reverſion, to whom the Tenant attorns, yet he ſhall not have Debt for the Arrearages, becauſe the Freehold of the Rent continues. 19 H. 6. 42. b.

3. If a Parſon hath an Annuity in Fee, and leaſes it to another for Years, and after Arrearages incur, the (b) Leſſor ſhall not have an Action of Debt during the Years for the Arrearages, ſo long as the Eſtate of Inheritance of the Annuity continues. Mich. 1649. between (c) Tintal and Harrington, adjudged in Arreſt of Judgment. Intratur 1645. Rot. 1612.

(b) In the Original 'tis Leſſee, and ſo appears to be miſprinted.

(c) Styl. 162. S. C. and Judgment ſtay'd till the Plaintiff ſhould move.

4. (d) If a Prebend hath an Annuity in Fee in the Right of his Church, and after Arrearages incurred he (e) reſigns, he ſhall have Debt for the Arrearages, becauſe the Perſon of the Grantor was at all Times chargeable before in Annuity, and now the Manner of the Action is changed into Debt for Neceſſity. Dubitatur, 19 H. 6. 41. b.

(d) 4 Co. 48 b. 49. a. b. S. P.

(e) So if he dies, his Executors may. 4 Co. 49. a, b.

5. So if a Parſon hath an Annuity, and he is deprived, he ſhall have Debt for the Arrearages due before. 19 H. 6. 42. b.

6. So he ſhall have Debt for the Arrearages after a Recovery againſt him and the Patron in a Quare impedit. 19 H. 6. 42. b.

Fol. 596.

7. If Leſſee for Life of a Rent acknowledges a Statute, and after releaſes to the Tertenant, and after the Statute is extended, and after the Rent is Arrear, the Tenant by the Statute ſhall not have an Action of Debt for the Arrearages during the Extent, for though in Truth the Freehold is extinct by the Releaſe, yet as to him it is in Eſſe, otherways the Extent lay not; and during the Continuance of the Freehold Debt lies not, though the Tenant by the Statute hath but a Chattel, for this is derived out of the Freehold. Hill. 4 Jac. B. between (f) Duncombe and Lillington, per Curiam.

(f) 7 Co. 37, 38. S. C. adjudged.

8. The very Lord ſhall not have an Action of Debt for Aid, to marry his Daughter, or make his Son a Knight. Co. Lit. 47. b.

(g) 4 Co. 49. b. S. P. Co. Lit. 83. a. S. P. Dal. 17. Kelw. 133. a.

9. (g) The very Lord ſhall not have an Action of Debt for Relief due to himſelf, for this is Part of his Seigniory, and he may diſtrain for it. Co. Lit. 47. b.

10. The very Lord ſhall not have an Action of Debt for Eſcuage due to himſelf for the Cauſe aforeſaid. Co. Lit. 47. b.

11. If a Rent be reſerved upon a Leaſe for Life after the Death of the Leſſee, Debt lies for the Arrearages before, for now the Freehold is determined, and it is changed into a Contract. 10 H. 6. 11. 11 H. 6. 15.

12. So if a Leaſe be for the Life of another, and Ceſtuy que vie dies after the Rent incurred. 19 H. 6. 41. b. 39 E. 3. 22.

13. But if a Lease be made for Life, rendring Rent, upon Condition for Non-payment to re-enter, and detain till the Arrearages paid; if the Lessor re-enters for Non-payment, he cannot during his Seisin have Debt for the Arrearages before, because the Freehold remains in the Lessee, and the Lessor hath it but in the Name of a Distress. Contra, 30 E. 3. 7. adjudged.

14. Contra, (h) 30 E. 3. 7. adjudged; but this Matter of the Freehold is not intended, but there in the same Folio is another Case of a Lease for Years, and it seems this is the same Case with the other, and so the other is misprinted, in that it calls it a Lease for Life; (but Fitzherbert abridges this Case to have been a Lease for a Year.)

(h) Co. Lit. 203. S. C. cited, and said to be misprinted. Ante.

15. If Lessee for Life, rendring Rent, does Waste after Arrearages due, and the Lessor recovers in an Action of Waste, he may have an Action of Debt for the Arrearages, because the Estate is determined by lawful Action to avoid his Disinheritance. 19 H. 6. 42.

16. So if such Lessee aliens in Fee, and the Lessor enters for a Forfeiture, he may have Debt for the Arrearages. 19 H. 6. 42. b.

17. (i) So if the Lease for (k) Life be upon Condition, and the Lessor enters (l) for Breach of it, he shall have Debt for the Arrearages. Dubitatur, 17 E. 3. 48, 73. b. but 18 E. 3. 9. adjudged. Contra, 19 H. 6. 42. 39 E. 3. 22. agreed.

(i) 3 Co. 22. b. S. P.

(k) So upon a Lease for Years. Kelw. 153. b.

(l) So if Lessee surrenders to Lessor. 3 Co. 23. b.

18. If the Father grants a Rent-Charge to the Son in Fee, and the Rent being Arrear, the Father dies, and the Land descends to the Son, by which the Rent is extinct, the Son may charge the Executors of the Father in an Action of Debt for the Arrearages incurred in the Life of the Father, for though no Action lies for them as for the Arrearages of a Rent, yet it lies for them as for the Arrearages of an Annuity, for though both the Annuity and Rent are determined, yet the original Election remains as to the Arrears. 4 Co. 49. a.

(I) Executor.

1. If a Rent becomes due to the very Lord, and after he dies, his Executor shall not have Debt for this Rent, (a) because the Rent continues a Freehold in the Heir. 11 H. 6. 15. 19 H. 6. 41. b.

(a) So at Common Law, though extinguished by the Discent, as if the Seigniory descends to the Tenant, because the Lord himself by no Possibility could have such Action for the Arrears, for the Tenure being wholly in the Realty, the Tenant could not be charged in any personal Action for them. 4 Co. 49. a. — But if a Woman had been endowed of a Rent, or a Rent had been granted for Life, and the Tenant had attorned, and after Rent had been Arrear, and then the particular Estate in the Rent had determined by Death, the Executors of the Tenant in Dower, or of the Grantee for Life, should have had Debt by the Common Law, because by Possibility the Testator might have had Debt, as if he had surrendred his Estate to the Reversioner, he should have had Debt for the Arrears incurred before, and these particular Estates, with the Attornment of the Tenant, or when the Law supplies an Attornment, amount to a real Contract in Law, which Realty when the Freehold is determined resolves it self to the Personalty. 4 Co. 49. a. b. Kelw. 47. b.

2. (b) The Executor shall have Debt for Relief fallen in the Life of the Testator. 11 H. 6. 15. (c) Co. Lit. 47. b.

(b) 4 Co. 49. b. S. P. Noy 43. S P.

adjudged, and said, that in such Action Seisin of the Services need not be alledged. Otherways where the Party himself avows. Dal. 17. (c) Because it is now become as a Flower fallen from the Stock, and they have no other Remedy. Co. Lit. 162. b. S. P. for it is no Rent, but a casual Improvement of Services.

3. The

(e) Co. Lit. 47. b.

3. (e) The Executor ſhall have Debt for Eſcuage, Aid pur fair Fitz Chivaler, & pur file marrier, due in the Life of the Teſtator.

4. The Baron ſhall have Debt for Relief fallen in the Right of the Feme during the Coverture after the Death of the Feme. 10 H. 6. 11. b.

Fol. 597.

5. If there be a Cuſtom that a Town ought yearly to chooſe a Man to collect the Rents of the Lord, and to pay 22 s. to him for the Profits of his Fair, if there be 22 s. due by a Collector, and after the Lord dies, his Executor ſhall have Debt for it. 11 H. 6. 14. b. dubitatur. (So it ſeems the Lord himſelf might.)

6. If the Grantee in Fee of an Annuity grants it over for Years, and after the Term expires, the Leſſee ſhall have Debt for the Arrearages, though the Annuity continued of Inheritance, becauſe the Eſtate of the Leſſee is determined, and ſo he hath no other Remedy, and the Perſon of the Tertenant was chargeable before. 19 H. 6. 42.

(f) But during the Term he ſhall not have ſuch Action. 7 Co. 38. b. 39. b.

7. So Leſſee for Years of a Manor, (f) after the Term expired, ſhall have Debt for the Arrearages, becauſe he hath no other Remedy, yet the Inheritance continued. 19 H. 6. 42. 9 H. 7. But quære the Reaſon thereof.

(g) Intended of Tenants pur auter vie, ſo long as Ceſtuy que vie lived. Co. Lit. 162. a.

(h) Reſerved upon a Leaſe for Life, or Gift in Tail within the Act. Co. Lit. 162.

(i) Extends not to Rents iſſuing out of Copy, but out of Free Land only. Yelv. 135.

8. By 32 *H.* 8. *c.* 37. Foraſmuch as by the Common Law Executors or Adminiſtrators of Tenants in Fee-Simple, Tail, or for (g) Life, of Rents, (h) Service, Charge, and Seck, and Fee-farms, had no Remedy to recover ſuch Arrears as were due to their Teſtators in their Life, it is enacted, That the Executors and Adminiſtrators of ſuch Perſon to whom (i) ſuch Rent or Fee-farm ſhall be due, and not paid at his Death, may have Debt for ſuch (k) Arrearages againſt the (l) Tenant or Tenants that ought to have paid the ſaid Rents or Fee-farms ſo being behind in the Life of their Teſtator, or againſt the Executors or Adminiſtrators of the ſaid Tenants; and further, That it ſhall be lawful for ſuch Executor or Adminiſtrator of ſuch Perſon to whom (m) ſuch Rent or Fee-farm ſhall be due, and not paid at his Death, to diſtrain for the (n) Arrears of all ſuch Rents and Fee-farms upon the Lands, &c. charged with the Payment of ſuch Rent or Fee-farms, and chargeable to the Diſtreſs of the Teſtator ſo long as the ſaid Lands, &c. continue in the Seiſin or Poſſeſſion of the Tenant in Demeſn, who ought to have paid the ſaid Rent or Fee-farm ſo behind to the Teſtator in his Life, or in the Seiſin or Poſſeſſion of any other claiming (o) only (p) by (q) and (r) from the ſame Tenant, (s) by Purchaſe, Gift, or Diſcent, (t) in like Manner as their Teſtator might or ought in his Life, and ſhall make Avowry upon the Matter aforeſaid.

adjudged. (k) Whether Money, Corn, Cattle, &c. or other Profit, to be delivered or yielded, whether annual or every 2d, 3d, &c. Year, but Work-days, or other corporal Service, is not within the Act. Co. Lit. 162. b. (l) Whether the Leſſor, Leſſee, or Occupier. Lit. Rep. 93. All. 62. (m) This extends not to the Executors of a Grantee of a Rent-Charge for Years, if he lives ſo long. Cro. Car. 471. adjudged. For the Statute hath provided only where the Teſtator dies ſeiſed of a Rent in Fee or for Life, and the Executors have no Remedy. Et vid. 2 Sid. 62. (n) But it extends not to the Arrears of a Nomine Pœnæ, Relief, Aid pur fair Fitz Chivaler, or File marrier. Co. Lit. 162. b. (o) Of Ceſtuy que uſe of a Feoffment, though he claims not only by the Feoffor, but by the Statute alſo. 4 Co. 50. b. —So if the Tenant makes a Gift in Tail, and the Donee dies, a Diſtreſs may be taken upon the Poſſeſſion of the Iſſue in Tail, though he claims per formam doni, as well as by Deſcent. 4 Co. 50. b. 2 Leon. 153. 3 Leon. 59, 60. (p) The Tenant leaſes for Life, the Remainder in Fee, and the Tenant for Life pays not his Rent to the Lord, and the Lord dies, and the Tenant for Life dies, the Executors of the Lord cannot diſtrain upon him in Remainder, for he claims not by or from the Tenant for Life. Co. Lit. 162. b. 5 Co. 118. a. —So in Caſe of a Reverſion. Co. Lit. 162. b. (q) And not Paramount, as the Lord by Eſcheat. Co. Lit. 162. b. 1 Leon. 303. 3 Leon. 263. —Or one that is remitted to an ancient Title. 4 Co. 50. b. (r) The Feoffee and Leſſee of the Feoffee, &c. in infinitum within the Act. 4 Co. 50. a, b. 1 Leon. 303. 2 Leon. 153. 3 Leon. 60. 4 Leon. 116. (s) But Tenant in Dower or by Curteſy ſhall not be charged, for they claim not by the Party only, but by Law alſo. 1 Leon. 303. per Curiam. 3 Leon. 263. per Curiam. (t) So that if after Rent is Arrear the Lord grants away his Seigniory, his Executors ſhall have no Remedy, for the Act gives none where the Teſtator had none at his Death. Co. Lit. 162. b.

9. Provided that it extends not to any Manors, *&c.* in *Wales*, or the Marches thereof, where the Inhabitants Time out of Mind have uſed to pay the Lord, *&c.* at his Firſt Entry a Sum of Money, for the Diſcharge of all Duties, Forfeitures, and Penalties, wherewith they were chargeable to any of the Lord's Anceſtors.

10. And by the ſame Act, if one in the Right of his Wife hath any Eſtate in Fee-Simple, Tail, or for Life, in Rents or Fee-farms, which ſhall be unpaid in the Wife's Life, after the Death of his Wife, he, his Executors and Adminiſtrators, ſhall have Debt for the (u) Arrears againſt the Tenant of the Demeſn that ought to have paid the ſame, his Executors or Adminiſtrators; and he may diſtrain for the Arrears, in like Manner as he might have done if his Wife had been then living, and avow upon the Matter aforeſaid.

(u) Extends to ſuch as incurred before Marriage, for as to thoſe incurr'd during Marriage, he might have had Debt by the Common Law. 4 Co. 51. a. b. But for this, vid. 1 Part 705. Pl. 3.

11. And by the ſame Act, if one hath Rents or Fee-farms for the Life of another, which ſhall be unpaid, and *Ceſtuy que vie* dies, after his Death ſuch Perſon, his Executors or Adminiſtrators, may have Debt againſt the Tenant in Demeſn that ought to have paid it when firſt due, his Executors or Adminiſtrators, and alſo (w) diſtrain for the ſame Arrears upon ſuch Lands, *&c.* (x) out of which payable in ſuch Manner as he ought or might if *Ceſtuy que vie* had been living.

(w) But if upon a Judgment againſt Tenant for Life of a Rent-Charge, a Moiety thereof is extended upon an Elegit, and after Rent being Arrear, the Tenant for Life dies, the Tenant by Elegit cannot diſtrain for the Arrears by this Act, for coming in by an Act of Parliament, he is in the Poſt. Pool and Neal, 2 Sid. 28, 62. adjudged. (x) If a Rent be granted to A. for the Life of B. and after the Land out of which, &c. is let to C. for Life, the Remainder to D. in Fee, and Rent being Arrear, B. dies, and after C. dies, A. may diſtrain upon D. in Remainder for all the Arrears. Co. Lit. 162. b. Edrich's Caſe, 5 Co. 118. adjudged. Et vid. Moor 625. Pl. 858. Cro. El. 805.

(K) (a) Where Debt, Covenant, an Action upon the (b) Caſe, or Account lies, (c) without Contract.

(a) If I deliver 20 l. to A. to deliver to B. and he does not deliver it, I may have an Action of Account, Debt, or perhaps Caſe, againſt him. Kelw. 69. a.

1. If a Man delivers Money, upon Condition to be his Money, and that if it be not performed, that it ſhall be redelivered, if the the Condition be not performed, the Bailor may have Debt for it. 41 E. 3. 10.

77 b. Cro. Jac. 687. Dyer 21. b. Hut 12. —A. delivers Oxen to B. to ſell for as much as he can get, and he ſells them for ſo much, A. may have Debt againſt B. for the Money. 1 Rol. Rep. 257. adjudged. — A. delivers Money to B. to re-deliver, Debt lies for it. Palm. 364. per Curiam. (b) Where Debt or Caſe lies, vid. 1 Part 26. (c) A. pays Money to B. as a Fine, upon B.'s Promiſe to make a Leaſe of Land, and before the Leaſe is made, B. is evicted, Debt lies not for the Money, for it was not paid to be received back, but Caſe lies for Non-performance of the Bargain, in which he ſhall recover in Damages not only the Money given for the Fine, but the Damage by Breach of the Contract. Palm. 364. per Curiam.

2. If a Man delivers 100 l. in a Bag unſealed to another, Debt does not lie for it, becauſe the Property was never out of the Bailor. 18 H. 6. 20. b.

3. If I have a Rent out of Land, and the Tenant delivers it to another to pay me, I cannot have Debt againſt him for what he hath received. 6 H. 4. 7. b.

4. (d) If a Man delivers Money to you to pay to me, I shall not have Debt for it, (e) because there is not any Contract between us. 6 H. 4. 8.

(d) Cro. Jac. 687. S. P. adjudged con. by Two Judges. 2 Rol. Rep. 441, 442. S. P. debated.

(e) Dyer 21. Pl. 121.

5. If a Man receives Rent of my Tenants by my Command, I shall not have Debt against him. 6 H. 4. 8.

6. So if he receives it of his own Head. 6 H. 4. 8.

7. If a Man by Obligation acknowledges that he hath received a Sum ad proficiendum (f) & computandum, the Obligee may have Debt for it if he will. 42 E. 3. 9.

(f) The Defendant by Bill sealed acknowledged that he had received 7 l. of the Plaintiff ad emendum a Pair of Bellows. Cro. El. 644. adjudged, that Accompt or Debt lay. But note, Debt being brought, the Plaintiff averred, that he had not bought the Things, nor paid the Money: Yet vid. 3 Leon. 31.

8. If a Man by Deed delivers certain Money to another, to render an Account thereof to him, he may have an Action of Debt for the Money at his Election. 28 E. 3. 98. b.

9. If there be a Custom that the Collector of the Rents of the Lord ought to pay 22 s. to the Lord for the Profits of the Market of the Lord, the Executor of the Lord may have Debt for the 22 s. without bringing a Writ of Account, for he is not a Receiver of this; but he ought to pay it whether he receives the Profits or not. 11. H. 6. 14. b.

10. If a Man delivers Money to deliver to J. S. if he does not deliver it, yet J. S. cannot have a Writ of Debt against him. 12 H. 6. 5. b. 20 H. 6. 35. D. 28 H. 8. 21 S. 131.

11. So if J. S. refuses the Money, the Bailor may have Debt against the Bailee for it. 19 H. 6. 35.

12. If a Man by his Deed acknowledges that he hath so much of the Money of J. S. due to him in his Hands, though here is no Contract or Borrowing between them, yet J. S. may have an Action of Debt against him. 11 H 6. 39.

13. If I deliver Money to another, (g) to repay at a certain Day, Debt lies for it at the Day. 29 E. 3. 26. b.

(g) So if to be re-delivered upon Request; for by the Delivery the Property is altered, inasmuch as the Money cannot be known. Ow. 86. adjudged, and a Diversity taken between Goods and Money, for if an Horse be delivered to be re-delivered, the Property is not altered, but Detinue lies for him. Et vid. 3 Leon. 38. N. Dyer 22. b. margine.

14. If I deliver Money to B. to keep safely, I may have an Action of Debt against B. for it. 2 R. 3. 15. D. 28 H. 8. 22 S. 137.

15. If A. by my Command pays Money to B. to my Use, and B. does not pay it to me, I may have Debt for it against him. 36 H. 6. 9. b.

Fol. 598.

16. If a Man leases for Years, rendring Rent, and after (h) devises the Rent to another, and dies, the Devisee may have an Action of Debt for the Rent, though it is become a Rent-seek, because by the original Creation thereof Debt lay. Mich. 11 Jac. B. R. between Holland and Hunt, per Houghton.

(h) So if he grants the Rent by Deed, and the Lessee attorns. 1 Leon. 315. dubitatur. Robins and Cor, 3 Levin. 22. by Two Judges against Two: And being after adjourned into the Exchequer-Chamber, and the 3d Part of Croke's Reports being published, in which was reported the Case of Ards and Watkins, Fol. 631, 651. the Parties agreed. Vide 1 Part 505. Pl. 4. Raym. 11, 12. the Court divided, and adjourned into the Exchequer-Chamber. Goodman and Packer, 2 Leon. 1. adjudged, for the Attornment made a Privity.

17. If a Sheriff levies (i) certain Money upon a Levari facias out of a Recognizance at the Suit of J. S and after returns the Writ ſerved, J. S. may have an Action of Debt againſt the Sheriff, as well as a Scire facias, or Fieri facias, though there be not any actual Contract between the Sheriff and him, for this is a Contract in Law, ſcilicet, the levying the Money to the Uſe of J. S. Hill. 15 Jac. B. between Speak and Richards, per Curiam adjudged. Hobart's Reports (k) 279. the ſame Caſe. Paſch. 15 Car. B. R. between (l) Parkinſon and Culliford, adjudged per Curiam, that an Action of Debt lay againſt the Executor of the Sheriff, though it did not appear that the Fieri facias upon the Judgment was returned; for it is not material, inaſmuch as the Party is (m) diſcharged by the Payment thereof, without the Return; and it is not grounded upon a perſonal Tort, but upon a Contract in Law made by the Teſtator upon the Receipt of the Money; and this is not a ſimple Contract, but grounded principally upon the Record, ſo that the Executor cannot wage his Law, and therefore the Action lies againſt the Executor: Adjudged, this Matter being moved in Arreſt of Judgment.

(i) Otherways where he returns that he hath taken Goods into his Hands to ſuch a Value, which remain there pro defectu emptorum. Slp and Finch, Cro Jac 514. 2 Rol. Rep. 57. Godb. 276 Et vid. March 13. —But if he returns they were reſcued from him, he ſhall be charged. Mildmay and Smith, 2 Saund. 343, 344 adjudged. Cro. Jac. 514. 2 Rol. Rep. 57. Godb. 276. (k) Hob. Fol. 206. S. C. adjudged. Moor 886. Pl. 1244. S. C. adjudged. 1 Brownl. 51. S. C. adjudged. Hut. 11, 12. S. C. & S. 1. doubted. Hut. 32. S. C. cited to be adjudged. Et vid. 1 Mod. 246. (l) Cro. Car. 539. S. C. adjudged. 1 Jon. 430. S. C. adjudged. March 13, 14. S. C. adjudged. (m) Roke and Wilmore, 1 And. 247. Cro. El. 208, 209. But vid. 1 Rol. Abr. 902. Pl. 14.

18. Where by the Statute of 14 H. 8. cap. 5. and the Letters Patents of the King, it is enacted, That every one that practiſes Phyſick in London without Licence of the College of Phyſicians, ſhall forfeit for every Month 5 l. one Moiety to the King, and the other to the College; though no Action is appointed for it, yet they may have an Action of Debt for it. Trin. 4 Jac. B. R. College of Phyſicians, adjudged.

19. An Action of Debt lies upon the Statute of 2 E. 6. for the treble Value for not ſetting forth of Tythes, though the Statute does not mention any Action, but only that he ſhall forfeit the treble Value, and does not mention to whom he ſhall forfeit it, nor by what Action it ſhall be recovered. Co. Entries.

And this is now the common Practice.

20. (n) An Action of Debt lies by a Sheriff upon the Statute of 28 Eliz. cap. 4. for his Fees given by the Statute, for an Execution ſerved by him, though the Statute does not ſay that he ſhall have his Fees, or any Action for them, but only ſays, that he ſhall not take for any Execution ſerved any Conſideration or Recompence beſides that thereafter in the ſaid Act mentioned, which it ſhall be lawful to be had and received, ſcilicet, 12 d. for 20 s. where the Sum does not exceed 100 l. and 6 d. where above 100 l. 14 Jac. B. R. between (o) Proby and Lumly Plaintiffs, and Mitchel Defendant, adjudged. Intratur, Paſch. 14 Jac. Rot. 531.

(n) Walden & al' and Urſy S. P. Lat. 17, 51. adjudged. Noy 75. adjudged. Poph. 173.

(o) Poph. 173. S. C. cited.

Lat. 51. S. C. cited. Noy 75. S. C. cited. Moor 853. Pl. 1166. S. C. adjudged. 1 Rol. Rep. 404. S. C. adjudged, and ſaid there was no Precedent of ſuch Action before that Time: But vid. Cro. El. 335, 654.

21. If one makes a Bill to another in theſe Words: *Memorand'*, That I owe to *A. B.* 20 *l.* to be paid in Watches, an Action of Debt, *&c.* muſt be brought for the Money, and not an Action for the Watches, for the Number of Watches is not certain. *Hill.* 26 *Eliz. Anonymus.* 1 *And.* 117. *per totam Curiam*; and ſaid it was not like the Caſe of 39 *H.* 6. *Fol.* 36. by which if one ſells to another 20 Clothes for 500 *l.* upon Cndition that for 200 *l.* he ſhall take two precious Stones, and for 100 *l.* certain Pearls, and 200 *l.* in Money; an Action lies for the precious

precious Stones and Pearls. Or if one ſells an Horſe for Corn, an Action lies for the Corn: But ſaid, the Book muſt be intended where the Certainty thereof appeared.

(p) Cro. Jac. 382. S. P. per Curiam. Ray. 68. S. P. adjudged.

22. (p) An Action of Debt lies without any Preſcription for a (q) Fine aſſeſſed by a Steward in a Court-Leet. *Hill.* 37 *Eliz.* between the (r) Earl of *Lincoln* and *Fiſher*, *Cro. El.* 581. adjudged.

(q) So it lies for the Fine of a Copyholder, for though it ſavours of the Realty, yet it is a certain Duty. 3 Mod. 240. 1 Sid. 58. 2 Mod. 230. & S. P. appears.

(r) Moor 470. Pl. 675. S. C. Ow. 113. S. P. appears.

(s) For this, vid. 1 Part 26. Pl. 2. 66. Pl. 13.

23. (s) If *A.* delivers Money to *B.* to the Uſe of *C. C.* may have Debt againſt *B.* for this Money. *Mich.* 44 & 45 *Eliz.* between (t) *Whorwood* and *Shaw*, *Yelv.* 23, 24. adjudged.

(t) 1 Brownl. 82. S. C. adjudged. Moor 667. Pl. 914. S. C. & S. P. appears. Ow. 127. S. C. adjudged. Cro. El. 729. S. C. & S. P. appears. Et vid. 1 Rol. Rep. 257, 391. 2 Rol. 441, 442. March 14.

24. If the King lets to Farm the Cuſtom of Poundage, and after a Merchant brings a Ship into a Port, and unlades the ſame, the Cuſtom not being paid, by which the Goods are forfeited by 1 *Jac. cap.* 33. and after the Merchant compounds with the King for the Forfeiture, yet the Farmors may have Debt for the Cuſtom, *ſcilicet*, 12 *d. per* Pound, becauſe by the bringing the Ship into Harbour, *&c.* it was a Duty veſted, and the Forfeiture is given only as a Security for the Cuſtom. *Trin.* 14 *Jac.* between (tt) *Salter & al'* and *Malapert*, 1 *Rol. Rep.* 383. adjudged.

(tt) Upon a Covenant to pay. Cro. El. 797. 1 Leon. 208.

25. (u) If *A.* covenants with *B.* to pay him (w) ſo much Money as he ſhall expend in the Repairing and Victualling a Ship for him, and *B.* expends 300 *l.* accordingly, an Action of Debt or Covenant lies for the Money expended. *Trin.* 23 *Car. Styl.* 31. adjudged.

(u) Styl. 133. like Point adjudged.

(w) 2 Jon. 184. like Point adjudged, though the Certainty of the Debt did not appear by the Deed.

26. If it be recited by Deed, That there is a Suit depending between the Vicar of *S.* and *A.* concerning a *Modus decimandi*, which concerns all the Pariſhioners of *S.* and *B.* a Pariſhioner by the ſaid Deed agrees and promiſes *A.* to pay his proportionable Part of the Charges of the Suit; an Action of Debt or Covenant lies upon this Deed, for by an Averment of what was expended in the Suit, that which was at firſt uncertain may be reduced to a Certainty. *Trin.* 7 *Will.* 3. between *Sanders* and *Marke*, 3 *Levin.* 429. after a long Debate adjudged.

(L) Upon an Account.

(a) Yelv. 70. S. P. per Curiam.

1. (a) Debt lies upon an Account before himſelf. 45 E. 3. 14. b. 7 H. 4. 14. b.

2. Debt lies for the Arrearages of an Account againſt the Bailiff of a Manor. 7 H. 4. 3.

3. If the Bailiff of a Manor accounts for the Iſſues before they are leviable, an Action of Debt lies for the Arrearages, for he hath voluntarily charged himſelf with them. 13 H. 4. 12. b.

(b) Otherways of a Receiver or Guardian. Palm. 512. Et vid. 1 Part 232.

4. If upon the Account of a (b) Bailiff of a Manor it appears, that he hath paid more than he received, he may have Debt for this Surpluſage. 7 H. 4. 3.

5. If upon the finding the Surplus the Lord promiſes to pay it, the Bailiff may have Debt for it. 29 E. 3. 25. b.

6. If

6. If a Man accounts before Auditors for a Thing that lies not in Account, as for a Contract, Debt lies not for the Arrearages of the Account. 8 H. 6. 10 b. 15. b.

Fol. 599.

7. In an Account against another as Receiver to a Stranger, if the Defendant be found in Arrearages before Auditors assigned, Debt lies not for the Arrearages upon the Account, because it appears that he is not accountable to the Plaintiff. 20 H. 6. 6.

8. But in an Account as Receiver of the Plaintiff, if the Defendant be found in Arrearages, Debt lies for it upon the Account, though in Fact he never was his Receiver. 20 H. 6. 6. b. contra.

9. Debt lies against Executors upon the Arrearages of an Account by the Executor himself, of Receipts by the Testator. 2 H. 4. 13. b.

10. And the Count in this Case may be of Receipts in general, without mentioning the Particulars, because the Defendant was Party thereto. 2 H. 4. 13. b.

11. In a Writ of Account against another as Receiver, if the Defendant be found before Auditors in Surplus, yet he shall not have Debt against the Plaintiff for it, inasmuch as he is charged as Receiver, and not as Bayliff, (c) for a Receiver shall not have any Recompence of his Travel, &c. Mich. 12 Jac. B. R. between (d) the Earl of Suffolk and Floyd, adjudged upon Demurrer.

(c) For this, vid. 1 Part 232.

(d) 1 Rol. Rep. 87. S. C. adjudged. 2 Bulf. 277. S. C. adjudged.

12. If a Corporation that has Power by Charter or Prescription to make By-laws, makes a By-law, and that if it be broke, to forfeit a certain Sum to the Corporation; though it be not appointed by the By-law that it shall be recovered by Action of Debt, yet an Action of Debt lies for it, because this is a Duty in the Corporation, this being a By-law, and this Sum forfeited to them. (dd) Co. 5. Clar. 64. Hobert's Reports 279.

(dd) 1 Part 738. Pl. 3. S. C.

13. Debt lies for an Amercement in a Court-Baron. Hobert's Reports (e) 279.

(e) Hob. 206. S. C.

14. If a Tally be delivered to a Customer, Debt lies for it as soon as the Money comes to his Hand. 1 H. 7. (f) Hobert's Reports 279.

(f) Hob. Fol. 206. S. C.

15. If there be a Custom that if any breaks the Pound of the Manor, that he shall pay 3 l. to the Lord; admitting this to be a good Custom, an Action of Debt lies for it. (g) 11 H. 7. 14. by all the Justices.

(g) Hob. 206. S. C. cited.

(M) Upon what Judgment or other Record it lies.

1. A Man may have an Action of Debt upon a Statute-Merchant, (a) for it is in Nature of an Obligation, and the Seal of the Party is put thereto. 43 E. 3. 2. b. 3 E. 4. 27. 15 H. 7. 16.

(a) But where it was not good as a Statute, yet was held good as an Obligation. Vid. 2 Rol. Abr. 149. Letter L.

2. But no Action of Debt lies upon a Statute-Staple, for the Seal of the Party is not put thereto, and this is a Duty made by a special Law, which was not by the Common Law, and therefore he shall not have other Remedy for it than the Statute hath provided. 15 H. 7. 16.

3. But quære whether an Action of Debt lies upon a Recognizance in Nature of a Statute Staple, inasmuch as the Seal of the Conusor is put thereto.

4. An Action of Debt lies upon a Recognizance taken in Chancery. D. 22 El. 369. 52.

5. So an Action of Debt lies upon the Tenour of such Recognizance. D. 12 El. 369. 52.

Fol. 600.

6. (b) An Action of Debt lies upon a Recognizance taken before the Mayor of London. D. 4, 5 El. 219. S. 9.

(b) Chamberlain and Thory, S. P. appears. Cro. El. 186. 1 Leon. 130. Et vid. 1 Leon. 284.

7. If A. be Bail for B. in Banco, by Recognizance acknowledged by him, and after Judgment is given against B. for the Damages and Costs, and after a Scire facias is sued upon the Recognizance against A. and Judgment is had thereupon against him, an Action of Debt lies upon this Judgment against A. and if he hath Judgment therein, he may take his Body in Execution thereupon, though he could not take his Body in Execution upon the Judgment in the Scire Facias. Mich. 10 Car. B. R. between (c) Rigault and Carrick, adjudged upon a Demurrer per Curiam, and the Defendant taken in Execution accordingly, and this afterwards affirmed in a Writ of Error.

(c) 1 Rol. Abr. 987. Pl. 3. S. C. which vid. and the Notes there.

8. (d) If A. be Bail for B. in a Recognizance of 100 l. in Banco, in an Action against B. in which A. acknowledges himself to be bound in 100 l. that if B. be condemned in the Action, then he shall pay the Money, or render his Body to Prison, or he will pay it for him, an Action of Debt lies upon the Recognizance, alledging, that Judgment was had in the said Action against B. for 100 l. and that B. did not pay it, nor render his Body to Prison, and that A. hath not paid it, (e) for A. may aid himself by Plea in this Action, as well as he may upon the Scire facias upon the Recognizance. Hill. 14 Car. B. R. between Holmes and Faldoe. Intratur, Mich. 14 Car. Rot. 463. a Writ of Error was brought upon a Judgment given in Banco, in an Action of Debt upon such Recognizance; but the Parties after agreed: But Master Hoddesden said such Actions are usual.

(d) Raym. 14. S. S. upon a Recognizance of Bail in B. R. dubitatur: And though it was said there were several Precedents, it was answered they had passed sub silentio.

(e) In such Action the Defendant pleads that the Principal died before any Ca' sa' sued forth. Sparrow and Howgate, 1 Jon. 29. Winch. 61, 62. Et vid. Godb. 354.

(N) For what Thing the Judgment, being Debt, lies upon it.

1. If a Man recovers Damages in a real Action, as in a Writ of Apel, Cosinage, or Entry sur Disseisin, he may bring Debt upon the Judgment for the Damages, for by the Recovery they are in the Personalty. 43 E. 3. 2.

2. So he may have Debt for the Damages recovered in a Writ of Waste. 43 E. 3. 2. adjudged.

3. If a Man recovers the Arrearages of a Rent-Service, he shall not have Debt for them upon the Judgment, because these continue a Freehold. 43 E. 3. 2. Contra, 9 E. 4. 50. b.

4. So a Man shall not have Debt for the Arrearages recovered in a Writ of Annuity. 43 E. 3. 2.

5. Debt lies for Damages recovered in a Mordancestor, as Arrearages of a Rent. 46 E. 3. 25.

6. Debt lies for Arrearages recovered in a Writ of Account. 43 E. 3. b. 11 H. 4. 79. b.

7. If a Man recovers a Debt, Debt lies upon this Judgment. 43 E. 3. 2. b.

8. If a Man recovers Debt or Damages in London, in an Action brought there by the Custom of the City, which lies not at Common Law in the Courts of Westminster, yet when this is become a Debt by the Judgment, an Action of Debt lies in Banco or Banco Regis upon this Judgment. Mich. 15 Car. B. R. in an Action between Mason and Nichols, adjudged upon a Demurrer to the Declaration.

9. If a Woman be endowed of Copyhold Land by the Custom of the Manor, and she recovers Dower within the Manor, and Damages to 50 l. for the Profits of the Land from the Death of her Husband, by the Statute of Merton, cap 1. the Husband dying seised, yet she shall not have an Action of Debt at the Common Law for the Damages, for upon such Judgment no Writ of Error or false Judgment lies, but the Remedy is in the Court of the * Manor, or in Chancery. Co. 4. 30. b. between (a) Shaw and Thompson resolved.

* Fol. 601.

(a) Moor. 410. Pl. 599.

S. C. by Three Judges against One; but at another Day it was held by Three Judges that the Action lay, because the Court-Baron could not award Execution for so great Damages, though well assessed there. Cro. El. 426. S. C. adjornatur ante 208. Pl. 4.

10. But if a Man recovers Damages in a Writ of Right-close, in nature of an Assise, in a Court of Ancient Demesn, he may have an Action of Debt for these Damages at the Common Law. 8 E. 4. 6.

9. (b) If after Judgment for the Plaintiff in an Action of Debt in *B. R.* the Defendant brings a Writ of Error (c) *in Cam' Scac'*, an Action of Debt may be brought in *B. R.* upon the Judgment, pending the Writ of Error, and the Defendant cannot plead *null tiel record*, for by the Writ of Error the Transcript of the Record only is removed. *Hill.* 16 & 17 *Car.* 2. between (d) *Adamson* and *Tomlinson*, 1 *Sid.* 236. adjudged, that it lay as well after the Writ of Error brought as before.

(b) Styl. 124. S. P. dubitatur. 1 Mod. 121.

(d) So after a Writ of Error brought in Parliament adjudged; and

1 Sid. 236 (d) Adams and Tomlinson S. C. 1 Levin. 153. adjudged. Raym. 100. said, that it lay as well after the Writ of Error brought as before.

10. If after Judgment for the Plaintiff in an Action of Debt in *B.* a Writ of Error is brought, and the Record removed in *B. R.* an Action of Debt lies not upon it in *B.* as upon a Judgment (e) in that Court *Pasch.* 6 *Will. & Mar.* 3 *Levin.* 397. adjudged *per Treby*, at his Chambers, upon a Case made and referred to him upon a Trial at *Guildhall*: But the Plaintiff ought to have declared upon the whole Matter, *viz.* the Judgment and Removal by Writ of Error, and that the Judgment remained *in pleno robore, prout patet per Recordum inde in B. R.* And afterwards *Mich.* 9 *Will.* in an Action of Debt brought in *B.* the Plaintiff (f) declaring in such Manner, had Judgment *per totam Curiam.*

(e) It lies upon it in B. R. 1 Sid. 236. Dyer 32. Pl. 5. N. Benl. 20. Pl. 31. 2 Rol. Rep. 494. —And quære if it lies not upon a

Judgment by Writ of Error removed out of an inferior Court in B. R. 1 Sid. 236. And for this, vid. 1 Rol. Abr. 887. Pl. 4. and the Notes there. (f) To such a Declaration the Plaintiff demurred. Biddulph and Dashwood, 2 Vent. 261. per Curiam, admitting the Defendant might insist that the Judgment was suspended by the Writ of Error, yet he ought not to have demurred, but pleaded specially, and demanded Judgment if the Plaintiff should be answered pending the Writ of Error.

(O) At

(O) At what Time.

(a) 2 Inſ. 469.

1. AT Common Law, if a Man had recovered a Debt, (a) he might have had an Action of Debt upon this Judgment after the Year. 43 E. 3. 2. b.

2. If a Man ſues a Scire facias upon a Recognizance in Chancery, and has Judgment thereupon, and an Elegit is awarded thereupon, it ſeems he cannot have an Action of Debt upon the Recognizance afterwards, (b) inaſmuch as he hath elected another Courſe to have his Debt. Contra, P. 40 El. B. R. between (c) Cowper and Langworth, adjudged.

(b) Though upon an Elegit it be returned that Part of the Debt is levied of the Goods of the Defendant, yet if no Land is extended, Debt lies upon the Judgment for the Reſidue. Glaſcock and Bozgan. 1 Levin. 92. 1 Sid. 184. per Curiam, præter Kelynge: But vid. 1 Rol. Abr. 905. (c) Cro. El. 608. S. C. adjudged.

(d) But upon the Judgment in the Scire Facias Debt lies. 3 Leon. 14.

3. So after the Recovery in the Scire facias, though he does not ſue any Elegit, yet (d) Debt lies not upon the Recognizance, inaſmuch as it is changed into a new Judgment. Contra, P. 40 El. B. R. between Cowper and Langworth, per Curiam.

(e) By the Report of this Caſe in Dyer the Writ was ſerved, and a Moiety of the Land delivered to the Plaintiff.

4. If a Man recovers Damages in a Writ of Entry, and ſues an Elegit for them, (e) although the Elegit be not returned, yet he ſhall not have Debt upon the Judgment afterwards, becauſe he hath made his Election upon Record. D. 13 El. 299. 34. The ſame Law if the Extent be returned upon the Elegit, altho' the Party diſagree thereto. 50 E. 3. 5. b.

(f) 1 Rol. Abr. 584. Letter M. vid.

5. If a Man recovers a Debt, and after the Parties refer themſelves to an Award, and (f) by Aſſent the Plaintiff was diſmiſſed of the Court, by this Word Dimittitur he ſhall never have an Action of Debt upon this Judgment, becauſe he was once entirely diſmiſſed of the Court to have any Execution there. 11 H. 4. 44. adjudged.

(g) Cart. 212. S. P. cited to have been adjudged. Et vid. 1 Rol. Abr. 901.

6. (g) If a Man recovers Debt, and hath the Party in Execution, and he eſcapes, he ſhall not have Debt upon the Judgment againſt him afterwards. Dubitatur, 11 H. 4. 45.

(h) That an Indebitatus lies on Sale of Copyhold, vid. 3 Keb. 625.

7. If a Man by Indenture acknowledges to J. S. that he hath ſo much of his Money due to him in his Hands, without limiting any Day of Payment, yet Debt lies preſently. 11 H. 6. 39.

8. If a Man bargains with another to enfeoff him of (h) certain Land for a certain Sum, ſo that there is a full Bargain between them, he may demand the Money in a Writ of Debt preſently. 20 H. 6. 34. b.

9. If a Man leaſes Lands for Years, reſerving yearly 20 l. at Four Quarters, Debt lies for one Quarter before the other are paſt, becauſe it ſavours of the Realty, and is as ſeveral Contracts. Co. Lit. 47. b.

10. If a Man leaſes Lands for Years, reſerving weekly during the Term Nine Quarters of Wheat, an Action of Debt lies for any Week's Quarters before the others are incurred, for this is a Rent. Tr. Ja. B. R. between the Lord Denny and Parnell adjudged.

11. (h) **But upon a Bill obligatory for the Payment of (i) several Sums at several Days, no Action lies till the last Day is past.** Co. Lit. 47. b.

(h) 1 Rol, 221. S. P. per Coke. Co. Lit. 292. b.

S. P. 3 Co. 22. a. 10 Co. 128. b. Cro. Jac, 505. Cro. Car. 241. (i) If to pay 20 l. in Manner following, viz. 10 l. at one Day, and 10 l. at another Day, Debt lies not till after the last Day, because one entire Duty; but if a Man binds himself to pay J. S. 10 l. at one Day, and 10 l. at another Day, after the first Day Debt lies for 10 l. because it is in it self a several Duty. Ow. 42. per Periam. —So if A. makes a Bill to B. for the Payment of 20 l. viz. 10 l. &c. and thereby covenants and grants with B. that if he makes Default in either of the said Payments, that he will then pay what of the whole shall be unpaid after Default at the first Day, Debt lies for the whole. 1 Leon. 208. adjudged.

12. (k) **So upon a Contract Debt lies not till all the Days of Payment are past.** Co. Lit. 47. b.

(k) Co. Lit. 292. b. S. P.

3 Co. 22. 4 Co. 94. b. S. P. 5 Co. 81. b. S. P.

13. If a Man by Deed (l) assigns a Term for Years in an House, reserving the Rent during the Term, payable at several Days, this is a Sum in Gross, for which Debt lies not till all the Days are past. *Hill.* 23 *Car. All.* 57. *per Curiam.* And for this Reason, *inter alia*, the Judgment was stay'd; but in the Book there follows a *Nota*, that the Contract is in the Realty, and the Debt arises in respect of the Profits, and that therefore an (m) Action will lie before the last Day is past, and that it was so ruled. 45 *Ed.* 3. 8. b. And said the Opinion of *Hale* was so.

(l) If a Man assigns his Term to a Stranger, or by Parol surrenders to the Reversioner, reserving a Rent, 'tis good by way of Contract, and Debt lies upon it. Winton and Pinkny, Raym. 222. 2 Levin. 80. where in Debt brought for Rent, reserved upon such a Surrender, Judgment was given for the Plaintiff by Hale, with the Assent of the other Judges, though all the Days were not past. 1 Vent. 242. adjudged. (m) Cartwright and Pinkny, S. P. 1 Vent. 272. adjudged.

(P) How it shall be brought.

Fol. 602.

In what Cases in the (a) *Detinet* in respect of the Persons.

(a) Lan. 80. 2 Brownl. 204, 205. Cro. El. 326. Cro. Jac. 546.

1. **If A. be in Execution upon a Judgment for B. and after B. dies, and after A. brings an** Audita Querela **against C. the Executor of B. and has a** Scire Facias, **and thereupon puts in Bail by Recognizance in** Chancery, **according to the Statute of** 11 H. 6. cap. . **and after upon this** Audita Querela **Judgment is given against A. and afterwards a** Scire Facias **issues against the Bail, and after Judgment the Bail is taken in Execution upon the Recognizance, and the Sheriff suffers him to escape,** (b) **upon which Escape the Executor brings an Action of Debt;** (c) **this Action ought to be brought in the** Detinet **only, and not in the** Debet **and** Detinet, **for this Recognizance is in nature of the first Debt, this being in a legal Course.** M. 8 Ja. Scaccario, **between** (d) Carew **and** Broughton **adjudged.**

(b) But an Executor being Lessee for Years of a Rectory in the Right of the Testator, may have Debt upon 2 Ed. 6. for not setting out Tythes in the Debet and Detinet, because founded upon a Wrong in his own Time; and by the Statute it is given to the Party grieved. Cro. Jac. 545, 546. cited to have been adjudged. (c) So if one as Executor obtains Judgment in Debt, and takes the Defendant in Execution, and the Sheriff suffers him to escape, &c. for the first Action being in the Detinet, and that for the Escape being founded upon the same Record, it ought to pursue it. Hitchcock and his Wife against Skinner, Cro El. 326. the Court being at first divided, it was after adjudged: But in Cro. Jac. 546. Hitchcock's Case being cited, it was said the Court was therein divided, and that therefore the Plaintiff brought an Action in the Detinet only, upon which Judgment was given. But for this, vid. Sir George Reynel and Lancastle, Cro. Jac. 545, 685. Hob. 264. 2 Rol. Rep. 132. Styl. 232. Hut. 79. (d) Lane 79. S. C. adjudged.

2. If an Executor brings Debt upon an Obligation made to the Testator, where the Day of Payment incurred after the Death of the Testator, yet the Writ shall be in the Detinet only, (e) for he brings the Action as Executor. 20 H. 6. 5. b.

(e) It must be so where brought for a testamentary Duty. Moor 566.

3. So if a Man binds himself to the Testator to pay him 100 l. when such a Thing shall happen; if it happens after the Death of the Testator, yet the Writ of Debt by the Executor shall be in the Detinet only. 20 H. 6. b.

(Q) In the *Detinet tantum*.

1. (a) If the Action be of such a Nature that he ought to name himself Executor, it shall be in the Detinet only, (b) otherwise econtra. 20 H. 6. 5.

(a) 5 Co. 32. b. same Rule.
(b) Winch. 80.

2. If an Executor recovers in Trespass for Goods taken out of his Possession, in Debt for the Damages recovered the Writ shall be in the Debet and Detinet. (c) 20 H. 6. 5. b. for he need not name himself Executor.

(c) Lan. 80. S. C. cited.

3. (d) If a Man possessed for Years makes an Under-Lease, rendring Rent, if his Executor brings Debt for Rent incurred after his Death, the Writ shall be in the Detinet only. 20 H. 6. 5. b.

(d) Post Letter S. 7. S. P. vide, with the Notes there.

4. If the Executor sues a Scire facias out of a Recognizance made to his Testator, it shall be in the Detinet. 20 H. 6. 5. b.

5. If an Executor takes an Obligation for a Debt due to his Testator by Contract, in Debt upon this Obligation the Writ shall be in the Debet and Detinet. 20 H. 6. 4. b. 5. b. Contra, 25 E. 3. 40. adjudged.

(R) By whom.

1. (a) If in an Account an Executor recovers a Debt due to his Testator, in Debt for the Arrearages thereupon, the Writ shall be in the Detinet only; for though the Action is converted into a Debt by the Account, (b) yet it is the same Thing which was received in the Life of the Testator. 11 H. 6, 17. b. dubitatur. 20 H. 6. 4. b. 5. b. adjudged. Contra, 11 H. 6. 36. b.

(a) Cro. El. 326. S. P. Cro. Jac. 545. S. P. arguendo. 5 Co. 31. b.
(b) For the Account alters not the Nature of the Debt. 1 Part 31. Pl. 11. Et vid. Hob. 88

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184, 272. Noy 19. 2 Levin. 111. 165. 2 Jon. 47.

2. If a Rent be granted to another for Years, the Executor of the Grantee shall have Debt for the Arrearages of this Rent incurred after the Death of the Testator in the Detinet only, for he had it as Executor. 11 H. 6. 36.

3. (c) If an Executor recovers in Debt upon a Contract due to the Testator, and after brings a Writ upon the Judgment, the Writ shall be in the Detinet only. Contra, 20 H. 6. 5.

4. If the Executor sells the Goods of the Testator for a certain Sum, he shall have Debt for this in the Debet and Detinet, (d) 20 H. 6. 5. b. Contra, (e) 17 E. 3. 66. adjudged.

(c) Lan. 80. S. P. (d) Lan. 80. S. C. cited. (e) 2 Brownl. 205. S. C. cited.

(f) 2 Brownl. 205. 1 Mod. 185.

5. (f) If an Executor, having Lands by an Extent upon a Statute made to the Testator, and naming himself Executor, by Deed leases them for Three Years, rendring Rent, *&c.* if an Action of Debt is after brought by him for this Rent, it must be in the *Debet* and *Detinet*, because

cauſe it is founded upon his own Contract. *Paſch.* 22 *Jac.* between (g) *Holman* and *Chute*, *Cro. Jac.* 685. adjudged. (g) Winch. 80. S. C. adjudged; and by the Report it appears the Lands were extended in the Time of the Executor, and that the Leaſe was for Three Years, if the Leſſor ſhould continue ſo long ſeiſed by Force of the Extent.

(S) Againſt whom.

1. DEbt againſt an Executor ſhall be in the Detinet only 11 H. 4. 46.

2. (a) If a Debt be recovered againſt Executors of the Goods of the Deceaſed, and the Recoveror brings Debt upon the Judgment, the Writ ſhall not be in the Debet and Detinet, but in the Detinet only. 11 H. 4. 56. b. 11 H. 6. 3. b. (a) 1 Levin. 331, 332.

3. But otherwiſe it is if it be brought upon a Judgment de bonis propriis. 11 H. 4. 56. b.

4. A Writ of Debt in the Debet and Detinet does not lie againſt an Executor upon a Suggeſtion that he hath waſted or converted the Goods of the Deceaſed, (b) without a Writ depending. 11 H. 6. 7. b. (b) Not without a Judgment. Cart. 2.

5. (c) So if a Man recovers in a Writ of Debt againſt an Executor, and in a Fieri facias thereupon the Sheriff returns that he hath no Goods of the Deceaſed, the Recoveror, upon a Suggeſtion that he hath waſted the Goods, ſhall not have a Writ of Debt in the Debet and Detinet againſt him, for (d) upon this Return and Suggeſtion he is to have a conditional Writ of Scire facias, to the Sheriff, ſcilicet, Si ita ſit, to make Execution of his own proper Goods. Dubitatur, 11 H. 6. 7. b. 16, 35. b. (c) It lies upon ſuch a Suggeſtion in the Declaration only, without taking out Execution, &c. or having it found by Inquiſition, &c. which was the ancient Way. Wheatly and Lane, 1 Saund. 216, 217. argued and adjudged. 1 Levin. 147, 255. 1 Sid. 397. Et vid. Hob. 206. 2 Sid. 102, 103. 1 Levin. 147. Cart. 2. —The Defendant held to ſpecial Bail in ſuch Action. 1 Vent. 355. 1 Sid. 63. —But it lies not upon a Bond ſuggeſting ſuch a Devaſtavit, for it is hard upon ſuch a Surmiſe to charge an Executor in his own Right. Ent and Withers, 1 Vent. 321. adjudged; and the Court ſaid they would not extend theſe Actions further than they had been. 2 Levin. 209. adjudged. 1 Levin. 147. (d) 5 Co. 32. But for this, vid. Proceſs per et vers Executors, under Title Executors.

6. But if upon the Fieri facias the Sheriff returns a Devaſtavit made by the Executor, the Plaintiff may have Debt thereupon in the Debet and Detinet. (It ſeems there ought to be a Judgment upon the Return.) 11 H. 6. 16. b.

7. (e) If Leſſee for 20 Years leaſes for 10 Years, rendring Rent, and dies, his Executor or Adminiſtrator ſhall have Debt for the Rent incurred after the Death of the Teſtator (f) in the Detinet only. Tr. 43 El. B. R. between (g) Sparke and Sparke, per Curiam. (e) Cro. Car. 225. S. P. adjudged. Frevin and his Wife and Paynton, S. P. 1 Levin. 250. adjudged. 2 Keb. 407. adjudged. 1 Sid. 379. the Report thereof miſtaken, being ſaid to be brought againſt an Adminiſtrator. (f) But in the Caſe of Tratle and King, 2 Jon. 169. it is adjudged it lay in the Debet and Detinet, and a Diverſity taken between Things in Action and Chattels in Poſſeſſion, for as to Things in Action, the Writ muſt always be in the Detinet, as for the Arrears of an Account, &c. and it ſhall not be Aſſets till recovered: But in this Caſe, the Reverſion of the Term being in the Executor immediately by the Death of the Teſtator, it is Aſſets for the whole Value, and the ſhewing he is Executor is only to entitle him to the Term, to which the Rent is incident. (g) Cro. El. 840. 8. C. adjudged, the Leaſe being made to commence after the Death of the Teſtator. Noy 32. S. C. adjudged.

8. If the Executor obliges himſelf to pay a Debt due by Contract by the Teſtator, in Debt upon this Obligation the Writ may be in the Debet and Detinet, becauſe the Obligation made it his own Debt. 11 H. 6. 8. 17. b.

9. In

9. In an Action of Debt against the Executor for Rent incurred in the Life of the Testator, the Writ shall be in the Detinet only. 11 H. 6. 36.

10. (h) In an Action of Debt against an Executor for the Arrearages of a Rent, reserved upon a Lease for Years, and (i) incurred after the Death of the Testator, the Writ (k) shall be in the Debet and Detinet, (l) because the Executor is charged of his own Possession. 11 H. 6. 36. M. 41, 42 El. B. R. between (m) Hargrave and Boddy adjudged: But it was reversed for the same Cause in a Writ of Error in Camera Scaccarii. Co. 5. 31. same Case. M. 9 Ja. B. Rot. 1746. between Rone and Sir Henry Cary adjudged that it lay in the Debet and Detinet. Cited, M. 41, 42 El. B. R. 7 Ja. B. R. between the Lord (n) Rich and Frank adjudged. Cited, M. 41, 42 El. B. R.

(h) Bayliffs and Commonalty of Ipswich, Cro. Jac. 421. 3 Bulf. 211. Mawle and Lacyffer, S. P. Cro. Jac. 549. adjudged. 2 Rol. Rep. 132. Palm. 116. Et vid. Winch. 32. Aleyn 34. Styl. 61. 1 Bulf. 23.

(i) Where Part incurred in the Time of the Teſtator, and Part after his Death, his Executor may be charged in the Detinet for the whole. Al. 76. Styl 118.

(k) He may be charged in the Detinet only, but then he ſhall anſwer only out of the Teſtator's Eſtate. Royſton and Cozdary, Al. 42. adjudged; and ſaid that this was never doubted. Styl. 79. adjudged: And where in the State of the Caſe 'tis ſaid it was in the Debet and Detinet, I ſuppoſe it a Miſtake of the Printer or Reporter, as I think may be collected from the latter End of the Caſe: And by Holl Chief Juſtice 'tis there ſaid the Plaintiff might bring it either Way. Et vid. Styl. 52. 1 Levin. 127.

(l) For though they have the Land as Executors, yet nothing ſhall be employed to the Execution of the Will, but ſuch Profits only which are above that which is to make the Rent, and therefore ſo much of the Profits as is to make or anſwer the Rent they ſhall take to their own Uſe, and they ſhall be charged for it in the Debet and Detinet. Poph. 120. per Popham. 5 Co. 31. b. Cro. El. 712. —And if the Land be not more worth than the Rent, it is a good Plea to ſuch Action in the Debet and Detinet, for in ſuch Caſe he is to be charged in the Detinet only. 1 Vent. 171. per Curiam: And for this, vid. Palm. 118. 1 Sid. 266. 1 Mod. 185. —But where they are to be charged for Rent upon a Leaſe made to the Teſtator, and have not the Profits of the Leaſe to anſwer it, they ought to be charged in the Detinet only; as where Debt is brought againſt an Executor of a Leſſee for Rent incurred after Aſſignment of the Term. Poph. 120. per Popham. 1 Sid. 266. 1 Levin. 127. 2 Ven. 209. 3 Mod. 327. So if brought againſt him after Waiver of the Term. 1 Levin. 127. Et vid. Al. 43.

(m) Cro. Eliz. 711, 712. S. C. adjudged, but reverſed in Cam' Scac'. Moor 566. Pl. 771. S. C. adjudged. 1 Brownl. 56. S. C. adjudged, and reverſed. Cro. Jac. 546. S. C. cited to have been adjudged, and after reverſed. 1 Bulf. 23. S. C. cited to be adjudged; but that the Judgment was after reverſed upon another Matter, and for other Reaſons. 2 Brownl. 206. S. C. cited, and ſaid they were of Counſel for Hargrave, when the Judgment given in the King's-Bench was reverſed for Error in this very Point. Cro. Car. 225. S. C. cited, and denied to be Law: But Q. if the Book is not miſprinted, otherwiſe the Caſe is miſapplied there, the Action there being brought by an Adminiſtrator, not againſt one, for Rent incurred in the Time of the Inteſtate. Et vid. the Caſe of Smith and Nichols, cited, All. 34. which ſeems to be the ſame Caſe, as is reported in Cro. Car. 225. Et vid. 1 Mod. 185.

(n) Cro. Jac. 238. S. C. adjudged. 1 Bulf. 22. S. C. adjudged, after it had been fully debated. 1 Brownl. 56. S. C. 2 Brownl. 202, 203. after long Arguments, adjudged per Curiam, con. Velverton. Palm. 116. S. C. cited.

11. If an Action of Debt is brought againſt Baron and Feme upon an Obligation entered into by the Feme before Marriage, it (o) ſhall be in the *Debet* and *Detinet*, for by the Marriage all the perſonal Goods, and a Power of diſpoſing of the real, are by Law given the Husband, which he has to his own Uſe, and not as Executors to the Uſe of another. *Trin.* 30 *Eliz.* between (p) *Lloyd* and *Walcot*, 5 *Co.* 36. a.

(o) Al. 73.

12. So if an Action is brought upon a Bond againſt the Heir of the Obligor, it ſhall be in the *Debet* and *Detinet*, (q) becauſe he hath the Aſſets in his own Right. 5 *Co.* 36. a.

(p) Walcot and Powel, 3 Leon. 206. S. C. adjudged.

(q) And for another Reaſon, becauſe he is bound by ſpecial Words in the Obligation. Cro. El. 712. Et vid. Cro. El. 350. 2 Leon. 11. 2 Brownl. 204, 205. —But if in the Detinet only, 'tis good after Verdict, by 17 Car. 2. Comber and Watton, 1 Levin. 124. adjudged. 1 Sid. 342, 375, 379.

(T) How it ſhall be brought in the *Debet* and *Detinet*.

1. If Debt be brought againſt Baron and Feme upon a Recovery of Damages againſt the Feme dum ſola fuit, it is good in the Debet and Detinet. 47 E. 3. 23. b.

2. If the Succeſſor Prior brings Debt upon an Oligation made to his Predeceſſor, the Writ ſhall be in the Debet and Detinet. 47 E. 3. 23. b.

(V) How it ſhall be brought.

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In the *Debet* and *Detinet*, and where in the *Detinet* only.

In reſpect of the Thing.

1. If the Action be brought for Money, it ſhall be in the Debet and Detinet. 50 E. 3. 16. b.

2. (a) But if the Action be brought for dead Chattels or living, and not for Money, it ſhall be in the Detinet only. 50 E. 3. 16. b. Contra, M. 41, 42 El. B. R. Barnham's Caſe.

(a) 3 Leon. 260. S. P. per Curiam. 4 Leon. 46. S. P.

—Winch. 75. it was brought for Money in the Debet and Detinet, and for Two Shirts in the Detinet only.

3. (b) So if it be brought for Foreign Money (c) not made current, for then it is as Bullion. *Paſch.* 1 *Car.* between (d) *Ward* and *Kedgerow*, 1 *Jon.* 69. adjudged: But *Dod* ſaid, the Action might be brought in the (e) *Debet* and *Detinet*, or in the *Detinet* only.

(b) Cro. Jac. 617. S. P. adjudged. Et vid. Noy 13. Lat. 5. 77, 84.

(c) But if made current by Proclamation, the Action for it may be brought in the Debet and Detinet. Noy 13. Lat. 77, 84. Palm. 407. (d) Palm. 407, 409. S. C. adjudged niſi. Lat. 4. 77, 84. S. C. (e) I ſuppoſe this muſt be intended where ſo much Engliſh Money, being the Value of the Foreign, is demanded. Raſtal and Draper, Cro. Jac. 88. Yelv. 80. 1 Brownl. 90. Noy 13. Et vid. 1 Leon. 41. Yelv. 135. 1 Brownl. 102.

(X) What ſhall be a good Plea in Bar.

1. In Debt upon a Recovery in another Court, it is no good Plea that the Court where, &c. had taken him in Execution, if he does not ſay that it was at the Inſtance of the Plaintiff. 7 H. 6. 19.

2. But if he ſays ſo, it is a good Plea in Bar. 7 H. 6. 19.

3. In Debt upon a Judgment, it is no Plea that there is an Error in the original Proceſs, or Record of the firſt Judgment, for he is put to his Writ of Error for that. 7 H. 6. 19.

4. In Debt upon a Judgment, it is no Plea in Bar that after the Judgment the Parties put themſelves to an Arbitrament by Award of the Lord Chancellor, &c. and that the Arbitrator had made ſuch Award, &c. and that he himſelf had brought an Audita Querela to be relieved upon this Award, for this Matter

is not ſufficient to maintain an Audita Querela, and if it was, yet he could not plead it, but is put to his Audita Querela. Tr. 7 Ja. B. Miles Fale's Caſe, adjudged.

(Y) What Thing will extinguiſh a Debt.

A higher Thing.

(a) Dal. 53. S. P. per Curiam.

1. (a) If a Man accepts an (b) Obligation for a Debt by (c) Contract, this extinguiſhes the Contract. 13 H. 4. 1.

(b) This muſt be intended from the Debtor, for if a Stranger gives Bond for ſuch Debt, 'tis otherways. 2 Leon. 110. adjudged. But if upon the making the Contract a Stranger gives Bond for it, or being preſent promiſes to give Bond for it, and after does ſo, the Debt by Contract is extinguiſh'd, the Obligation being made upon or purſuant to the Contract. 2 Leon. 110. per Curiam. (c) So if a a Man accepts a Bond for a Legacy, he cannot after ſue for his Legacy in the Spiritual Court, for by the Deed the Legacy is extinct, and it is become a meer Debt at Common Law. Yelv. 38.

(d) Otherways if upon Record. 4 Co. 44. b. I ſuppoſe it muſt be ſo intended.

2. If a Man accepts an Obligation for the Arrearages of an Account before Auditors aſſigned (d) in Pais, this extinguiſhes the Arrears, for the Auditors are not of Record, for of this the Law lies, and for that the Obligation is higher. Contra, 11 H. 4. 79. b. 13 H. 4. 1. adjudged.

Et vid. Dyer 21. Pl. 132. 51. Pl. 14. 6 Co. 44. But vid. Poſt, Letter A. 1.

(dd) Vid. 3 Keb. 798.

3. (dd) If an Infant makes a Contract for his Diet and Cloathing, and after enters into an Obligation, with a Penalty, to pay it, and after the Infant avoids this Obligation, as he may for his Infancy, (e) yet it ſeems the Contract ſhall not be revived. Dubitatur, P. 32 El. B. R.

(e) Where a perſonal Thing being once ſuſpended ſhall be extinct, vid. 1 Rol. Abr. 940.

(Z) Acceptance of a Thing of equal Altitude.

(a) For one Deed cannot determine the Duty upon another.

1. (a) The Acceptance of an (b) Obligation for a Debt due by another Obligation is no Bar of the firſt Obligation. 11 H. 4. 79. b. 13 H. 4. 1.

Cro. El. 304, 727. But for this, vid. 1 Rol. Abr. 470. Pl. 1, 4. which vid. and the Notes there. (b) So if a Statute is accepted for it. 1 Rol. Abr. 470. Pl. 4. —Otherways if a Judgment is given or obtained upon the Obligation. 1 Part 722. Pl. 4.

(A) Acceptance of a lower Thing.

1. If a Man accepts an Obligation for the Arrears of an Account before Auditors assigned of (a) Record, this does not extinguish the Arrears, because they are higher. 20 H. 6. 45. b. (It does not appear whether the Auditors were of Record.)

2. If the Lessor accepts an Obligation for Rent due upon a Lease for Years, this does not extinguish the Rent, because the Rent is higher, being real, for of this the Law does not lie. 11 H. 4. 79. b. 13 H. 4. 1. 20 H. 6. 45. b.

(a) Otherways if assigned in Fol. 605. Pais. Ante, Letter Y. 2.

(B) (a) In what Cases a collateral Thing may be given in Satisfaction without a Deed.

(a) Where in Satisfaction of a Condition. 1 Rol. Abr. 455. S.

1. If a Rent be reserved by Deed upon a Lease for Years, it is no good Plea without a Deed, that by the Command of the Lessor he retained the Rent in Satisfaction of the Reparation of the House, which he had done, whereas the Lessor ought to have done it. 14 H. 4. 27.

2. The same Law is if the Rent was reserved without Deed, for he hath acknowledged the Duty by the Pleading. 14 H. 4. 27.

3. So if I (b) lend Money to you, if you pay the Money to another by my Command, yet this is not a good Satisfaction without Deed. 14 H. 4. 27.

(b) In the Original 'tis Appriſe.

(C) What ſhall be a good Bar in Debt.

(a) For this, vid. 2 Rol. Abr. 429. Letter O. and the Notes there.

(a) Eviction.

1. If a Man ſells (b) Land to another for a certain Sum of Money, in an Action of Debt for the Money it is no Plea in Bar that the Land is evicted. H. 37 El. B. per Curiam.

2. If a Man poſſeſſed of a Ward ſells it to another for a certain Sum, in Debt for the Sum it is a good Bar that the Ward is evicted by a Stranger. H. 37 El. B. per Curiam.

3. If Leſſee for Years, rendring Rent, cauſes a Stranger to enter upon him, and ouſt him, by which the Stranger deveſts the Reverſion by Diſſeiſin, (bb) yet the Leſſor may have an Action of Debt for the Rent arrear after, for this lies upon the Contract notwithſtanding the Diſſeiſin. M. 3 Ja. B. R. between Carpenter and Collins, cited to be adjudged in B.

4. If a Man leaſes for Years, to commence at Mich. rendring Rent, and the Leſſee enters before Mich. by which he is a Diſſeiſor, and ſo continues after Mich. and the Rent incurs, the Leſſor may have Debt for this Rent; and this Diſſeiſin ſhall not be any Impediment for the Privity of Contract which is between them. M. 32 El. B. R. between (c) Alexander and Dier adjudged.

(b) So if he ſells Goods, and before the Day of Payment they are taken from the Vendee by one that has a prior Title. 3 Co. 22. a.

(bb) Mid. Yelv. 74. Cro. Jac. 300.

(c) Cro. El. 169. S. C. adjudged. 2 Leon. 99. S. C. adjudged. N. Dyer 89. a. Margine, S C. And vid. Lit. Rep. 17.

5. If

(c) Dyer 4. b. S. P.

5. (c) If Leſſee for Years, rendring Rent, makes a Feoffment in Fee, yet this ſhall not be any Bar of the Rent Arrear after, for the Privity of Contract continues notwithſtanding the Feoffment, and the Eſtate is not determined but at the Election of the Leſſor.

(d) And therefore in a Declaration in Debt for Rent againſt

6. If Leſſee for Years, rendring Rent, (d) never enters into the Land, yet if the Leſſor waives the Poſſeſſion, an Action of Debt for the Rent lies upon the Contract. D. 24 H. 8. 4, 3. 28 H. 8. 14.

ſuch Leſſee, it need not be ſhewed that he entered, for the Contract is the Ground of the Action. 4 Leon. 18. Hetl. 54. 1 Vent. 41. —And the Occupation is not material. Otherways of a Leaſe at Will. Dyer 14. a. Hetl. 54. 1 Vent. 41. 108. Where upon a Leaſe from Year to Year, quamdiu partibus placuerit, no Entry or Continuance of the Poſſeſſion was ſhewed as to the ſecond Year, and yet after Verdict it was intended he was in Poſſeſſion for all the Time, for which the Rent is found due, Goſtwich and Maſon, 1 Mod. 3. 1 Sid. 423. Et vid. Pl. Com. 423. b. Palm. Rep. 117. 2 Rol. Rep. 131. Kelw. 65. b.

Pleading.

(a) Declaration.

(a) A Suit was entered in Placito debit', and the Plaintiff declared, quod Def. reddat ei 50 l. de annuali redditu, quas ei debet, & injuſtè detinet, and ſhewed the Grant of

1. IF in (b) Debt for (c) Rent the Plaintiff declares, upon a Leaſe for Years, rendring 31 *s.* yearly at (d) *Lady-day* and *Michaelmas* by equal Portions, and demands 15 *s.* 6 *d.* for Rent behind for one Year (e) ending at *Lady-day* laſt, the Declaration is naught; for the Demand of the 15 *s.* 6 d. being for the Arrears of the Rent of the whole Year, it ought to have been ſhewed how he was ſatisfied (f) the Reſidue, *Trin.* 4 *Car.* between *Bayly* and *Offord*, *Cro. Car.* 137. adjudged; and for this Cauſe, after a Demurrer to the Defendant's Plea, the Writ was abated.

the Rent for Years, payable at ſeveral Days out of Land, with a Clauſe of Diſtreſs, and concluded that the Defendant ſubſtraxit at the ſeveral Days annualem redditum pred', and upon nil debet pleaded, the Plaintiff took a Venire in Placito debiti, and had a Verdict, yet between Lucas and Ward, Yelv. 208. adjudged, quod nil cap' per billam, for the Declaration is repugnant to the Entry of the Plaint, for a Man cannot declare in Debt, quod ſubſtraxit annualem redditum; and the Word ſubſtraxit ſhews that he does not demand the Rent as a Debt, but as an Annuity; and the Judgments are different, for in an Annuity he ſhall have Judgment to recover the Arrears pending the Writ, but not ſo in Debt. 1 Bulſ. 151. adjudged. (b) An Avowry cannot be for Part of a Rent due at a Day, without ſhewing how the Reſidue was diſcharged. Cro. Car. 104. Hut. 96. (c) In an Action of Debt for Part of a Debt upon Contract or Obligation, the Plaintiff muſt acknowledge Satisfaction of the Reſidue, for there muſt be no Variance from the Specialty, &c. Cro. Jac. 499. Cro. Car. 436. Al. 57. 2 Vent. 129. —But in Debt upon Two Bonds, the Plaintiff in his Declaration may acknowledge the Payment of 10 l. in Part, without ſhewing upon which Bond it was paid, for it is immaterial, and can be no Prejudice to the Defendant. Meletine and Hall, 3 Bulſ. 244. adjudged. 2 Rol. Rep. 423. adjudged and affirmed upon a Writ of Error; and perhaps the Money was paid generally, without Application to either Bond. —In Debt upon 2 E. 6. for not ſetting out Tythes, the Plaintiff may demand leſs than what appears his Due upon the ſeveral Valuations, becauſe the Action is not brought for a certain Sum, but only for what ſhall be given by the Jury. Cro. Jac. 499. 1 Rol. Rep. 54. —So in Covenant. 2 Lev. 77. adjudged upon a general Demurrer; but upon a ſpecial Demurrer Hale inclined it would be otherways. —A Man obtains Judgment in an Hundred Court for 58 s. and 4 d. he cannot bring Debt for the 58 s. only, without ſhewing how the 4 d. is diſcharged. 3 Mod. 41. (d) The Plaintiff declared upon a Leaſe, paying 1 Sept. yearly 74 l. by equal Portions and demands 100 l. for an Year and half, without ſhewing how the Reſidue was diſcharged, ſo after a Verdict upon Nil debet, and Judgment for the Plaintiff. 2 Lev. 4. a Writ of Error being brought, the Court inclined to reverſe the Judgment; but there being none there for the Defendant, adjornatur; and in this Caſe it was ſaid, the Words, by equal Portions, were vain and idle. (e) It ought to be ſhewed at which of the Feaſts due; but where an Action was brought for Two Years Rent, without ſhewing at which Feaſt it was due, it appearing that Two Years of the Leaſe only were expired. 3 Mod. 70. adjudged, that was helped by the Verdict, but that it had not been good upon Demurrer. (f) But it need not be ſhewed how the Arrears of former Years were ſatisfied. Noy 45. —So where a Quarter's Rent is demanded, it need not be ſhewed that the Rent of former Quarters are paid, 2 Ven. 129. for every Quarter's Rent is a ſeveral Debt, and a diſtinct Action lies for it.

2. If in (g) Debt for the Arrears of an Annuity, the Plaintiff declares. That *A.* was poſſeſſed of a Term for Years, and thereout granted an Annuity to *B.* for Life, to commence after the Death of *A.* and that *A.* died, and the Defendant (h) had his Eſtate, *&c.* and that *B.* died, *&c.* this Declaration is good, (i) without ſhewing the mean Aſſignments, and how the Defendant came to the Eſtate, for the Plaintiff is a Stranger thereto. *Mich.* 18 *Car.* 2. between *Coates* and *Wade*, 1 *Sid.* 297. adjudged after a Verdict for the Plaintiff: And by *Windham* Juſtice it would have been good upon Demurrer, *ad quod non fuit reſponſum.*

(g) 1 Saund. 112. like Exception taken to a Declaration in Covenant.

(h) For the Pleading a Que Eſtate, vid. Co. Lit. 121. and the Title Que Eſtate, under the Subdiviſion Certainty, in the general Title Pleading.

(i) Raym. 389.

The Plea.

1. IN Debt upon a Contract, the Defendant cannot plead the Contract was for a leſs Sum, or otherways than the Plaintiff has declared, and traverſe the Contract in the Declaration laid, but may (a) wage his Law. (b) *Paſch.* 5 *Eliz. Moor* 49. *Pl.* 148. adjudged.

(a) Or plead Nil debet.

Kelw. 39. Cro. El. 880. Palm. 223. the Contract being but the Conveyance to the Action, is not traverſable. Co. Lit. 295. a. But where the Inducement to the Action is traverſable or not, vid. the Title Matter of Inducement, under the Subdiviſion Traverſe, under the general Title Pleading.

(b) Dal. 49. S. C.

(a) Nil (b) Debet.

(a) In Debt upon a Bond or other Specialty, this is no good Plea: Otherways in Debt founded upon a Matter in Pais only, as upon a Preſcription, or upon a Deed that is not requiſite to maintain the Action, as for Rent reſerved upon a Leaſe by Deed. Hardr. 332. by the Counſel, arguendo, and ſeveral of the old Books citee to prove the Difference. (b) Where the Teſtator could not plead Nil debet, his Executor ſhall not plead Non detinet. 2 Mod. 266. (c) Cro. El. 621. S. P. adjudged. 766. S. P. adjudged. (d) Where the Action is founded upon a penal Statute, Not guilty is a good Plea. Cro. El. 257. Goulſ. 39. Noy 56. 2 Inſ. 651. Moor. 914. Pl. 1293. (e) Hob. 218. S. P. adjudged.

1. (c) IN Debt upon the 2 *Ed.* 6. for not ſetting forth Tythes, (d) Not guilty or (e) *Nil debet* are good Iſſues. 2 *Inſ.* 651.

2. In Debt for the Arrears of an (f) Annuity granted for Life, *Nil debet* is no good Plea, for the Action is meerly founded upon the Deed, for without it no Action can be maintained: And though by the Death of the Grantee the Nature of the Action is changed, the Annuity being determined, yet this proves not but that the Action is founded upon the Deed. *Kel.* 147. b.

(f) But in Debt upon the Grant of a Rent, Nil detinet is a good Plea, becauſe the Plaintiff hath other Remedy to levy it, viz. by Diſtreſs. Otherways upon the Grant of a bare Annuity, for there being no Remedy by Diſtreſs, the Grant muſt be avoided by Matter of as high a Nature, viz. by Acquittance, &c. Hardr. 333. per Hale Chief Baron, as ſeems by the Book.

3. But in Debt for the Arrears of a Rent-Charge, by Will deviſed to the Plaintiff's Wife for Life, againſt the Adminiſtrator of the Occupier of the Land, *Nil detinet* is a good Plea, for a Will is no Deed, nor wants any Delivery. *Mich.* 15 *Car.* 2. *Wilſon*'s Caſe, *Hard.* 332. adjudged; and ſaid, the Action was not ſo much grounded upon the Will it ſelf, as upon the Statute by which Men are enabled by Will to diſpoſe of their Lands and Rents iſſuing out thereof.

Fol. 606.

(a) (b) Detinue.

(a) F. N. B. 138.

(b) In Detinue the Venire facias was in Placito detiti. Cro. El. 867. adjudged good; and said, that it was the usual Course to enter Warrants of Attorney or Essoins upon this Writ in Placito detiti, which proves it all one.

(A) For what Things it lies.

1. Detinue lies for Money in a Bag, 7 H. 4. 13. b.

2. Detinue lies for a Bag sealed, and 100 l. in eadem baga contenta. 18 H. 6. 20. b.

3. So Detinue lies for a Bag, and 100 l. in eadem baga contenta, without saying the Bag was sealed, for the Property is altered. 18 H. 6. 20. b.

4. So Detinue lies for Money (c) not in a Bag, though in this Action the individual Thing is to be recovered, and the Money may be known. Contra, (d) M. 3 Ja. B. R. Pasch. 1 Ja. B. between Wood and Ballet; & Trin. 2 Ja. it lies if the Money was in the View of another, and the Defendant took it.

(c) It lies not for Money out of a Bag or Chest, nor for Corn out of a Sack, &c. for it cannot be known. Co. Lit. 286. b. Banks and Whetstone, Cro. El. 457. adjudged upon Demurrer. Moor 394. Pl. 510. adjudged upon a Writ of Error upon a Judgment in an inferior Court, and the Judgment reversed for this Cause. N. Dyer 22. Et vid. Margine there. Et vid. 2 Bulst. 308. 1 Rol. Rep. 59, 60, 128. Lit. Rep. 342. (d) Noy 12. seems to be S. C.

5. If a Man lends a Sum of Money to another, Detinue lies not for it, but Debt. 18 H. 6. 20. b.

6. Detinue lies of a Piece of Gold of the Price of 22 s. though it does not lie of 22 s. in Money, for here he demands the particular Piece. P. 16 Ja. B. R. between Mason and Malgrove, this being moved in Arrest of Judgment.

7. Detinue lies of (e) Charters concerning Land. 17 E. 3. 45. b.

(e) If the Certainty thereof is known, or if they be in a Bag sealed, or Chest lock'd, though the Certainty of them is not known. Co. Lit. 286. b.

8. Detinue lies not for an House, and therefore where the Plaintiff had declared *de uno domo, vocat'* a Bee-house, *Mich.* 2 *Jac.* between *Coupledike* and *Coupledike*, *Cro. Jac.* 39. upon a Writ of Error, the Judgment for this Fault was reversed.

(B) (a) The Gist of the Action.

(a) It lies against a Man that hath Goods, either by Delivery or Finding. Co. Lit. 286. 1 Rol. Rep. 128. —So if A. bargains and sells Goods to B. upon Condition to be void if A. pays B. a certain Sum of Money at a Day; if A. pays the Money, he may have Detinue against B. for the Goods, though they came not to the Hands of B. by Bailment, but by Bargain and Sale. Cro. El. 867. 1 Part 684. Pl. 2. Vid. the Notes there.

1. A Man may have a general Detinue against a Man that finds his Goods. 7 H. 6. 22.

2. If A. by his Deed acknowledges himself to have sold to B. 10 Cords of Hop-poles for 14 s. per Cord, which he is to deliver to B. at his Garden, when B. shall send his Servant to cord them. Quære if B. may have an Action of Debt in the Detinet to render 10 Cords of Hop-poles upon this Deed, or shall be put to an Action of Covenant. Hill. 11 Car. B. R. between Couchman and Horden, per Curiam, dubitatur.

(C) Who ſhall have it.

1. IF a Man delivers Goods to L. to deliver to C. (a) C. may have Detinue, for the Property is in him. 9 H. 6. 58. b. 60. 39 E. (b) 3. 17. adjudged.

(a) Yelv. 24. 1 Bulſ. 69.

(b) This is miſprinted in the Original, being there 7.

2. If a Man delivers Goods to B. and after grants them to D. he ſhall not have Detinue after the Grant. 9 H. 6. 64. b.

3. But the Grantee ſhall have Detinue. 9 H. 6. 64. b.

4. If my Bailee delivers them over to another, I may have Detinue againſt the ſecond Bailee. 11 H. 4. 46. b.

5. So if he delivers them over to him that has Right thereto, yet he is chargeable to me. 9 H. 6. 58.

6. If the Bailee delivers the Thing to another to re-deliver, he may have Detinue againſt him. 12 H. 4. 18. b.

7. If my Bailee delivers it again to me, he is not chargeable to others who have a Right to the Thing. 7 H. 6. 22.

8. If I deliver a Deed to A. to which B. hath Right, and A. dies, and his Executor takes the Deed, he is not chargeable in Detinue (c) to me, but only to B. that hath the Right, becauſe he comes to it by the Law. 9 H. 6. 58.

Fol. 607.

(c) This is miſprinted in the Original, for there 'tis al A.

2. If I deliver a Deed to A. to re-deliver, and he loſes it, and B. finds it and delivers it to C. who has Right thereto, he is not chargeable afterwards to me in Detinue, becauſe he is not privy to my Delivery. 9 H. 6. 58.

But if I find a Thing, and another recovers it from me, yet any other that hath the Right may have Detinue againſt me alſo. 7 Hen. 6. 22.

(D) Againſt whom.

1. IF the Bailee of a Thing dies, Detinue lies again his Executors if they take it. 43 E. 3. 29. 11 H. 4. 45. b.

2. So if he dies inteſtate, and a Stranger takes it, Detinue lies againſt him, or any other to whom it comes. 43 E. 3. 29. 11 H. 4. 46. b.

So it ſeems during the Life of the Bailee, Detinue lies againſt any other to whom it comes. 43 Ed. 3. 29. contra.

But if the Bailee of a Thing by Indenture burns it, and dies, his Executor ſhall not be charged in a Detinue, becauſe he ſhall not be charged without a Poſſeſſion in him, for the Action dies with the Perſon. 11 H. 4. 46. b.

5. If a Bailee by Indenture delivers the Goods to B. and B. delivers them back to the Bailee, to re-deliver when he is requeſted, and after recovers in Detinue againſt the Bailee, yet the firſt Bailor may alſo charge him in Detinue, for by his own Act he hath charged himſelf to both. 3 H. 6. 44. b.

(E) How the (a) Judgment ſhall be.

(a) Mid. 2 Rol. Abr. 101. Pl. 2, 3.

1. IN Detinue of Charters, if the Iſſue be upon the Detinue, and it is found that the Defendant hath burnt the Charters, the Judgment ſhall not be to recover the Charters, for it appears that he cannot have them, but he ſhall recover the Value of the Land in Damages. Contra, 17 Edw. 3. 45. b. adjudged.

Fol. 608.

Deviſe.

(A) (a) Teſtament.

(aa) What (b) (c) Perſons may make it.

1. A Biſhop may make a Teſtament. 2 H. 4. 2. b.
2. So an Archdeacon may. 2 H. 4. 2. b.
3. So a Parſon may. (d) 19 H. 6. 44. b.
4. So a Dean may. Con. (e) 19 H. 6. 44. b.

(a) Made by Writing or Nuncupative: And for this, vid. Went. Off. of Execut' 9, 10. &c. Godb. 446. but by 29 Car. 2. c. 5. par. 19. it is enacted, That no nuncupative Will ſhall be good where the Eſtate bequeathed exceeds the Value of 30 l. that is not proved by the Oath of Three Witneſſes that were preſent at the making thereof, nor unleſs the Teſtator bid the Perſons preſent, or ſome of them, bear Witneſs that ſuch was his Will, or to that Effect; nor unleſs made in the laſt Sickneſs of the Deceaſed, and in his Dwelling-houſe, or where he had been reſident 10 Days or more before the making the Will, except where ſurpriſed and taken ſick from home, and died before his Return. And by the ſame Act, after Six Months paſſed after ſpeaking the pretended teſtamentary Words, no Teſtimony ſhall be received to prove any nuncupative Will, unleſs the Teſtimony or Subſtance thereof was committed to Writing within Six Days after the making the ſaid Will. —And by the ſame Act, no Probat of any nuncupative Will ſhall paſs the Seal of any Court till 14 Days after the Teſtator's Death, nor ſhall be proved till Proceſs have iſſued to call in the Widow or next of Kin to conteſt it, if they will; provided Soldiers in actual Service, and Mariners at Sea, may diſpoſe of their perſonal Eſtate as they might before the Act. (aa) A Deviſe of any Manors, Lands, &c. by a Feme Covert, Infant, Ideot, or Non compos, is not good, 34 & 35 H. 8. c. 5. par. 14. declared ſo in expreſs Words. (b) Such only as have a ſound and diſpoſing Memory; And it is not ſufficient that they be able to anſwer to familiar and uſual Queſtions. 6 Co. 23. a. Cro. Jac. 497. (c) It ought to be made by the Teſtator's Directions, and not from Queſtions asked him. Cro. Jac. 497. (d) Fitz. Teſtament 1. S. C. (e) Fitz. Teſtament 1. S. C.

5. But an Abbot or Prior cannot make a Teſtament. 2 H. 4. 2. b.
6. A Maſter of an Hoſpital cannot make a Teſtament. (f) 19 H. 6. 44. b.

(f) Fitz. Teſtament 1. S. C. Br. Arrearages 6. S. C.

7. A Warden of an Houſe that has a Covent and Common Seal cannot make a Teſtament. 19 H. 6. 44. b. adjudged. (It ſeems to be intended of the Goods of the Houſe.)

8. A Feme Covert may (g) make a Teſtament if the (h) Baron (i) agrees to it after her Death. (k) 26 E. 3. 71. b. Mich. 8 Jac. b. Graunt's Caſe, per Curiam.

(g) The Huſband may bind himſelf by Covenant or Bond to permit his Wife by Will to diſpoſe of Legacies, &c. and this will be ſuch an Appointment as the Husband will be bound to perform. Cro. El. 27. Cro. Car. 219, 220, 376, 597. —But it is no Will, nor ought to be prov'd in the Spiritual Court. 1 Mod. 211. —But of Things in Action, or of what ſhe hath as Executrix, by her Husband's Conſent ſhe may make a Will, and this is properly a Will in Law, and ought to be proved in the Spiritual Court. 1 Mod. 211, 212. (h) If ſhe diſpoſeth of any Thing by the Husband's Conſent, the Property paſſes from him to her Legatee, and it is the Gift of the Husband. 1 Mod. 211. per Curiam. (i) If he once aſſents, he cannot after diſſent; and where he is bound by Agreement to let her make a Will, his Conſent ſhall be implied till the contrary appears: And what ſhall be a ſufficient Evidence of an Aſſent, vid. 2 Mod. 172, 173. (k) Fitz. Deviſe 28. S. C.

9. A Feme Covert Executrix cannot deviſe any of the Goods which ſhe hath as Executrix without the Aſſent of the Husband, or his Agreement after, (l) though ſhe may make an Executor without his Aſſent. Mich. 8 Jac. B. Graunt's Caſe per Curiam.

(l) Moor 340. 2 And. 92. 1 Rol. Abr. 912. N. 3, 4, 5. 1 Mod. 211, 212.

11. So

10. (m) So a Feme Covert cannot deviſe Things in Action which ſhe hath, without the Aſſent or Agreement of the Husband. Mich. 8 Jac. B. Graunt's Caſe, per Curiam.

(m) Finche's Caſe S. P. Mo. 339. Pl. 459. per Curiam. 2 And. 92. arguendo.

11. Rol. Parliamenti, 18 Ed. 3. Numero 12. the Commons pray'd, that where a Conſtitution was made by the Prelates to take Tythes of all manner of Wood, which was a Thing never uſed, and that Niefs and Femes might make Teſtament, which is againſt Reaſon, that he would pleaſe, by himſelf and by his good Counſel, to ordain Remedy, and that his People might remain in the ſame Eſtate, as they had uſed to be in the Time of all his Progenitors, &c.

Anſwer: The King will, That what is Law and Reaſon ſhould be done.

12. An Infant of the Age of 18 (n) may make a Teſtament, and conſtitute (o) Executors for his Goods and Chattels. *Co. Lit.* 89. b.

(n) The Common Law hath appointed no Time, but it depends wholly on the Spiritual Law. 2 Mod. 315. per Curiam. And it was ſaid, that they ſometimes allowed Wills made by Perſons of 14 Years of Age; but however it being a Matter within their Juriſdiction, the Courts of Common Law will not intermeddle. 2 Mod. 315. 2 Jon. 210. (o) But who may make Executors, vid. 1 Rol. Abr. 912. N. O.

(B) Deviſe at the Common Law.

What Eſtate might be deviſed at the Common Law.

1. (a) AN Eſtate in Fee could not be deviſed by the Common Law, becauſe it was preſumed that he would do that in Extremis that he would not do in his Health, that it proceeded from the Diſtemper of his Mind by the Anguiſh of his Diſeaſe, or by (b) ſiniſter Perſwaſion, to which he is now more ſubject than he was in his Health.

(a) 6 Co. 16. b. —By the Common Law no Lands or Tenements were deviſable by any Laſt Will and Teſtament, nor ought to be transferred from one to another, but by ſolemn Livery of Seiſin, Matter of Record, or ſufficient Writing. Co. Lit. 111. b. (b) If a Man makes a Will in his Sickneſs, by the Over-importunity of his Wife, to the end he may be quiet, this ſhall be ſaid to be a Will made by Conſtraint, and ſhall not be a good Will. Styl. 427. per Roll Chief Juſtice.

2. With this agrees the Law of Scotland, Skeen Regiam Majeſtatem 44. 7, 8.

3. He that was poſſeſſed of an Eſtate for Years might have deviſed it at the Common Law. 50 Aſſ. 1. admitted.

(C) What Thing might have been deviſed.

Fol. 609.

1. AN Eſtate for Years might have been deviſed at Common Law. 50 Aſſ. 1. admitted by him that was poſſeſſed thereof.

2. A Guardian by Knight's Service might have deviſed the Ward of the Body and Land (a) 26 E. 3. 65. admitted of a Guardian in Socage, where it is held that it is grantable over.

(a) Fitz. Gard. 159. S. C.

(D) (a) Where it ſhall be void for the (b) Uncertainty.

(a) 2 Sid. 25, 26.

(b) The Deviſe muſt be taken according to the Intent of the Deviſor, but ſuch Intent muſt be ſo expreſſed in the Will written, that it may be certain to the Court, and not againſt Law. Hob. 32.

1. IF a Man deviſes to (c) 20 of the pooreſt of his Kindred, this is void for the Uncertainty which the Court ſhall adjudge the Pooreſt. Webb's Caſe adjudged. Cited, Mich. 5 Jac. B. R. per Brock.

(c) Moor 753. Pl. 1040. a like Deviſe to 20 of his pooreſt Kindred, being his Brothers and Siſters Children, but no Exception taken as to the Uncertainty, but Judgment given againſt them for another Reaſon. —A Man deviſes to another ſo much of his Lands as are of the yearly Value of 20 l. Lit. Rep. 218. N. Dyer 280. Margine.

2. If a Man hath Iſſue Two Sons and Two Daughters, and deviſes his Lands to his Wife for Life, and that after her Death the ſame ſhall remain to his Iſſue, this is a void Deviſe as to the Remainder, for (d) having ſeveral Children, 'tis uncertain what Iſſue is intended. *Trin.* 41 *Eliz.* between (e) *Taylor* and his Wife and *Sayer*, *Cro. El.* 742. adjudged.

(d) A Man deviſes to his Nephew for Life, and in caſe he ſhall have Iſſue Male, to ſuch Iſſue Male and his Heirs for ever, the firſt Son that he ſhall have born ſhall take this Remainder, and if Twins, he that comes firſt into the World. 3 Levin. 433. per Curiam. (e) Raym. 83. S. C. cited, and denied to be Law. Et vid. 6 Co. 17. and in the Diviſion Eſtate Tail by Deviſe, under Title Eſtate.

3. A Man had Iſſue 8 Daughters by 3 ſeveral Venters, and one Son, and deviſed Lands to his youngeſt Daughter, the Remainder to his Son in Tail, the Remainder to his two Daughters by the middle Venter for Life, the Remainder *proximo de Sanguine* of the Deviſor, and died, and after the eldeſt Daughter had Iſſue, and died, and after the Son, and all the other Daughters, except the two Daughters by the middle Venter, to whom it was given for Life, died without Iſſue; and whether the Iſſue of the eldeſt only, or of all, ſhould have the Eſtate, *Mich.* 20 *Jac.* between (f) *Periman* and *Price*, *Palm.* 303, 304. *dubitatur*: But at length the Court delivered their Opinion for the Iſſue of the eldeſt, though by reaſon of an Imperfection in the Verdict no Judgment could be entered: But they differed in their Reaſons, for *Houghton* and *Chamberlain* ſaid, that by the Word *proximo* the Intention of the Deviſor appeared that one only ſhould take; and ſaid there was a Difference where the Words are in the Singular and where in the Plural Number, where *proximo*, and where (g) *propinquioribus*; But by *Dod*, there is no Difference between nearer and neareſt; and by *Dod*, an expreſs Eſtate for Life being given to the two Siſters by the middle Venter, they or their Iſſue can take no Eſtate by Implication, to which *Chamberlain* agreed, but *Haughton* ſaid the Iſſue ſhould not be excluded.

(f) 2 Rol. Rep. 256. S. C. debated, but no Judgment.

(g) Hob. 38.

4. A Man deviſed his Lands in theſe Words: I give and bequeath one Half of my Land to my Wife, and after her Death I give all my Lands to the Heirs Males of my Sons, or next of Kin: And whether the Deviſe was not void for the Uncertainty, *Trin.* 1649. *Styl.* 240. *dubitatur & adjornatur.*

5. (h) If *A. B.* and *C.* being Aliens and Brothers, *A.* has Iſſue a Son, and *B.* and *C.* are naturalized, and *B.* purchaſes Lands, and deviſes them to the Heir of his Brother *A.* and his Heirs, and *B.* dies, living *A.* and his Son; the Deviſe is void for the Uncertainty, who is intended thereby, for *A.* being an Alien, can have no Heir, or however, being living, can have none during his Life. *Trin.* 1656. between *Foſter* and *Ramſy*, 2 *Sid.* 23, 51. adjudged *per totam Curiam*; but by *Glyn* Chief Juſtice, if it had been found that the Son of *A.* was the reputed Heir of *A.* though *A.* was an Alien, yet his Son might have taken by this Deviſe.

(h) Collingwood and Pays S. P. though B. had ſurvived A. 1 Sid. 194. adjudged; but ſaid, if it had been found that the Son was the reputed Heir of A. it had been well enough. 1 Levin. 59. adjudged.

6. If

6. If a Man deviſes all his Lands to one of his Couſin *Nich. Amherſt*'s Daughters that ſhall marry a *Norton* within 15 Years, and dies, and *Nich. Amherſt* having Three Daughters, one of them marries a *Norton* within the 15 Years; this is a good Deviſe to her, notwithſtanding the Uncertainty, and the Law ſupplies the Words who ſhall *firſt* marry, *&c. Mich.* 15 *Car.* 2. between *Bate* and *Amherſt*, *Raym.* 82. adjudged.

7. If a Man deviſes Lands to *A.* and his Heirs during the Life of *B.* in Truſt for *B.* and after the Deceaſe of *B.* to the Heirs Males of the Body of *B.* now living, *B.* having one Son then living; by this Deviſe a Remainder is immediately veſted in the Son, for the Words Heirs Males (i) (k) now living being in a Will, are a full Deſcription of the Son, who then was the Heir apparent of *B.* and known by the Deviſor (who was his Unkle and Godfather) to be ſo. *Mich.* 29 *Car.* 2. between (l) *James* and *Richardſon*, 2 *Jon.* 99. adjudged: But upon a Writ of Error in the *Exchequer-Chamber* this Judgment was reverſed.

(i) If a Man deviſes to his right Heirs Males and Poſterity, his Heir being a Female, it is void, Counden and Clerk, Hob. 29. adjudged. Moor 860. Pl. 1181. —But in Hob. 33. 'tis agreed, that a Deviſe to the Stock, Family or Houſe, as in Dyer, . is good, and ſhould be intended of the Heir and Principal of the Houſe. (k) But where Man deviſed to his youngeſt Son in Tail, the Remainder to the Heirs of the Body of his eldeſt, the Remainder to his Daughters, and the youngeſt died without Iſſue living the eldeſt. 2 Leon. 70. it was adjudged the Deviſe to the Heirs of the Body of the eldeſt was void. Et vid. Raym. 163. 1 Keb. 567, 752. 800. 2 Keb. 111, 145, 296, &c. 2 Mod. 291. 3 Jon. 112. (l) Raym. 330, 331, &c. S. C. reverſed in the Exchequer-Chamber; but by the marginal Notes at the latter End of this Report the Judgment was reverſed, becauſe the Eſtate given to A. and his Heirs, in Truſt for B. was executed by the Statute, and ſo B. was Tenant in Tail, and had Power by Fine to dock it, &c. 3 Levin. 232. adjudged, and that now living ſhould refer to the Heirs of the Body of B. and not to B. tho' B. was the next Antecedent, for otherways it would be Tautology, the Deviſor having before taken Notice that B. was living; but this Judgment was after reverſed in Cam' Scac', but afterwards upon a Writ of Error in the Houſe of Lords, the Judgment in the Exchequer-Chamber was reverſed, and the firſt Judgment affirmed.

(E) Deviſe the Cuſtom.

Of what Thing.

1. (a) If a Rent be granted out of Land deviſable by Cuſtom, the Rent may be deviſed within the Cuſtom, for this is of the ſame Nature with the Land. (b) 22 Aſſ. 78. adjudged. Perkins S. 135. Contra, D. 26 H. 8. 1. Quære, D. 3. 4 Ma. 140, 38.

(a) Lit. Sect. 585. S. P. appears; but 1 Mod. 97. ſaid, that the Authorities clash in this Point. Co. Lit. 111. Styl. 409.

(b) Fitz. Mortdanceſter 26. S. C. Br. Cuſtoms 34. S. C. Br. Rents 13. S. C.

(F) (a) Deviſe by Cuſtom, what Eſtates.

(a) Lit. Sect. 167.

1. Tenant in Tail to him, and the Heirs of his Body, with the Reverſion expectant in Fee cannot deviſe the Land in Fee to another, though he dies without Iſſue. (b) 31 Aſſ. 3. adjudged. (c) Quære rationem.

(b) Br. Deviſe 18. S. C. Fitz. Deviſe 15. S. C.

(c) Whether ſuch Reverſion could be deviſed by Parol within the Cuſtom, Styl. 409, 410. dubitatur, becauſe at Common Law it was only a Poſſibility, and not grantable or deviſable; and it was ſaid the Statute of Weſtminſter 2. helped not the Cuſtom.

2. If an Eſtate be given to Baron and Feme, and the Heirs of their Two Bodies, the Remainder to the Right Heirs of the Baron, the Baron may deviſe this Remainder to the Feme. (d) 27 Aſſ. 60. Curia.

(d) Fitz. Aſſiſe 259. S. C. Br. Deviſe 42. S. C.

(G) What Perſon may deviſe.

1. A Feme (a) Covert cannot deviſe to her Husband. Con. (b) 3 Aſſ. 3. admitted; But Brook Deviſe 18. makes a Quære thereof.

(a) But for ſuch Cuſtom for a Feme Covert to deviſe, vid. the printed here as in the Original, and I ſuppoſe ſhould be 31 Aſſ. 3. which vid. Br. Deviſe 18. Fitz. Deviſe 15.

Subdiviſion, What ſhall be a good Cuſtom, under Title Cuſtom. (b) This is miſ.

2. A Feme Covert cannot deviſe any thing that belongs to her Husband without the Aſſent of her Husband.

3. With this agrees the Law of Scotland. Skene Regiam Majeſtatem 53. 7.

4. If a Feme Covert makes a Will, and deviſes Goods to another, and the Baron after her Death delivers the Goods accordingly to the Deviſee, (c) this ſhall bind him. (d) 26 Ed. 3. 71. admitted by the Iſſue.

(c) 'Tis as a Gift by him. 1 Mod. 211. per Curiam. (d) Fitz. Deviſe 28. S. C.

5. (e) If one being under the Age of 21 Years makes his Will, and thereby deviſes his Lands, and after attains the Age of 21 Years, and dies without making any new Publication thereof, this Deviſe is void. *Mich.* 15 *Car.* between (f) *Herbert* and *Torball*, 1 *Sid.* 162. agreed *per Curiam*, upon a Trial at Bar.

(e) 1 And. 182. S. P. arguendo. But for this, vid. Dyer 143. b. (f) Raym. 84. S. C. but S. P. appears not.

(H) Deviſe at Common Law.

To what Perſons.

I

1. If a Man (a) deviſes to the Prieſts of a Chantry, or of a College in the Church of A. and dies, and at this Time there is not any Chantry or College, this Deviſe is void, and ſhall not have any Effect, though a Chantry or College be after made there. (b) 9 H. 6. 24. b.

(a) So if deviſed in Remainder, tho' ſuch Corporation be made before the Remainder fall. Hob. 33. —Secus where the Corporarion is begun, though no Head choſe. Hob. 33. 10 Co. 31. b. —But a Deviſe in præſenti to a Corporation having no Head is void. Dal. 31. 4 Leon. 223. (b) 2 Sid. 26. S. C. cited.

2. (c) A Man might have (d) deviſed to an Infant in Ventre ſa mere, though the Deviſor died before the Infant was born, for he was in Eſſe in ſome * reſpect, and the Freehold ſhall be in the Heir in the mean time. Dubitatur, 11 H. 6. 13.

(c) 1 Sid. 153. S. P.

* Fol. 610.

per Windham; who ſaid, that Dyer 303. Pl. 50. to the contrary had been denied to be Law: And he ſaid, that the Roll of the ſaid Judgment had been ſearched, and that it did not warrant the Report; and it was ſaid per Curiam to be very clear, that a Deviſe to an Infant when he ſhall be born, or to a Daughter when ſhe ſhall marry, is good, and that the Land ſhall diſcend to the Heir in the mean Time. So 1 Levin. 135. ſaid, the Opinion of Hale and Hide Chief Juſtice was upon View of the Roll. 2 Mod. 9. it was ſaid by Finch Lord Keeper, That at Common Law, without all Queſtion, a Deviſe to an Infant in ventre ſa mere, of Lands deviſable by Cuſtom, was good; but the Doubt ariſes upon the Statute, which enacts, That it ſhall be lawful for a Man by Will in Writing to deviſe to any Perſon or Perſons, &c. and ſaid, That in Two Caſes in the Common-Pleas, one in the Time of the Lord Chief Juſtice Hale, and the other in the Time of the Lord Chief Juſtice Bridgman, it was reſolved, That if there were ſufficient Words to deſcribe the Infant in ventre ſa mere, ſuch Deviſe to him might be good; but that in the King's-Bench the Judges have ſince been divided upon this Point; and that it was doubted how the Law ſtood, the Caſe of Snow and Cutler, 1 Levin. 135. Raym. 163, 164. Et vid. 1 Keb. 851. But for this, vid. Dyer 303. Pl. 50. Moor 177. Pl. 312. 220. Pl. 358. 2 Bulſ. 273. 1 Rol. Rep. 110, 137. 2 Rol. Rep. 335. Raym. 83. Cart. 5, 87. 2 Mod. 292. —And as to the Diverſity between a Deviſe of an Eſtate in Poſſeſſion and Remainder. vid. Moor 637. Pl. 877. 2 Bulſ. 275. 1 Rol. Rep. 254. (d) But a Man cannot ſurrender a Copyhold to the Uſe of an Infant in ventre ſa mere. Simpſon and Southern, 1 Rol. Rep. 190, 137, 254. 2 Bulſ. 272.

3. The Husband may deviſe to his Wife, though they are but one Perſon in Law, for this does not take Effect till after his Death. Brook Title Deviſe 18.

(I) To whom in reſpect of the Eſtate.

1. A Deviſe in Tail to the Heir, the Remainder over to another, is good. (a) 3 H. 6. 46.

(a) Br. Deviſe 4. S. C.

(K) What ſhall be a good Deviſe againſt Law and Reaſon.

1. A Deviſe againſt (a) Law and Reaſon is void. 11 H. 6. 13. b.

(a) 1 Bulſ. 63.

2. If a Man deviſes to one for Life, the Remainder to another, and the Heirs male of his Body, and if he dies without Iſſue Male, that when any of his Heirs Females ſhall have Iſſue (b) Male, he ſhall have the Land; if he in Remainder dies without Iſſue Male, upon which the Iſſue Female enters, though ſhe hath Iſſue Male after, yet he ſhall not have it by the Limitation, becauſe his Intent is againſt Reaſon. 11 H. 6. 14.

(b) This is miſprinted in the Original, for there it is Female.

3. So if a Deviſe be to one and his Heirs, and in caſe he hath Iſſue a Daughter, that ſhe ſhall have the Land, if the Deviſee hath Iſſue a Son and Daughter and dies, the Son ſhall have the Land, though the Daughter took Husband after, and had Iſſue a Son, he ſhall not ouſt the other, for his Intent was againſt Reaſon. 11 H. 6. 13. b.

4. If a Man deviſes a Chattel perſonal to one for Life, the Remainder to anther, (c) this is a void Remainder. Mich. 5 Jac. B. per Curiam.

(c) March 106. 1 Bulſ. 192. Pl. Com. 521, 522.

(d) Matthew Manning's Caſe, 8 Co. 94. S. P. adjudged. Lampet's Caſe, 10 Co. 47. S. P. adjudged. Cro. Jac. 461. ſaid, that this Point had been much controverted, and if it were again to be diſputed, it would be hard to maintain; but having been ſo often adjudged, the Court would not then ſuffer it to be diſputed. Raym. 163. Et vid. Godb 308. 309. (e) And in Pleading he may alledge, that by Vertue of the Will he is poſſeſſed of the whole Term. 3 Levin. 265. (f) 1 Brownl. 41. Moor 269. 748. 635. Pl. 871. 809. Pl. 1095. 846. Pl. 1146. Cro. El. 795. 1 Bulſ. 193. 8 Co. 95. a. (g) Cro. Jac. 198. S. P. dubitatur.

5. (d) **If a Man poſſeſſed of a Leaſe for Years of Land deviſes it to one for Life, the Remainder to another; though the firſt Deviſee (e) hath the whole Eſtate of the Term in him, and ſo no Remainder can depend upon it at the Common Law, (f) yet it is a good Deviſe to the ſecond Deviſee by way of executory Deviſe.** Mich. 5 Jac. B. **between** (g) Mallet **and** Sir Hen. Sackford.

(h) 1 Rol. Rep. 356, 358. S. C. & S. P.

6. Hill. 16 Jac. in Scaccario, **in** (h) **Sir** Rich. Lewknor's **Caſe, agreed** per Curiam.

7. **But if a Man poſſeſſed of a Term deviſes it to one, and the Heirs Males of his Body, and for Default of ſuch Iſſue, to another, and the Heirs Males of his Body; this is a void Deviſe to him in Remainder, becauſe by the Rules of Law a Remainder cannot depend upon the Limitation of a Fee, ſcilicet, upon the Death of another, without Heirs Male of his Body.** Hill. 15 Jac. in Scaccario, **between** Johnſon **and Sir** Rich. Lewknor, **adjudged upon a Special Verdict by** Tanfield **and** Bromly **againſt** Denham, **for if this ſhould be ſuffered, a Man might make Perpetuities of a Term, and there ſhould be no means to deſtroy it,** Vide **the ſame Caſe,** (i) My Reports, Paſch. 14 Jac. Contra, H. 10 Jac. B. R. **between** (k) Rhetorick **and** Chappel **adjudged.**

(i) 1 Rol. Rep. 356, 357. S. C. adjornatur: And by the Report of this Book, the Deviſe was to the Firſt, and his Heirs Males, and for want of ſuch Heirs Males, &c. the Word Body being omitted. (k) Cro. Jac. 461. S. C. cited, and put, that the Deviſe was to his Wife for Life, and that afterwards his Son John ſhould have the Occupation of the Term ſo long as he had Iſſue, and if he died without Iſſue unmarried, that another ſhould have it, and that it was adjudged that the Deviſe to another was good. Palm. 335. cited accordingly.

8. **If a Man deviſes a Term to his Wife, if ſhe lives ſo long unmarried, and if ſhe marries, then a Rent to her out of the Land, and makes the Wife Executrix, and dies, and the Wife agrees to the Legacies, and after takes Husband, the Rent ſhall riſe to her well enough, though ſhe once had the whole Term in her as Executrix, for this future Rent ſhall not be extinct thereby.** Mich. 13 Jac. B. R. **between** (l) Goffe **and** Haywood. **And** Paſch. 14 Jac. **ſame Caſe adjudged.**

(l) 1 Rol. Rep. 247, 368. S. C. 3 Bulſ. 121, S. C. & S. P. ſeems to be admitted, the Arguments being long upon another Point, and no Judgment at Length given. Bridg. 52, 53. S. C. & S. P. agreed by all the Juſtices.

Fol. 611.

(m) Dyer 354. Pl. 33. like Point; and this Caſe of Dyer being cited, 2 Rol. Rep. 220. it was agreed to be the ſame in Terminis. Styl. 258, 274. like Caſe upon a Deviſe of a Copyhold doubted: (n) Cro. Jac. 590, 591. S. C. adjudged, and that it was a good executory Deviſe, and upon the Contingency happening the one Eſtate determines, and the other begins. Bridg. 1, 3. S. C. adjudged. 2 Rol. Rep. 196, 216. S. P. adjudged. Styl. 271. S. C. cited; and ſaid, that the 21 Jac. in the Serjeant's Caſe, it was made a Quære; and in the ſame Book, it is ſaid, that upon ſolemn Argument it had been adjudged contrary to this Caſe. Winch. 55. S. C. cited. Et vide Vaugh. 272. S. C. cited. Et vid. Howel and Anger, Hut. 60. 1 Jon. 17.

9. (m) **If a Man deviſes Lands to B. his younger Son, and his Heirs, and that if he dies without Iſſue, living A. his eldeſt Son, that the Land ſhall go to A. in Fee; this is a good future Poſſibility to A. in nature of a Remainder, though it be dependant upon an Eſtate in Fee in B. for a future Poſſibility by Deviſe may well depend upon ſuch Eſtate in Fee upon a collateral Contingent.** Mich. 18 Jac. B. R. **between** (n) Brown **and** Pells, **adjudged** per Curiam, **upon Argument upon a Special Verdict.**

10. (o) If one before the 27 H. 8. of Uſes had Feoffees to his Uſe, and after that Statute, and the Statute of 32 H. 8. of Wills, he had deviſed, that his Feoffees ſhould make an Eſtate to W. N. and the Heirs of his Body, and dies, this had been a good Will by reaſon of the Intention. 38 H. 8. S. 316.

(o) Hob 32. S. P. but makes a Q. if the Land were never in Feoffment.

11. (p) If after the Statute of 32 H. 8. a Man ſeiſed of Lands cuſcoffs A. and B. thereof, to the Uſe and Intent to perform his Will, and after by his Will, reciting the ſaid Feoffment, and the Feoffees to ſtand ſeiſed to the ſaid Uſe, declares his Will to be, That the ſaid Feoffees and their Heirs ſhall ſtand and be ſeiſed thereof to the Uſe of J. S. and the Heirs of his Body, &c. this is a good Deviſe of the Land by the Intention of the Deviſor, though by no Poſſibility the Feoffees could ſtand ſeiſed to the ſaid Uſe. D. 15 El. 323, 29. Linghen's Caſe, per Curiam.

(p) 1 Leon. 313. S. P. adjudged. 3 Leon. 262. S. P. adjudged. Moor 278. Pl. 434. S. P. adjudged.

12. A Man ſeiſed of Lands makes his Will, and in this deviſes, that J. N. and J. D. and their Heirs, ſhould ſtand ſeiſed thereof to the Uſe of J. S. &c. though the ſaid Perſons have nothing in the Land, yet this is a good Deviſe to J. S. for either this will amount to a Deviſe to the Feoffees, to the (q) Uſe of J. S. or as an immediate Deviſe to J. S. for his Intention is apparent that J. S. ſhould have it. Mich. 2 Car. Regis B. R. (r) between Burfield and Knarsborough, for an Inn in Windſor, call'd the Garter, adjudged per Curiam, upon Evidence to a Jury at Bar.

(q) That a Deviſe may be to an Uſe. Moor 107. 1 Leon. 254.

(r) Poph. 188. S. C. ruled upon Evidence; and by the Report the Deviſe was, That A. and B. his Feoffees ſhould ſtand ſeiſed, &c. where in Truth he had no Feoffees.

13. If *A.* deviſes Lands to *B.* for 5 Years from *Michaelmas* following, the Remainder to *C.* and his Heirs, and *A.* dies before *Michaelmas*, yet this is a good Remainder, though it cannot veſt before the particular Eſtate begins, and the Freehold cannot be in Expectancy, for in the mean time the Fee ſhall diſcend to the Heir. *Paſch.* 45 *Eliz.* (t) *Pay's* Caſe, *Cro. El.* 878, 879. adjudged without Argument.

(t) Noy 43. S. C. adjudged, and a Caſe there cited, that a Deviſe for Years, the Remainder to the right Heirs of J. S. is good, if J. S. die during the Term, for that the Freehold is in the Heir of the Deviſor in the mean time: But vid. Lit. Rep. 255. Raym. 83.

14. If (u) a Man having Iſſue three Sons, *viz. A. B.* and *C.* and Land in three Towns, *viz. C. D.* and *E.* deviſes his Land in *C.* to *A.* his Lands in *D.* to *B.* and his Lands in *E.* to *C.* and that if any of them die, the other ſurviving ſhall be his Heir, and dies, by (w) the Diſcent of the Fee to the eldeſt Son, his Eſtate by the Will in the Lands in *C.* is drowned, and the contingent Remainders thereupon deſtroyed. *Paſch.* 7 *Jac.* between (x) *Wood* and *Ingerſale*, *Cro. Jac.* 260. adjudged *per Curiam, præter Flemming* Chief Juſtice, who held, though the Freehold Eſtate is drowned by the Diſcent of the Fee, yet it is not ſo drowned but that by the Death of *A.* the ſurviving Sons ſhould have it by the Limitation and Intent of the Will.

(u) Forteſcue and Abbot. S. P. 2 Levin. 202. adjudged con. ut audivit; and according to the Opinion of Flemming, that it was a good executory Deviſe to the younger Sons. 1 Keb. 788, 824. adjornatur.

(w) Moor 268. Pl. 420. 3 Leon. 110. Et vid. Cro. El. 743. Poph. 52. 1 Leon. 101. 3 Leon. 216.

(x) 1 Bulſ. 61, 62. &c. S. C. adjudged per Curiam præter Flemming. 2 Saund. 386. S. C. cited.

15. If *A.* hath Iſſue Two Sons, *viz. B* and *C.* and deviſes Lands to *B.* for Life, and if he dies without Iſſue living at his Death, to *C.* and his Heirs, but if *B.* hath Iſſue living at the Time of his Death, that then the Fee ſhall remain to the Heirs of *B.* for ever; by this Deviſe *B.* has only an Eſtate for Life, (y) the Remainder to his Heir not executed: And though the Reverſion deſcended to *B.* as Heir of *A.* yet it drowned not the Eſtate for Life againſt the expreſs Deviſe and Intention of the Will, but left an Opening (as it was termed) for the Interpoſition

(y) 3 Levin. 434.

terpoſition of the Remainder when it ſhould happen to interpoſe between the Eſtate for Life and the Fee. *Hill.* 12 & 13 *Car.* 2. between (z) *Plunket* and *Holms*, 1 *Levin.* 11, 12. adjudged; and that by a Recovery ſuffered by *B.* the contingent Remainder was barr'd.

(z) Raym. 30. S. C. adjudged: And by Windham and Twyſden the Fee was not in Abeyance, but deſcended to B in the mean time in ſome ſort, but not ſo as to confound the Eſtate for Life. 3 Levin. 434 S. C. cited. 1 Sid. 47. S. C. adjudged, but confuſedly ſtated.

16. Baron and Feme being ſeiſed of a Copyhold to them and the Heirs of the Baron, he ſurrenders it to the Uſe of his Will, and then deviſes it to the Heirs of the Body of the Feme, if they attain the Age of 14, and dies without Iſſue, and then ſhe marries a Second Husband, and has Iſſue that attains 14, and then ſhe dies; and whether this was a good Deviſe by reaſon of the double Contingency, *ſcilicet*, the having Heirs of her Body, and that ſuch Heir ſhould live till 14, *Trin.* 16 *Car.* 2. between (a) *Snow* and *Cutler*, 1 *Levin.* 135. *dubitatur:* But it was agreed, that if the Deviſe was good, it muſt be by way of executory Deviſe, which is allowable where to take Effect within the Compaſs of a Life, (b) but not after a dying without Iſſue, for that tends to a Perpetuity, and it cannot take Effect by way of Remainder, for it is a new Deviſe to take Effect after her Death, and is not as a Remainder joined to her Eſtate, But the Court being divided upon the Point of the Contingency, it was agreed to be adjourned into the *Exchequer-Chamber*; and the Reporter ſuppoſes the Parties agreed afterwards, for he heard no more of it.

(a) Raym. 162, 163. S. C. and the Court divided. 1 Keb. 567, 752, 800. 2 Keb. 11, 145, 296. S. C. and the Court divided.

17. If one deviſes Lands to his Wife for Life, and if ſhe hath a Son, and cauſes him to be called by the Chriſtian and Sirname of the Deviſor, *viz. Sampſon Shelton*, then after her Death deviſes the ſame to her Son, and if he die before 21, to the right Heirs of the Deviſor, and dies, and after the Wife marries *Broughton*, by whom ſhe has Iſſue a Son, which ſhe cauſed to be chriſtened *Sampſon Shelton, &c.* the Deviſe to the Son is good by way of contingent Remainder, but not by way of executory Deviſe, (c) for where a contingent Eſtate is limited, and depends upon a Freehold, which is capable of ſupporting a Remainder, it ſhall never be conſtrued to be an executory Deviſe, but a contingent Remainder. *Paſch.* 23 *Car.* 2. between (d) *Purefoy* and *Rogers*, 2 *Saund.* 380, 381, 388. adjudged; and that the Reverſion deſcending to the Heir of the Deviſor, till the Contingency happened by the Bargain and Sale, and Fine thereof, by the Heir of the Deviſor to *B.* and his Wife, and their Heirs before the Birth of their Son, the contingent Remainder was deſtroyed.

(b) Vet vid. Vaugh. 270. 272, 273.

(c) 3 Levin. 434.

(d) 3 Keb. 11. S. C.

18. If a Man having only one Siſter and Heir, (who had Iſſue *A.* and after married *B.* by whom ſhe had Iſſue *C.* and *D.*) deviſes Lands to his Siſter until *C.* attains 21. and after *C.* attains that Age, to *C.* and his Heirs, and if *C.* dies before 21. then to the Heirs of the Body of *B.* and their Heirs, as they ſhall attain their reſpective Ages of 21. and dies, *C.* dies before 21. living *B.* and after *B.* dies; *D.* either as Heir of *C.* in whom the Fee was veſted, or as Heir of the Body of *B.* (though he could not be ſo during the Life of *B.*) being of Age, after the Death of *B.* ſhall have the Eſtate, and not *A.* the Heir of the Deviſor. *Hill.* 29 & 30 *Car.* 2. between *Taylor* and *Biddulph.* 2 *Mod.* 289. adjudged accordingly.

(L) Againſt Law.

1. IF A. poſſeſſed of a Term for Years, deviſes it to B. and the Heirs Male of his Body begotten, the Remainder to C. and the Heirs Male of his Body begotten, this is a void Remainder to C. becauſe it is to commence upon a Limitation of the Death of B. without Heirs Male of his Body, (a) which is moſt remote, and by the Deviſe before to B. and the Heirs Male of his Body begotten, (b) B. had the whole Term, which ſhall come to his Executors, and not to his Iſſue, (c) and he hath the whole Power of diſpoſing thereof to whom he pleaſes during the Term; and if he does not diſpoſe thereof, (d) yet his Executors ſhall have it if he dies without Iſſue, and it ſhall not revert to the Executor of A. Paſch. 11 Car. B. R. between (e) Leventhorp and Aſhby, per Curiam, reſolved upon a Trial at Bar; and they would not ſuffer it to be argued for the Clearneſs thereof, nor to be found ſpecially. Intratur, Mich. 10 Car. Rot. 120.

(a) 2 Rol. Abr. 406. Pl. 8, 9.

(b) Moor 220. Pl. 358. 758. Pl. 1049, 810. Pl. 1095.

(c) Where a Term was ſettled in Truſt, for one, and the Heirs Males of his Body and after for another, and the Heirs Males of his Body, &c. and each entered into a Statute to the other not to alien, &c. Moor 810. it was decreed in Chanc. that the Statutes ſhould be cancell'd, becauſe made to ſupport a Perpetuity, which the Law will not allow. Et vid. Moor 819. Pl. 1095. 1 Sid. 37.

(d) But for this, vid. 1 Rol. Abr. 831. Pl. 2. and the Notes there.

(e) 1 Jon. 15, 16. S. C. cited.

2. If A. poſſeſſed of a Term for 163 Years, deviſes the (f) Uſe and Occupation thereof to B. his Brother for Life, and after to the Wife of B. for Life, and after to the eldeſt Son of B. for Life, and after, ſuch Son dying without Heir Male, to any other Son which B. ſhall have, one after another in Form aforeſaid, and if B. die without Heir Male of his Body, I having yet 136 Years to come of the ſaid Term, and having a Purpoſe and Deſire to have the ſame kept in my Name, my Will and Meaning is, that the Uſe, Profit and Occupation, of the Premiſſes ſhall remain and be unto S. for his Life, and after him, unto the eldeſt Son that S. ſhall have for his Life, and after, ſuch Son dying without Heir Male, to any other Son which the ſaid S. ſhall have, one after another, in Form aforeſaid; and if S. die without Heir * Male of his Body, to Richard, &c. with divers Remainders over; and after A. makes the ſaid (g) B. and S. his Executors, and dies, and they adminiſter, and agree to the Legacy, and after the Wife of B. dies, and B. dies without Iſſue Male, and S. ſurvives, and hath Iſſue E. his eldeſt Son and J. his youngeſt Son, and after makes his Will, and by it deviſes all his Goods and Chattels to the ſaid E. and makes the ſaid E. his Executor and dies, and after E. enters, and makes F. his Executor, and dies without Heir Male of his Body, and after F. enters, and makes G. his Executor, and dies; in this Caſe G. hath good Title to the Land, and not the ſaid J. who was the ſecond Son of S. for to entitle J. to the Land by the Will, (who hath no other Title thereto beſides the Will) B. ought to die without Iſſue Male, which is a Limitation by Intendment of a Perpetuity, and the eldeſt Son of S. (who was the ſurviving Executor) ſcilicet E. (under whom G. claims) ought alſo to die without Heir Male, which is another Limitation of a Perpetuity, by Intendment before J. could have any thing by the Will, and ſo a double perpetual Limitation ought to determine before the Remainder limited to the ſecond Son of S. who was the ſaid J. could take Effect: And though (as it was objected) here the Eſtate is not limited to B. and the Heirs Males of his Body, nor to the eldeſt Son of S. and his

(f) There is no Difference where the Uſe and Occupation, and where the Term it ſelf is deviſed: Yet vid. Godb. 26. 10 Co. 47. Cro. Jac. 462. Palm. 335. Ow 7. 1 Saund. 186.

* Fol. 612.

(g) This Letter B. is wanting in the Original, but ſeems neceſſary to make good the Senſe.

Heirs Males, yet this is all one, though it be admitted that the Executor of B. nor of ſuch eldeſt Son of S. ſhould have it ſo long as the ſaid B. and the eldeſt Son ſhould have Iſſue Male, for the ſecond Son of S. could not have it till B. and the eldeſt Son of S. died without Iſſue Male; and in the mean time the Executor of the Deviſor ſhould have it, and this would be all one Miſchief to make ſuch executory Deviſes, which would be worſe than any Perpetuity, and no means to dock it. Mich. 7 Car. B. R. between (h) Sanders and Corniſh, upon a ſpecial Verdict, per Curiam reſolved; and they gave a peremptory Rule for Judgment for the Defendant, ſcilicet, Corniſh the Executor, againſt the Plaintiff, who was the Second Son of S. but after the Plaintiff procured a Day further till next Term, and in the mean time the Parties agreed; I being of the Defendant's Counſel: And vide my Argument in my Book.

(h) Cro. Car. 230. S. C and the Court inclined, that a Deviſe in this Manner to make a Perpetuity could not be good, for that to limit a Poſſibility after a Poſſibility, and to limit the Remainder of a Term after a dying without Iſſue, ſtands not with Law; ſed adjornatur.

3. If A. poſſeſſed of a Term for Years, deviſes it to B. his Wife for 18 Years, and after to C. his eldeſt Son for Life, and after to the eldeſt Iſſue Male of C. for Life; though C. had not any Iſſue Male at the Time of the Deviſe and Death of the Deviſor, yet if he had Iſſue Male before his Death, this Iſſue Male ſhall have it as an executory Deviſe, for that although there be a Contingent upon a Contingent, and (i) the Iſſue not in Eſſe at the Time of the Deviſe, yet inaſmuch as it is limited to him but for Life, it is good, and all one with Manning's Caſe, 8 May 14 Caroli, upon a Reference out of Chancery to Juſtice Jones, Croke, and Barkly, between Cotton and Heath, by them reſolved without Queſtion.

(i) 1 Mod. 54, 115. 1 Sid. 451.

4. If A. poſſeſſed of a Term, deviſes it to B. his Wife for Life, and after her Death to his Children unpreferred, and after B. dies, C. then being the only Daughter of A. ſhall have it, for an executory Deviſe that hath a Dependance upon the firſt Deviſe may be made to a Perſon uncertain. Mich. 26, 27 Eliz. B. R. between (k) Amner and Lodington, per Curiam adjudged, quod vide cited in Matthew Manning's Caſe, Co. 8. 96. for it was uncertain whether the Daughter ſhould have it as long as B. lived, whether ſhe ſhould have it, inaſmuch as ſhe might have been advanced in the Life of B. and then ſhe ſhould have had nothing.

(k) 1 And. 60, 61. S. C. adjudged. Godb. 26, 27. S. C. adjudged. 2 Leon. 92. S. C. adjudged. 3 Leon. 89. S. C. adjudg- 8 Co. 96. b. S. C. cited.

5. If a Man poſſeſſed of a Term for Years deviſes it to D. his Wife for Life, and after to William his eldeſt Son, and his Aſſigns, and if he dies without Iſſue then living to Thomas, another Son, this * is a void Deviſe to Thomas, inaſmuch as he cannot have it by the Deviſe unleſs the eldeſt Son dies without Iſſue, which is a perpetual Limitation by Intendment of Law; though it was objected that it is limited that although he hath Iſſue, yet if that Iſſue be not living at his Death, yet Thomas ſhall have it by the Deviſe, for by the Deviſe it is given abſolutely to the eldeſt Son and his Aſſigns, and after it is deviſed to Thomas, if the eldeſt dies without Iſſue, ſo that the Aſſignee is to have it till the eldeſt dies without Iſſue: And if Men ſhould be admitted to make ſuch Deviſes, there would not be any End of them, nor any Certainty. 15 Jac. between (l) Child and Bayly, adjudged per totam Curiam in Camera Scaccarii, in a Writ of Error upon a Judgment in B. R. where it was ſo alſo adjudged be-

* Fol. 613.

(l) Cro. Jac. 459, 460. S. C. adjudged, and that Judgment affirmed upon a Writ of Error accotdingly. Palm. 333, 336. S. C. adjudged; and that Judgment affirmed in Cam' Scac' accordingly, contrary to the Opinion of Tanfield, who doubted by reaſon of the Caſe there cited between Rhetorich and Chappel, 1 Jon. 15. adjudged in B. R. and that Judgment affirmed in the Exchequer-Chamber, by all except Tanfield and Denham, 1 Mod. 52. cited. 1 Sid. 37. cited.

foze per Curiam; and the Juſtices and Barons ſaid they would not admit a Deviſe to be made to exceed the Deviſe in Mathew Manning's Caſe, foz the Inconvenience they have ſeen by that.

6. If one poſſeſſed of a Term deviſes it to his Wife for Life, the Remainder to his Firſt Son for Life, and if he dies without Iſſue, to his Second Son, &c. the Remainder to the Second Son is void; for the Remainder of a Term cannot depend upon a Poſſibility ſo remote as the dying without Iſſue. *Paſch.* 22 *Car.* 2. between (m) *Love* and *Windham*, 1 *Levin.* 290. adjudged, though objected that the Deviſe was not to the Firſt Son and his Iſſue, (in which Caſe it was agreed it ſhould go to his Executor) but it was given to him for Life only, with an executory Deviſe to the Second Son, upon the Contingency of the Firſt not having Iſſue at the Time of his Death.

(m) 1 Mod. 50. S. C. debated, & adjornatur. 3 Keb. 637. S. C. 1 Sid. 450, 451. S. C. adjudged.

7. If a Man poſſeſſed of a Term deviſes it to his Son, and if he dies unmarried and without Iſſue, to his Daughters, and if his Son be married, and has no Iſſue then living to enjoy it, then after the Death of his Son's Wife he deviſes it to his ſaid Daughters, the Deviſe to the Daughters is void, being a Limitation after the Death of their Brother without Iſſue, for 'tis not to be taken (as objected) that the Dying ſhould be without Iſſue living at his Death, and ſo the Contingency to happen within the Compaſs of a Life. *Hill.* 22 *Car.* 2. between *Gibbons* and *Summers*, 3 *Levin.* 22, 23. adjudged; and if it ſhould be intended of ſuch a dying without Iſſue, yet the Court held it would be void, according to *Child* and *Bayly*'s Caſe; for though ſuch Deviſe hath prevailed in caſe of an Inheritance, as in *Pell* and *Brown*'s Caſe, yet it hath not yet prevailed in caſe of a Term; and the Court ſaid they would not extend the Deviſes of Chattels to make Perpetuities farther than they had been.

(N) What (a) Thing ſhall be ſaid to be deviſed by the Will.

(a) Where by Deviſe of his Lands and Tenements, a Reverſion after an Eſtate for Life paſſed, vid. 1 Leon. 180, 181. Cro. Eliz. 159.

1. If a Man ſeiſed of Three Tenements of Soccage Lands in Fee, and poſſeſſed of divers Goods, and of a Leaſe foz Years of certain Lands, deviſes one Tenement of the Soccage Lands to one of his Sons, and another Tenement to one of his Daughters, and in another Clauſe of the Will it is, Item, I make my Two Sons, ſcilicet, Richard and Richard, my Executors of all my Goods movable and immovable, and all my Lands, Debts, Duties, and Demands; by this Clauſe no Eſtate in the Three Tenements of which the Deviſoz was ſeiſed in Fee paſſed to the Executozs by foze of the Wozds and all my Lands, becauſe that theſe Wozds might well be ſatisfied by the Leaſe foz Years, of Land which paſſed by it; and it appears the Intent of the Teſtatoz was not to paſs the Fee-Simple Lands, becauſe then this would paſs an Eſtate as well in the Lands which he had befoze deviſed to one of his Sons and to his Daughter, and ſo the Will would be repugnant. Trin. 15 Jac. B. R. Rowſe againſt Stanning, adjudged upon a Special Verdict. (Alſo it ſeems that this is not an expreſs Deviſe, but he ſays that he makes them Executozs of his Land, &c. (b) which muſt be intended of ſuch Things as belong to Executozs.)

(b) Noy 48.

2. If A. having Nine Childzen, and poſſeſſed of a Leaſe foz Years, deviſes it in this Manner: I deviſe my Two Rectories, (of which the Leaſe was) to be divided between my Children, and that all the Profits thereof ſhall remain between my Children; and if my Son Richard die, then the Two Daughters of Richard ſhall have his Part; and

and if any of the reſt of my Children die, then his Part ſhall come unto my Children; and after Four of the Nine Children die, by which an equal Part of theſe Four Parts came to Richard, and after Richard dies; & per Curiam the Daughters of Richard ſhall have only the Ninth Part, which was firſt deviſed to Richard, and nothing of the Four Parts which by the future Deviſe came to Richard by the (a) other Four Children, for the Deviſe to them is limited to the firſt Part of Richard, and the future Deviſe upon the Death of the other Children comes after this Limitation. Mich. 10 Car. B. R. between Rimer and Belcher, adjudged per Curiam upon a Special Verdict clearly without Argument. Intratur, Trin. 9 Car. B. R. Rot. 988.

(a) Theſe Words, viz. (Death of the) ſeem to be wanting.

3. If a Man be ſeiſed in Fee of Two Houſes in D. adjoining the one to the other, and one is in the Poſſeſſion of A. and the other in the Poſſeſſion of B. which is alſo the Corner-houſe in the Street of the Town, and he deviſes his Corner-houſe, in the Poſſeſſion of (b) B. by theſe Words only; * this Houſe, which is in the Poſſeſſion of B. ſhall paſs, which is the Corner-houſe, and not the other Houſe, which is in the Poſſeſſion of A. though it be next adjoining thereto, for his Intent appears to be ſo. Hill. 11 Car. B. R. between (c) Blake and Gold, per Curiam, adjudged upon a Special Verdict, for an Houſe in Andover, in Comitatu Southampton. Intratur, Hill. 10 Car. Rot. 752.

* Fol. 614.

(b) This is printed here as in the Original, but ſeems that it ought to be of A. and B. &c.

(c) Cro. Car. 447. S. C. reſolved, the Corner-houſe being in the Poſſeſſion of A. and B. and the Houſe adjoining in the Poſſeſſion of C. and the Deviſe being of the Corner-houſe in the Poſſeſſion of A. and C. the Corner-houſe only in the Poſſeſſion of A. and B. (if they occupy jointly) ſhall paſs; but if they occupy ſeverally, viz. the one Patt in the Tenure of A. and the other Part in the Tenure of B. then only that Part in the Tenure of A. and not the Reſidue in the Tenure of B. ſhall paſs. 473. S. C. and agreed to be as before ſtated; but only that there was in the Will this further Clauſe, Upon Condition that the ſame be new-built, according to Covenants between me and J. S. And it was found that the Covenant was for rebuilding the Corner-houſe only; and adjudged, that the Corner-houſe only paſſed; for though the Corner-houſe was not in the Poſſeſſion of C. yet it is ſufficiently aſcertained before, viz. the Corner-houſe in D. &c. and the Addition of the Tenure of C. is but Surpluſage; and it is the ſtronger by reaſon the Covenant was to re-edify the Corner-houſe only. 2 Rol. Abr. 54. Pl. 4. S. C.

4. If M. ſeiſed for Life, the Reverſion in Fee to A. of a Portion of Tythes in D. and A. hath not any other Land or Hereditament in D and makes his Will in Writing in this Manner: If my Wife, who goeth with Child, be delivered of a Son, then I give to my Brother B. 100 l. but if ſhe be delivered of a Daughter, then I deviſe all my Fee-Simple Lands whatſoever to the ſaid B. and his Heirs for ever, upon Condition that my Wife ſhall hold and enjoy my Free Land at D. during her Life after the Death of M. my Mothrr; and after appoints other Proviſion for the Daughter if his Wife ſhould be delivered of a Daughter, and afterwards A. dies, and his Wife is after delivered of a Daughter; in this Caſe the ſaid Portion of Tythes ſhall paſs to B. by this Will by the Words of all his Fee-Simple Lands whatſoever, for otherwiſe his Wife ſhould not have it, nor is the Will of any Effect, he not having any Lands or Hereditaments in D. to ſupply it. Trin. 1651. between (d) Saunders and Rich, per Curiam, adjudged upon a Special Verdict. Intratur, Hill. 1649. Rol. 758.

(d) Styl. 261, 278. S. C. being put, that he deviſed all his Fee-Simple Lands to his Brother and his Heirs, upon Condition that he ſhould ſuffer his Wife to enjoy all his Free-Lands in Wolford for Life, the Deviſor having only a Portion of Tythes in H. and no Land there; and that the Queſtion was, Whether theſe Tythes ſhould be accounted Free-Land within the Intent of the Will, ſo as his Wife ſhould have them for Life? And the Court inclined they ſhould.

5. If

5. If a Man is ſeiſed of Lands in a Vill, and in *A.* and *B.* Two Hamlets within the ſame Vill, and deviſes all his Lands in the Vill, and in *A.* and dies, no Part of the Land in *B.* ſhall paſs, for his (e) naming one Hamlet only fully ſhews his Intent that the Lands in the other ſhould not paſs. (f) *Paſch.* 9 *Eliz. Dyer* 261. *Pl.* 27. by divers of the Juſtices; but *Brown econtra*, becauſe the Vill comprehends all the Hamlets.

(e) A Man having two ſeveral Moieties of Lands by ſeveral Purpaſs. 1 Bulſ. bought of the

chaſes, one lying in Kent, the other in Eſſex, deviſes all his Moieties in Kent, both 117. adjudged; but by the Concluſion of the Caſe it ſeems as if they were both ſame Perſon, and at the ſame time: But vid. 2 Bulſ. 176, 177. this Caſe debated at large, and Judgment accordingly, for the Words being all his Moieties, they cannot be ſatisfied with one Moiety only. Et vid. Noy 112. (f) Hob. 173. S. C. cited. Cro. Eliz. 658. S. C. cited.

6. If a Nobleman poſſeſſed of a Collar of SS. and of a Garter of Gold, and a Buckle annexed to his Bonnet, and of many other Buttons of Gold and precious Stones annexed to his Robes, and of many other Chains, Bracelets, and Rings of Gold, and precious Stones, deviſes all his Jewels to his Wife, and dies, the Garter and Collar of SS. paſs not, becauſe they are not properly Jewels, but Enſigns of Honour and State, and the Buckle in his Bonnet and the Buttons paſs not, becauſe annexed to his Robes, but all the other Chains, Rings, Bracelets, and Jewels, paſs. *Mich.* 26 *Eliz.* the Earl of *Northumberland*'s Caſe, upon a Reference to *Wray* and *Anderſon* Chief Juſtices, *Ow.* 124. reſolved accordingly.

7. If a Man poſſeſſed of a Leaſe for Years bequeaths ſeveral Legacies of Plate and other Goods to ſeveral Perſons, and after deviſes all the Reſidue of his Goods to his Wife, his Debts and Legacies being paid, and makes her ſole Executrix, by this Will the Leaſe paſſes to her as Legatee; for though by a Grant of *omnia bona* a Leaſe paſſes not, yet by the Civil Law *bona* including all Chattels, and this being a Legacy, the Judges of the Common Law in this Caſe ought to be guided by that Law. *Paſch.* 37 *Eliz.* between (g) *Portman* and *Willis*, *Cro. El.* 387. reſolved by Two Judges.

(g) Moor 352. Pl. 474. S. C. and

ſaid per Curiam, that by the Deviſe of omnia bona a Term will paſs, if there be no Circumſtances to ſhew the Intention of the Deviſor to be otherways. Goulſ. 129. S. C. but no Judgment; and that Reporter ſeems to have miſtaken the Caſe, for as there put the Deviſe was of the Reſidue of all his Goods and Chattels; and the Queſtion there made, Whether this being a Chattel real ſhould paſs? Et vid. N. Dyer 261. b. margine.

8. If a Man being ſeiſed of a Meſſuage (h) in *A.* and of a Meſſuage and ſeveral Lands in *B.* deviſes to *J. S.* his Houſe in *A.* with all other his Lands, Meadows, Paſtures, with all and ſingular their Appurtenances whatſoever, in *B.* yet the Houſe in *B.* ſhall not paſs, for though by a Feoffment or Leaſe of all Lands in *D.* Houſes will paſs, becauſe to be taken moſt ſtrongly againſt the Feoffor, *&c.* and the Land paſſing, the Houſe thereupon ſtanding muſt alſo paſs; yet Wills are to be taken according to the Intention of the Deviſor; and when he deviſes his Houſe in *A.* and Lands in *B.* it cannot be preſumed that he would have more paſs than by the Words is expreſſed. *Paſch.* (i) 41 *Eliz.* 2 *And.* 123. adjudged.

(h) And of Land alſo, according to the Report in Moor 359. Pl. 491. Cro. Eliz. 476.

(i) Ewer and Heydon S. C. Moor 359.

Pl. 491. adjudged con. Cro. Eliz. 476. adjudged, for the particular Deviſe of the Lands, Meadows, &c. excludes the general Intendment of the Word terra, viz. Houſes and Wood, 658. this Judgment affirmed in the Exchequer-Chamber. Ow. 74. adjudged, for by the particular mentioning Lands, Meadows, and Paſture, the Houſe is excluded. Palm. 376. S. C. cited, and ſaid, the Judgment was affirmed in the Exchequer-Chamber.

9. (k) If one is ſeiſed of Lands call'd *Hayes-Land*, lying in two Vills, *viz. A.* and *B.* and deviſes all his Lands in *A.* call'd *Hayes-Land*, to his youngeſt Son, and his Heirs, and in another Part wills, That if his ſaid Son dies without Iſſue, that his Wife ſhall have *Hayes-Land*, and dies, and the Son dies without Iſſue, the Wife ſhall have only that Part of *Hayes-Land* that lies in *A.* becauſe no more was deviſed to the Son.

(k) Cro. Jac. 22. S. P. adjudged.

(l) 3 Leon. 77. S. C. but not ſo fully ſtated.

Trin. 41 *Eliz.* between (l) *Woodden* and *Osborn*, *Cro. El.* 674 adjudged: But by *Popham*, if the Deviſe had been to the eldeſt Son, and if he dies without Iſſue, *&c.* perhaps ſhe ſhould have had all, becauſe the eldeſt Son had all, Part by Deviſe, and Part by Diſcent.

10. If a Man being ſeiſed of Lands in *A.* and of other Lands in *B.* makes ſeverally Leaſes of them for Years, rendring 10 *l.* yearly upon each Leaſe, and after deviſes in theſe Words, *As concerning the Diſpoſition of my Lands and Tenements, my Will and Meaning is, and I do bequeath the Rent of* 10 *l. in* A. *to my Wife for Life*, &c. Item, *I give to my Wife my Houſe and Tenements in* B. *for ever.* By this Deviſe the Reverſion of the Lands in *A.* paſs to the Wife for Life, *&c.* and after the Leaſe expired ſhe, *&c.* ſhall have the Land itſelf. *Mich.* 3 *Jac.* between (m) *Kerry* and *Derrick*, *Moor* 771. *Pl.* 1066. adjudged; though (n) at firſt the Court was divided, becauſe the Deviſor himſelf makes a Diſtinction in giving the Rent of the Land in *A.* and the Land it ſelf in *B.* whereas both were in Leaſe at the Time; but the Reporter ſays a Writ of Error was adviſed.

(m) Cro. Jac. 104. S. C. adjudged, being alledged, that the Rent divided from the Reverſion, was not deviſable by the Statute, for he had no Inheritance therein; and the Words are apt enough to carry the Land according to the Common Phraſe and uſual Manner of Speaking of ſome Men, who name their Land by their Rent; but in this Report is no Notice taken of the other Clauſe, by which the Lands in B. are deviſed. —And where by the Deviſe of all his Livelihood Lands paſs, vid. Ow. 30. —And where a Deviſe of the Profits of Land is a Deviſe of the Land it ſelf, unleſs the Intention is apparently otherways, vid. Moor 635. Pl. 871. 753. Pl. 1040. Cro. El 190. 3 Leon. 78. Cro. El. 252. 1 Rol. Rep. 319, 320. Hob. 285. 1 Brownl. 79. 3 Bulſ. 105. Cart. 27. —Diverſity taken where the Deviſor wills, that his Wife ſhall take the Profits till his Son comes of Age, for his Education, and where he deviſes to her the Profits till his Son comes of Age, for his Education. 2 Leon. 221. 3 Leon. 9. 78. —But by All. 45. an Authority to take the Profits implies as much as a Deviſe of the Profits, which gives an Intereſt. —But where a Man deviſes, that J. S. ſhall have the Overſight and Dealing of his Lands till his Son comes of Age, by this J. S. has no Intereſt, but an Authority only. Carpenter and Collins, Moor 774. Pl. 1069. Yelv. 73. for it ſhall be intended in the Right of the Heir, and to his Uſe only. 1 Brownl. 88. —And vid. Cro. El. 679, 734. where willed, that he ſhall have the Education of his Son, and let and ſet. Et vid. Cro. Jac. 199. Cro. Car. 382. Car. 25, 26. 3 Mod. 109. (n) And vid. Moor 640. Pl. 880. the Opinion of Gaudy and Lord Keeper.

11. If a Man is ſeiſed of a Meſſuage and two Acres of Land in *A.* and of two Acres of Meadow in *B.* and hath uſed and occupied the two Acres of Meadow, (being 4 Miles diſtant from his ſaid Houſe) together with his ſaid Houſe and Lands in *A.* and deviſes the Houſe, *cum omnibus & ſingulis pertinentiis ſuis adindé ſpectant'*, to *J. S.* the two Acres of Meadow ſhall not paſs, for by the Words (o) *cum pertinentiis* Lands paſs not, but ſuch Things only which may be properly appertaining. Otherways if the Words had been *cum terris pertinentibus*, for then the Lands (p) uſed therewith ſhould have paſſed. *Trin.* 22 *Jac.* between *Hearn* and *Allen*, *Cro. Car.* 57. adjudged upon an Ejectment brought for the Two Acres of Meadow, (q) but as to the Land in *A.* there is nothing ſaid in the Report.

(o) 1 Levin. 131.

(p) For 10 or 12 Years. Cro. El. 16. But vid. Palm. 376. Godb. 352.

(q) Cro. El. 704. S. P. dubitatur; but the Houſe there being Freehold, and the Land Copyhold, it was ruled very clear, that the Land would not paſs as appurtenant. Higham and Horwood S. P. Moor 221. Pl. 360. dubitatur. Godb. 40. adjudged that the Lands paſſed. 1 Levin. 34. adjudged per totam Curiam, eſpecially being found that the Deviſor gave Inſtructions to paſs the Land.

12. If one deviſes his Houſe wherein *J. S.* dwells, call'd the *White-Swan* in *Old ſtreet*, to *J. N. &c.* and dies, and at the Time of his Death and Making the Will *J. S.* occupied the Entry only, and Three of the upper Rooms of the Houſe, and others occupied the Garden, and other Parts of the Houſe, yet all the Houſe paſſes, for the Houſe imports the whole Houſe, and the Sign of the *White-Swan* cannot refer to Three Rooms only. *Mich.* 4 *Car.* between (r) *Chamberlain* and *Turner*, *Cro. Car.* 129. adjudged; and the Houſe being named by the particular Name of the *White-Swan*, though *J. S.* never inhabited therein, it ſhall paſs;

(r) 1 Jon. 195. S. C. adjudged.

paſs; but if the Deviſe had been only of the Houſe in the Occupation of *J. S.* without naming the Sign, perhaps it ſhould not have carried more than what was in his Occupation.

13. If one having Lands in Fee, and other Lands for Years, deviſes all his Lands and Tenements, the Fee-Simple Lands only paſs. *Trin.* 7 *Car.* between *Roſe* and *Bartlet*, *Cro. Car.* 293. reſolved *per Curiam.*

14. But if a Man hath Leaſes for Years only, and no Fee-Simple Lands, by the Deviſe of all his Lands and Tenements the Leaſes for Years paſs, for otherways the Will ſhould be meerly void. *Cro. Car.* 293. reſolved *per Curiam.*

15. (s) If a Man being ſeiſed of the Manor of *A.* and of other Lands in the County of *S.* deviſes the Manor of *A.* for 6 Years, and Part of the other Lands to *J. S.* in Fee, and then comes this Clauſe, *and the reſt of my Lands in the County of* S. *or elſewhere, I give to my Brother*, &c. by this Deviſe he ſhall have the Reverſion of the Manor. *Paſch.* or *Trin.* 18 *Car.* between *Wheeler* and *Walroon*, *All.* 28. adjudged; though objected, that the Word *reſt* extended only to ſuch Lands as were not deviſed before.

(s) 3 Mod. 228. S. P. agreed. 1 Levin. 212. 2 Vent. 285, 286. S. P. adjudged.

16. If a Man being ſeiſed of Lands within a Borough, where Lands by Cuſtom are deviſable by Parol, deviſes in theſe Words. *I give all to Mother, all to my Mother*; the Lands paſs not, for the Words are too uncertain, and not ſufficient to diſinherit an Heir. *Paſch.* 16 *Car.* 2. between (t) *Bowman* and *Milbank*, 1 *Levin.* 130. adjudged.

(t) Raym. 97. S. C. adjudged.

(O) What Act will revoke it.

1. IF a Man deviſes Lands by the Statute of 32 H. 8. by Writing, and after revokes it (a) by Parol in the Preſence of certain Perſons, requiring their Teſtimony of his preſent Revocation; and ſays further, that he will alter it when he comes to D. and before he comes there he is murdered, this Will is revoked, though it was not in Writing. D. 14 El. 310, 81. reſolved.

(a) A Will in Writing might be revoked, and revived again by Parol. Styl. 343, 418. 3 Mod. 260.

2. If a Man deviſes Lands to another, and after makes a Feoffment to the Uſe of his Will, this is a Revocation of the Will. (b) Huſſy's Caſe agreed. Cited per Will. Hill 4 Jac. B. R. in Frecheville's Caſe.

(b) Moor 789. Pl. 1090. S. C. adjudged; but the Feoffment being to the Uſe of ſuch Perſons, and for ſuch Eſtates as he had declared by his Will, it was held, though the Will was countermanded, that yet it was ſufficient to declare the Uſes upon the Feoffment.

3. If a Man covenants by Indenture to levy a Fine, and that this ſhall be to the Uſe of ſuch Perſons as he ſhall nominate by his Will, and after he makes a Will, by which he deviſes the Lands to certain Perſons, and after he levies a Fine in Perfozmance of the ſaid Covenant, this is a Revocation of the Will, though it is levied in Perfozmance of a Covenant which was made befoze the Will, foz the Land cannot paſs by Relation to the Time of the Covenant made, but only to the Time of the Fine levied. Trin. 16 Jac. in Curia Wardorum, between Lutwich and Mitton, agreed per Curiam and Counſel.

4. If a Man deviſes Lands to one, and afterwards deviſes it to the Pooz of ſuch a Pariſh, which is void, becauſe they have not Capacity to take, yet this is a Revocation. 29 El. Frenche's Caſe adjudged. Cited, Paſch. 41 El. B. R. Mountague's Caſe.

5. So if he deviſes it to a Cozpozation, becauſe the Deviſe to them is not within the Statute, yet this is a Revocation. Paſch. 41 El. B. R.

6. If

6. If a Man by Will in Writing deviſes his Lands to his youngeſt Son and his Heirs, and after marries again, and by another Will in Writing deviſes the Land to his Wife for Life, paying yearly to his youngeſt Son and his Heirs an yearly Rent, this is no Revocation of the former Will, but conſiſtent therewith, and may ſtand with it as if made in one and the ſame Writing; and by appointing the Rent to his Son it appears that he intended him the Reverſion, and that his Intention was not to alter his Will, but only to provide for his Wife. *Mich.* 41 *Eliz.* between (b) *Coward* and *Marſhal*, *Cro. Eliz.* 721. by *Anderſon* and *Glanvill*; but the Matter was after ended by Arbitrament.

(b) Cro. Car. 24. S. C. cited. 3 Mod. 204. S. C. cited.

7. (c) An Iſſue being directed to be tried whether a Will of Lands made by *J. S.* was revoked or not, the Jury found that he made a later Will in Writing, but ſay they do not find that he deviſed any Land thereby, this ſhall not be taken to be a Revocation of the former, for it might, notwithſtanding what appears, be a Confirmation thereof, and conſiſtent therewith. *Mich.* 16 *Car.* 2. between (d) *Seymour* and *Noſworthy*, *Hardr.* 374. adjudged.

(c) Hitchins and Baſſet, 3 Mod. 203. like Caſe adjudged, the Jury finding the Deviſor made aliud Teſtamentum; but what was contained therein, Juratores ignorant.

8. (e) If one Tenant in Common by Will, deviſes his Part, and after by Indenture and Fine a Partition is made between them, this is not a Revocation of the Will. *Paſch.* 26 *Car.* 2. between *Riſly* and Lady *Baltinglaſs*, *Raym.* 240. it ſeemed to be the Opinion of all the Barons in the *Exchequer*, but no Judgment was given, becauſe the Plaintiff had Leave to diſcontinue.

(d) Caſ. in Parl. 146, 147. S. C.

9. If a Man bequeaths a Legacy in theſe Words, *viz.* I give to my Neece *A.* 500 l. which my Siſter *B.* now hath in her Hands of mine, as by Bond appears, and after the Money is paid in, and 10 Years after Payment thereof the Teſtator dies, yet the Legacy is good, though the Security is altered, and by the Words no more is intended, but that the Legacy ſhould be as ſure as he could make it. *Mich.* 31 *Car.* 2. *Pawlet's* Caſe, *Raym.* 335. adjudged, and the Difference taken between a Legacy *in numerat'* and a ſpecifick Legacy.

(e) 1 Sid. 90. S. P. dubitatur.

10. If Tenant in Tail deviſes the Lands, and after by Bargain and Sale enroll'd conveys them to a Tenant to the Precipe, againſt whom a common Recovery is had, with Voucher of Tenant in Tail to the Uſe of himſelf in Fee, by this Recovery the Will is not made good, but revoked, for by the Bargain and Sale and Recovery all the Eſtate is altered after the Will made. *Hill.* 34 *Car.* 2. *Diſter* and *Diſter*, 3 *Levin.* 108. adjudged.

Fol. 615.

(P) What Act ſhall be ſaid a Revocation.

(a) 2 Sid. 75. S. P. per Curiam. Cro. El. 306. Cro. Jac. 497.

1. (a) If a Man ſaith that he (b) will at a future Time revoke a Will which he hath made, this is not any Revocation before other Act done. Mich. 38, 39 El. B. R. per Popham.

(b) Diverſity where the Words ſpoke in the future and where in the preſent Tenſe. (b) So if he ſays I ſhall die without a Will, or that J. S. ſhall be my Heir, &c. this is no Revocation, but ſhews an Intent only to revoke, &c. 2 Sid. 75. per Curiam. But what Words made a Revocation, vid. Ow. 76. Goulſ. 33. Cro. Car. 51, 52. 3 Mod. 206, 207. —Not without expreſs Words, and not by Words only ſpoke by way of Diſcourſe. Cro. Jac. 115.

2. So if he ſays he will make a Feoffment thereof to another, this is not any Revocation before it is done. Mich. 38, 39 El. B. R. per Popham.

3. If a Man ſeiſed in Fee of a Reverſion of Land, deviſes it by his Will in Writing to J. S. his Brother, and after covenants with B. upon a Marriage with the Siſter of B. to make a Feoffment in Fee of the ſaid Lands, and of other Lands alſo, which Feoffment ſhall be to the Uſe of himſelf for Life, the Remainder to

to the ſaid Siſter of B. for Life for her Jointure, ſuch Covenant without more is not any Revocation of the Will; for perhaps his Intent will alter before the Performance thereof. Mich. 38, 39 El. B. R. between Mountague and Jeffrys, agreed per Curiam.

4. But if after the ſaid Covenant made he makes a Deed of Feoffment accordingly, with a Letter of Attorney to J. N. to make Livery, and the Attorney makes Livery in the other Land in the Name of the whole, the Leſſee for Life of the Land deviſed being then in Poſſeſſion thereof, who never attorned to this Feoffment, by which the Livery as to the Land deviſed is meerly void, yet this is a Revocation of the Will; for (c) here the Intent of the Deviſor is fully expreſs'd to have it revok'd, inaſmuch as he hath appointed another to execute it for him. Dubitatur, Mich. 38, 39 El. B. R. between (d) Mountague and Jeffrys, Paſch. 41 El. B. R. the ſame Caſe.

(c) But in a like Caſe, where the Deviſor ask'd the Queſtion, and was told the Feoffment would not prejudice his Will, being made to the Uſe of the Deviſor for Life, and after to the Deviſee and his Heirs. Wingfield's Caſe, Godb. 132. it ſeems to be the Opinion of the Court, that it was not revoked, as to thoſe Lands, of which the Livery was not well made. Ow. 80. upon a Trial ruled accordingly. Goulſ. 32, 33. ruled accordingly. (d) Moor 429. Pl. 599. S. C. & S. P. ſeem to be agreed per Curiam. Poph 108. S. C. but no Reſolution.

5. If a Man ſeiſed of a Reverſion expectant upon an Eſtate for Life deviſes it to J. S. and after by his Deed grants the Reverſion in Fee to J. D. though the Leſſee never attorns, yet this is a Revocation, inaſmuch as he hath fully ſhew'd his Intent that the other ſhould have it, and put in the Power of the Leſſee. Mich. 38, 39 El. B. R. per Popham and Gaudy.

6. So if a Man deviſes Lands to J. S. and after bargains and ſells to J. D. and acknowledges it before a Doctor to be inroll'd according to the Statute, though it be not inroll'd within the Six Months, yet this ſhall be a Revocation of the Will for the Cauſe aforeſaid. Mich. 38, 39 El. B. R. per Popham and Gaudy agreed.

7. If a Man deviſes Lands to another by his Will in Writing, and after he deviſes it to another by Parol, though this be void as a Will, yet it is a Revocation of the firſt Will. Mich. 38, 39 El. B. R. per Popham.

7. By 29 *Car.* 2. *cap.* 3. *par.* 6. it is enacted, That no Deviſe in Writing, of Lands, Tenements, or Hereditaments, or any Clauſe thereof, ſhall be revocable otherways than by ſome other Will or Codicil in Writing, or other Writing declaring the ſame, or by burning, cancelling, tearing, or obliterating the ſame by the Teſtator himſelf, or in his Preſence, and by his Direction and Conſent, but ſhall continue, *&c.* unleſs altered by ſome other (e) Will or Codicil in Writing, or other Writing of the Deviſor, (f) ſigned in the Preſence of Three or more credible Witneſſes declaring the ſame.

(e) But whether neceſſary that ſuch Will ſhould be ſigned by the Teſtator, in the Preſence of Three Witneſſes, vid. 3 Mod. 220. 258, 259, 261. adjudged, that the Second Will muſt be a good Will in all Circumſtances, if it revokes a former. (f) 3 Levin. 86, 87.

8. And by the ſame Act, no Will in Writing concerning perſonal Eſtate ſhall be repealed, nor any Clauſe or Bequeſt therein (g) altered, by Words, or Will by Word of Mouth only, except the ſame be in the Life of the Teſtator committed to Writing, and read to and allowed by him, and proved ſo to be done by Three Witneſſes.

(g) But where by Will in Writing a Man deviſed the reſiduum of his perſonal Eſtate to his Wife, and after, ſhe dying, he, by a nuncupative Codicil, bequeathed to J. S. all that he had given his Wife, Raym. 334. it was reſolved good, for by the Death of the Wife the Deviſe of the Reſidue was totally void, and the Codicil was no Alteration of the former Will, but a new Will for the Reſidue.

(Q) (a) Countermand.

(a) A Man hath a Leaſe, and deviſes it by Will, and after ſurrenders it, and takes a new Leaſe, this is a plain Countermand, and the Deviſee ſhall not have the new Leaſe. Goulſ. 93. ruled by all the Juſtices upon a Trial.

1. If a Man deviſes Lands to J. S. and after makes a Feoffment in Fee thereof to a Stranger, to the Uſe of himſelf in Fee, though he hath his old Eſtate, yet it ſeems this is a Revocation, for his Intent was to have it by the new Limitation, and by the Feoffment he paſſed the Eſtate, and the Statute reveſted it in him, which is as a new Purchaſe. Contra, Mich. 38, 39 Eliz. B. R. per Popham.

Fol. 616.

(b) Cro. Car 24. S. P. cited to have been adjudged. Poſt, Letter U. 4. S. C.

2. So if a Man deviſes Lands to J. S. in Fee, and after makes a Feoffment thereof to another, to the Uſe of himſelf for Life, the Remainder to his Wife for Life, the Remainder to his own right Heirs in Fee, though here he hath his old Reverſion, yet it ſeems that it was his Intent to have it paſs by the Livery, and to be in by the Statute and Limitation, and ſo as a new Purchaſe; and therefore it ſeems that this ſhall be a Revocation of the Fee, as well as for the Life of the Feme. Contra, M. 38, 39 El. B. R. between Mountague and Jeffrys, per Curiam agreed.

3. If a Man, having Feoffees to his Uſe before the Statute of 27 H. 8. had deviſed the Lands to another, and after the Feoffees had made a Feoffment of the Land to the Uſe of the Deviſor, and after the Statute the Deviſor had died, the Land ſhould have paſſed by the Deviſe; for after the Feoffment the Deviſor had the ſame Uſe as he had before. D. 6 E. 6. 73. 10. M. 38, 39 El. B. R. agreed.

(R) What Act of the Deviſor.

1. If the Deviſor aliens the Land, and re-purchaſes, yet the Will is revoked. 44 E. 3. 33. 44 Aſſ. D. 3, 4. P. M. 143, 55. Contra, 2 R. 3. 3. b.

2. If before 27 H. 8. Ceſtuy que uſe had deviſed the Uſe, and after came 27. H. 8. which transferred the Uſe to the Poſſeſſion, this was a Revocation, becauſe the Uſe was gone by it, and every Man is Party to the Statute, and by Conſequence the Deviſor, and therefore 'tis a Revocation. D. 3, 4. Ma. 148, 54, 55.

3. If a Feme Sole deviſes her Lands to J. S. and his Heirs, and after marries him, by this Marriage the Will is countermanded, for otherways ſhe could not after Marriage revoke it; for by the Marriage her Will is ſubmitted to her Husband's. *Mich.* 30 & 31 *Eliz.* between (a) *Forſe* and *Hembling*, 4 Co. 60. adjudged.

(a) 1 And. 181, 182. S. G. adjudged. Goulſ. 109, 110. S. C. adjudged.

(S) What Act of a Stranger.

1. A Stranger diſſeiſes the Deviſor, if he dies before Re-entry the Deviſe is void. (a) 39 H. 6. 18. b.

(a) Goulſ. 111. S. C. cited. 2 Leon. 165. S. C. cited.

(T) What Act ſhall be a Revocation.

1. IN a Will if there be ſeveral Deviſes of one Thing, (a) the laſt Deviſe ſhall take Effect. Co. Lit. 112. b.

(a) Where Land by one Clauſe is deviſed to A. and by a ſubſequent Clauſe to B. whether they ſhall not be Joint-Tenants, Cro. El 9 Yelv. 210. But for this, vide poſt, under Title Joint-Tenants.

(V) In what Caſes the whole Eſtate ſhall be ſaid to be revoked, which was before deviſed, and where but Part.

1. (a) IF a Man ſeiſed in Fee deviſes it to J. S. in Fee, and after leaſes it to J. D. for Years, this is not any Revocation of the Fee, but only during the Years. Mich. 38, 39 El B. R. between Mountague and Jeffrys, agreed per Curiam, and Counſel.

(a) Cro. Jac. 49 S P. agreed per Curiam.

2. So if after the Deviſe he leaſes it to another for Life, yet this is not any Revocation of the Fee but only during the Eſtate for Life; for his Intent does not appear further than only during this Eſtate. M. 38, 39 El. B. R. between Mountague and Jeffrys, agreed per Curiam.

3. If a Husband poſſeſſed of a Term for 40 Years deviſes it to his Wife, and after leaſes the Land to another for 20 Years, and dies, this Leaſe is not any Revocation of the whole Eſtate, but only during the 20 Years, and the Wife ſhall have the Reſidue by the Deviſe. 26 El. B. Wilcox's Caſe of Kent, by Gaudy.

4. If a Man deviſes Black-acre to J. S. in Fee, and after upon a Martiage between him and A. covenants to make a Feoffment of the ſaid Black-acre, and of other Lands in Fee, to the Uſe of himſelf (b) for Life, the Remainder to his new Wife for Life, the Remainder to his own right Heirs, and after * makes a Feoffment accordingly, by which this is a Revocation of the Will as to the Eſtate for Life of the Feme, yet this is not any Revocation as to the Fee, notwithſtanding he made the Feoffment in Fee to the Feoffees, and limited the Remainder to his own right Heirs; for this is only his old Reverſion without any Alteration. M. 38, 39 El. B. R. between Mountague and Jeffrys, per Curiam agreed: (c) But it ſeems this is not Law, for his Intent appears to have it by the new Limitation, which revokes the Will. Dubitatur, P. 41 El. B. R. ſame Caſe.

Fol. 617.

(b) This is miſprinted in the Original, for there 'tis in Fee.

(c) Cro. Car. 24. S. P. cited to be adjudged accordingly. Ante Letter Q. 2. S. C.

5. If

5. If *A.* deviſes Lands to *B.* and his Heirs, and 12 Years after leaſes the ſame Lands to (d) *B.* for 60 Years, to commence after his Death, and delivers the Deed to a Stranger to the Uſe of *B.* who does not deliver it to *B* till after the Death of *A.* this is a Revocation of the whole Eſtate; for both Eſtates are not conſiſtent, nor can veſt in *B.* at the ſame Time; and it was plainly the Intention of the Deviſor, that *B.* ſhould have the leſs Eſtate only. *Hill.* 45 *Eliz.* between (e) *Coke* and *Bullock*, *Cro. Jac.* 49. adjudged; though objected, that it was the Intention of *A.* that *B.* ſhould have his Liberty to take by the Leaſe or Deviſe, *B.* not having agreed to the Leaſe in the Life of *A.*

(d) If the Leaſe had been to another, it ſhould have been a Revocation only quoad the Term, but ſhould have ſtood as to the Inheritance. Hodgskinſon and Wood, Cro. Jac. 690. Cro. Car. 23. adjudged. (e) Cro. Car. 23. S. C. cited; and ſaid, it was agreed by all, except Warburton Juſtice, that if the Leaſe had been made to any other than the Deviſee, it ſhould not have been a Revocation as to the Inheritance.

6. But if the Leaſe made to the Deviſee had been to begin either *in præſenti* or *futuro*, in the Life of the Deviſor, it had not been a Revocation; for inaſmuch as the Leaſe might have determined in his Life, it was conſiſtent with his Will. (f) *Hill.* 45 *Eliz. Cro. Jac.* 49. *per Curiam.*

(f) Lit. Rep. 59. S. C. & S. P. cited.

(X) In what Caſe Revocation of Part of the Eſtate ſhall be of the Whole.

1. If a Man commands another to write his Will, and thereby to give to his Wife an Eſtate for Life in his Manor of D. and he writes it, that he gives it her for Life, upon Condition that ſhe ſhall not marry, and this Condition being ſhewed to the Deviſor, he diſallows it, yet by this the Eſtate is not revoked, but only the Condition. Sir Rich. (a) Pexhall's Caſe, cited, Mich. 38, 39 El. B. R. per Popham.

(a) Cro. El 100. S. C. cited. N. Dyer 72. a. margine S. C. cited.

(Y) Where by the Revocation of Part, all the Things, or Part only, ſhall be ſaid to be revoked.

1. If a Man deviſes Three Manors to J. S. and after he ſays that the Deviſee ſhall not have the Manor of D. which is one of the three, yet this ſhall not be any Revocation of the Will for the other two Manors. M. 38, 39 El. B. R. per Popham.

(Z) New Publication.

1. If a Man deviſes certain Lands, and after aliens the Land to a Stranger, and repurchaſes, and after ſhews his Intent that the ſaid Will ſhall be his Will, this is a new Publication, and the Land ſhall paſs by the Deviſe. (a) 44 E. 3. 33. 2 R. 3. 3.

(a) Br. Deviſe 8. S. C.

2. If

2. If a Man had deviſed an Uſe before the Statute of 27 H. 8. which Deviſe was revoked by the ſaid Statute, becauſe the Uſe was transferred into the Poſſeſſion, yet if after the 32 H. 8. of Deviſes, he had allowed the ſaid Will without new Writing, this had been a new Publication, and the Land had paſſed by the Will. (b) D. 3, 4. Ma. 143, 56.

3. If a Man deviſes a Term of which he is poſſeſſed, and after mortgages the Term, and after performs the Condition, and enters, and dies, it ſeems the Deviſe is void. Contra, M. (c) 40, 41 Eliz. B. R.

4. If a Man deviſes Lands to another, and after makes a Feoffment to the Uſe of his Will, though this be a Revocation of the Will, yet the Reference of the Feoffment to the Will makes it a new Publication of the Will. Huſſy's Caſe adjudged. Cited per Will, H. 4 Ja. B. R. in Fretchevill's Caſe.

5. If a Man deviſes Lands in Fee to J. S. and after makes a Feoffment thereof to a Stranger, to the Uſe of himſelf for Life, the Remainder to his Wife for Life, the Remainder to his own right Heirs, and by the ſame Will makes his Daughter Executrix; admitting that this is a Revocation of the Will for the Fee, if after the Deviſor adds and inſerts theſe Words in the Will with his own Hands, ſcilicet, I make my Wife and my Daughter my Executors of this my laſt Will and Teſtament; and alſo for his Supervisor before-named, who was dead, he puts in and interlines another to be * his Supervisor, and alſo gives and inſerts a new Legacy to his Wife, it ſeems that this is not any new Publication of the Will for the Lands, for the making of a new Executor, and giving a Legacy, does not touch the Lands, nor ſhew any Intent that this ſhould be a Will for his Lands, but for his Goods. Dubitatur, M. 38, 39 El. B. R. between (d) Mountague and Jeffrys. P. 41 El. B. R. ſame Caſe.

(e) 6. If a Man ſeiſed of Lands deviſes all his Lands to J. S. and after purchaſes the Manor of D. and after writes in his Will, that J. D. ſhall be his Executor, yet this is not any new Publication to make the Lands paſs. M. 38, 39 El. B. R. per Popham

7. But if after the Purchaſe of the Manor of D. he delivers the firſt Will as his Will, and ſays that it ſhall be his Will, without putting any Words thereto, yet this is a new Publication to make the Lands newly purchaſed to paſs. M. 38, 39 El. B. R. dubitatur.

8. If a Man ſeiſed of Lands in D. deviſes to another by his Will in Writing all his Lands in D. and after purchaſes other Lands in D. and after one J. S. comes to him, and requeſts him to give him the buying of the Lands laſt purchaſed, and he anſwers him that he will not, but that his Intent was that theſe Lands ſhould go to his Executors, for the Deviſee was made Executor by the Will, as his other Lands ſhould, and (f) after the Deviſor cauſes a Codicil to be writ, in which there is a Deviſe of ſeveral perſonal Things, as Corn, and Implements of Houſhold, and annexes it to his firſt Will, and after dies without other Publication, yet this ſhall be a ſufficient Publication to make the Lands newly purchaſed to paſs by the Will, for there needs no other Words in the Will than there were before, and his Intent appears that it ſhould be his Will by the Annexing the Codicil. M. 38, 39 El. B. R. between (g) Beckford and Parnacoll adjudged.

* Fol. 618.

(b) Travers and Trevelian S. C. 1 And. 7. adjudged. Benl. 131. Pl. 102. adjudged.

(c) N. Dyer 143. b. margine S. C.

(d) Moor 428. Pl. 509. S. C. dubitatur.

(e) In the Original 'tis 9. and ſo appears miſprinted there.

(f) By the Report of this Caſe in Moor 404, 405. it appears, that before the Codicil was annexed, the Will was read over to the Deviſor, and he ſaid nothing one way or other thereto. Moor 404. Pl. 542. Goulſ. 150. Et vid. Cro. El. 423.

(g) Cro. El. 493. S. C. adjudged; and by Fenner, the Annexing the Codicil amounted to a new Publication, for therein he affirmed, that it was his Will at the Time; but the other Judges doubted, becauſe thereby no Intention is ſhewed as to the purchaſed Lands. Moor 404. Pl. 542. S. C. adjudged. Goulſ. 150, 151. S. C. adjudged. 2 Levin. 244. S. C. cited; and ſaid, that all paſſed, becauſe there were ſufficient Words in the Will.

9. If a Man has Iſſue Three Sons, *A. B.* and *C.* and deviſes Lands to *B.* in Tail, Remainder to *C.* and *B.* has Iſſue Two Sons, and dies, and after the Deviſor ſays, My Will is, That the Sons of *B.* ſhall have the Lands deviſed to their Father, as they ſhould have had if he had lived, and had died after me, and then the Deviſor dies; *Hill.* 36 *El.* between (h) *Fuller* and *Fuller*, *Cro. Eliz.* 422, 423. *dubitatur* whether this ſhould amount to a new Publication, ſo as to entitle the eldeſt Son of *B.* and Two Judges againſt Two.

(h) Moor 353. Pl. 476. S. C. & S. P. dubitatur, becauſe the Words were not put in Writing.

10. If *J. S.* has Iſſue Two Sons, *William* and *Robert*, and *Robert* has Iſſue a Son named *Robert*, and *J. S.* deviſes his Lands to his Son *Robert*, and his Heirs, and by the ſame Will gives his Grandſon *Robert* 50 *l.* and *Robert* the Son dies, and after *J. S.* by Parol, republiſhing his Will, ſays, *Robert* my Grandſon ſhall take by my Will as *Robert* my Son ſhould have done, yet the Grandſon ſhall not have the Lands, for Lands cannot paſs but by Will in Writing, and his Son *Robert* cannot import his Grandſon *Robert*, eſpecially when by the ſame Will he has made a Diſtinction between Son and Grandſon. *Hill.* 30 *Car.* 2. between (i) *Strode* and *Berager*, 2 *Levin.* 247. the Judgment to the contrary given by Three Judges, againſt the Opinion of *Scroggs*, in the *Common Pleas*, is ſaid by the Reporter to have been reverſed in *B. R.* (as he heard) though it was argued, that the Words of the Will were proper enough to paſs the Lands to the Grandſon, for that the Addition of Grand only imported a Diſtinction between Father and Son while living, but that the Father being dead at the Time of the Republication, the Grandſon might properly be deſcribed by the Name of Son.

(i) Stead and Parrier S. C. 1 Mod. 267. dubitatur & adjornatur. 2 Mod. 313. S. C. adjudged in B. but after upon a Writ of Error in B. R. reverſed, 2 Jon. 135. upon a Writ of Error in B R. reverſed, Dolbin dubitante: And Scroggs, being Chief Juſtice, ſaid, he was againſt the Judgment in B. totis viribus, and he pronounced the Reaſon of the Reverſal, for that the Republication or Declaration by Parol could not make the Deviſe to Robert the Son to operate as a Deviſe to Robert the Grandſon, when the Deviſor by his Will has diſtinguiſhed between his Son and Grandſon. Raym. 408. S. C. reverſed by the Opinion of Three Judges con. Dolbin. 1 Vent. 341. S. C. and the Judgment in B. reverſed accordingly. Et vid. Pl. Com. 345. b.

(A) (a) Conſent to a Legacy.

(a) Enforced by Suit in Spiritual Court. March 96.

In what Caſes it is neceſſary.

To what Thing.

1. If certain Goods are deviſed to one, he cannot take them without the Delivery of the Executor. (b) 11 H. 4. 84.

(b) Brid. 54. S. C. cited arguendo, and the Diverſity taken in the Book of H. 6. between a Thing certain and uncertain, denied. Et vid. Kelw. 128. All. 39. Sryl. 54, 73. Br. Deviſe 11. S. C. March 137. Co. Lit. 111. a.

2. If a Man poſſeſſed of a Leaſe for Years of Land deviſes it to another, the Deviſee cannot have it, or enter into it without the Aſſent of the Executor or Adminiſtrator. Tr. 39 El. B. R. P. 11 Ja. B. per Curiam.

(B) Who may conſent.

1. A (a) Feme Covert Executrix may conſent to a Legacy. (b) 7 H. 4. 13. b.

(a) An Infant Executor at 18 may. Cro. El. 719. per Anderſon. 1 Sid. 188. he cannot aſſent before 17. 5 Co. 29. b S. C. Fitz. 55. S. C. 1 Sid. 188. S. P. adjudged con. and ſaid per Curiam, though anciently it had been a Point, yet ſince Ruſſel's Caſe it ſeemed to have been ſettled, that a Feme Covert could not aſſent to a Legacy.

(b) Br. Executors 47.

2. If there be two Executors, and Goods are deviſed to one, he may aſſent to his own Legacy, and take the Goods without the Aſſent of the other. 11 H. 84.

3. If the Teſtator deviſes a Leaſe for Years to his Executors, one Executor without the reſt may conſent to the Legacy, as to his own Part, without any Conſent by the others. M. 37 El. B. R. between (c) Pannel and Fen admitted.

(c) 1 Rol. Abr. 924. S. C. which vid. with the Notes there.

(C) At what Time it may be made.

Fol. 619.

1. If a Man hath a Term for 52 Years, and deviſes this Term to his Executor, after his Legacies paid, and deviſes 10 l. to be paid to the Iſſue of a Stranger when he comes to 21, (a) the Executor ſhall not have this as a Legacy by any Aſſent till the Iſſue comes to 21, and until he has paid him the 10 l. or made an Agreement with him for it. Paſch. 6 Ja. B. between Brand and Dane, per Curiam.

(a) Ante 16. Pl. 11. vid. and the Notes there.

2. But in the ſaid Caſe, if he deviſes 40 l. to be yearly paid to a Stranger for 52 Years, this ſhall be a Legacy in him preſently by his Aſſent, for that otherways he ſhould never have it as a Legacy, inaſmuch as the 40 l. is to be paid during all the Term. Paſch. 6 Ja. B. dubitatur.

3. If a Man poſſeſſed of a Leaſe for Years deviſes it to *A.* for Life, the Remainder to *B.* and makes *C.* his Executor, and dies, and after *B.* dies, yet *C.* may aſſent to the Legacy, for *B.* had an Intereſt by the Deviſe, which is perfected by the Aſſent. *Mich.* 17 *Car.* 2. between *Southward* and *Millard*, *March.* 135, 136, *&c.* adjudged.

(D) What ſhall be ſaid an Aſſent in Law to a Legacy.

1. (a) If a (b) Term be deviſed for an Executor, to a certain Time, the Remainder over, and the Executor enters (c) generally, he ſhall be adjudged in by the Law as an Executor, and not as a Legatee; becauſe if he ſhould be adjudged in as a Legatee, perhaps this would be a Devaſtavit, and ſo the Law ſhould do a Tort; and alſo by this the Remainder would be ſettled, and could not be diveſted by the Diſſaſſent of the Executor after, which would be miſchievous to the Executor. Mich. 37 El.

(a) Cro. Car. 293. S. P. adjudgen. Et vid. Pl. Com. 520. 4 Leon. 1. March 136.

(b) Where deviſed to a Woman Executrix, and before Election, ſhe takes Husband, he may elect whether it ſhall be taken as Deviſee or Executrix. 1 Leon. 216. per Curiam, March 135, 136.

(c) Where an Executor entered to the Uſe of the Legatee, 3 Leon. 6.

B. R.

B. R. between (d) Pannel and Fen, per Curiam adjudged. Co. 10. (e) Lampet 47. b. adjudged. Mich. 11 Ja. B. R. between Ellis and Osborn agreed.

(d) Moor 350. Pl. 470. S. C. adjudged, the Deviſe being to his Executors till they had paid all his Debts and Legacies, &c. for the Words of the Will are but declarative of the Power he had as Executor. Cro. El. 347. S. C. adjudged, for the Deviſe to them is meerly void. Goulſ. 185. S. C. dubitatur. Et vid. Moor 99. Pl. 242. 1 And. 22.

(e) 2 Brownl. 172, 173. S. C.

2. If a Man deviſes a Term to his Executors, and he enters generally, (f) the Law ſhall ſay prima facie that he is in as a Legatee, becauſe this is better for him, and the Law intends the Executor aſſented to it, and if he be in Danger of a Devaſtavit, he may after elect to be in as Executor, and ſo explain his general Entry, ſo there ſhall not be any Devaſtavit. Mich. 37 Eliz. B. R. 4. between (g) Pannel and Fen, per Curiam.

19 Eliz. (h) Lord Windſor's Caſe adjudged, Mich. 11 Ja. B R. between Ellis and Osborn dubitatur, though the Executor had ſufficient for all Debts, Legacies, and Funerals.

(f) Portman and Willis, Moor 352. Pl. 474. ſo adjudged upon a Special Verdict, it being found by the Jury, that there was Aſſets ultra the Term. Cro. El. 387. adjornatur.

(g) Cro. El. 347. S. P. per Curiam, for the entire Term being given to the Executors, there can be no Miſchief; but when a particular Intereſt therein is only given to the Executor, and the Reſidue to another, upon a general Entry he ſhall not be ſaid in as Legatee; for if ſo, he might be charged for the Reſidue as a Devaſtavit. But vid. Cro. El. 223.

(h) 3 Leon. 36.

3. If Leſſee for leaſes for Years, upon Condition that he ſhall not alien by Will or otherways, and he deviſes it to his Executors, who enter generally, it ſeems that he ſhall not be ſaid in, prima facie, as a Legatee, but as Executor, becauſe if he ſhould be in as a Legatee, this ſhould be a Breach of the Condition, and then no ſubſequent Election of the Executor to be in as Executor could help it. Contra, 19 Eliz.

(i) Lord Windſor's Caſe adjudged.

(i) Moor 351. S. C. cited.

4. If a Man deviſes a Term to his Executor, and dies not being indebted, and the Executor enters generally, this ſhall not be adjudged in Law in him as a Legatee, and to a Conſent to the Legacy. Paſch. 8 Ja. B. between (k) Hellam and Ley. Dubitatur, Trin. 8 Ja. B. for there may be Debts which are not yet known.

(k) 1 Btownl. 132. S. C. & S. P. dubitatur.

Fol. 620.

5. If a Man deviſes a Term to his Executor, and dies, and the Executor enters generally, and converts the Profits to his own Uſe, this is a Conſent to the Legacy. Mich. 11 Ja. B R. in Ellis and Osburn's Caſe, per Coke.

6. If a Man poſſeſſed of a Term for certain Years, deviſes it to another for his Life, with ſeveral Remainders over, and makes the firſt Deviſee his Executor, who enters generally, and by Deed, (l) reciting, That whereas he had a certain Eſtate for Years in the ſaid Land by the Deviſe of J. S. who was the Deviſor, he grants it over to another, this is a good Explanation of his Entry, ſcilicet, that he entred as Legatee, and ſo a Conſent to the Legacy. Mich. 15 Ja. B. R. in one Shrene's Caſe, per totam Curiam.

(l) So where a Man deviſed a Term to his Wife, whom he made Executrix, and ſhe married again, and ſhe and her ſecond Husband reciting, that he was poſſeſſed in her Right as Executrix, &c. leaſe, &c. it was held to be an expreſs Claim as Executrix. 1 Leon. 216. per Curiam.

7. If a Man deviſes a Term to his Executor, and dies not being indebted, and the Executor enters generally, and ſays, that his Teſtator had given no Legacy from him, but had left all to him, admitting that upon the general Entry he ſhould not be adjudged

adjudged in as a Legatee, it ſeems (m) theſe Words ſhould not make any Conſent to the Legacy. Paſch. 8 Ja. B. (n) between Hellan and Ley. Dubitatur, Trin. 8 Ja. B.

(m) But what Words are ſufficient to make an Aſſent to a Legacy, vid. 8 Co. 95. a. 2 Brownl. 173, 174. March 135, 136, &c. 139. 1 Keb. 15. (n) 1 Brownl. 132. S. C. by Three Judges con. Coke. 1 Levin. 25.

(E) In what Caſes the Conſent of one ſhall be to another.

1. (a) If a Man deviſes a Term to one for Life, the Remainder to another for Life, with ſeveral Remainders over, the Conſent by the Executor to the firſt Deviſee will be a Conſent to all the Remainders. Co. 10. (b) Lampets 47. b. agreed.

(a) 1 And. 61. S. P. arguendo.

(b) 2 Brownl. 172. S. C.

2. If a Man deviſes a Term to his Wife, if ſhe ſo long lives unmarried, and if ſhe marries, that the Wife ſhall have a Rent out of the Land, and makes the Wife his Executrix, and dies, and the Wife conſents to the Legacy of the Term, and enters into it, and after takes Husband, this Conſent to the Legacy of the Term is alſo a Conſent to the Rent when the Contingent happens. Mich. 13 Ja. B. R. between (c) Goffe and Haywood, Paſch. 14 Ja. B. adjudged.

(c) 1 Rol. Rep. 247, 368, S. C.

3 Bulſ. 123. S. C. adjudged. Bridg. 52, 53. S. C. adjudged. Mid. Pl. Com. 541. b.

3. If a Man deviſes a Term to one, and a Rent out of it to another, and dies, and the Executor aſſents to the Legacy of the Term, this is alſo an Aſſent to the Rent. Mich. (d) 13 Jac. B. R. per Dodderidge.

(d) 1 Rol. Rep. 248. S. C. & S. P. per Dod. 3 Bulſ. 122. S. C. & S. P. per Dod: But ſaid by him, that an Aſſent to the Deviſe of the Rent is no

4. If A. poſſeſſed of a Leaſe for Years, deviſes it to his Executors for 7 Years, and after to B. for 20 Years, and after to C. and the Heirs Males of his Body begotten, (e) if the Executors agree to the Deviſe to themſelves for 7 Years, this is a Conſent to all the Remainders. Paſch. 11 Car. between Leventhorpe and Aſhby, per Curiam, reſolved upon Evidence at the Bar. Intratur, Mich. 10 Car. Rot. 120.

Aſſent to the Deviſe of the Term. Et vid. Bridg. 55. (e) March 135. like Caſe adjudged,

What ſhall be a Revocation.

The Act of God.

1. IF a Man deviſes Lands to *A.* his Second Son, and the Heirs of his Body, and after his Death without Iſſue, then to *B.* his Third Son in Tail, *&c.* if *A.* hath Iſſue, and dies in the Life of the Deviſor, and then the Deviſor dies, *B.* ſhall have the Lands preſently, for the Deviſe to *C.* being void, it is as if it had never been made. *Hill.* 36 *Eliz.* between (a) *Fuller* and *Fuller*, *Cro. El.* 422, 423. adjudged.

(a) Moor 353. Pl. 476. S. C. but S. P. does not appear.

2. (b) If a Man deviſes Lands to *C.* and his Heirs, and *C.* dies in the Life of the Deviſor, *B.* the Heir of *A.* ſhall take nothing by the Will, for the Heirs of *C.* were not named as immediate Takers, but only to expreſs the Quantity of the Eſtate that *C.* ſhould take. *Trin.* 10 *Eliz.* between *Bret* and *Rigden*, *Pl. Com.* 345. adjudged *per totam Curiam, præter Walſhe*; though after the Death of *C.* the Deviſor ſaid to *B.* that he ſhould be his Heir, and ſhould have all the Lands which *C.* ſhould have had if he had outlived the Deviſor.

(b) Fuller and Fuller S. P. Cro. El. 423. adjudged. Moor 353. Pl. 476. adjudged. —So if the Deviſe be to A. and his Heirs, to the Uſe of C. and his Heirs, and C. dies in the Life of the Deviſor, his Heir can take nothing, but the Deviſe will be to the Uſe of the Deviſor and his Heirs. Hortop's Caſe, 1 Leon. 253. Cro El. 243. —But if there be a Deviſe to A. for Life, Remainder to B. in Fee, though A. dies in the Life of the Deviſor, B. ſhall take, though it was not the Intent of the Deviſor that he ſhould take in Poſſeſſion. Pl. Com. 344. b. Cro. El. 423. —So if A. refuſes, B. ſhall take. 1 Co. 101. a.

3. If a Man deviſes his Land to his Wife for Life, and after to his Four Daughters and Heirs, equally to be divided between them Share and Share alike, to hold to them (c) and their Heirs for ever, and one of the Daughters dies, having Iſſue a Son, and then the Deviſor dies, the Will is void for a Fourth Part. *Hill.* 1656. between *Pachman* and *Cole*, 2 *Sid.* 53, 78, 79. adjudged.

(c) Where one Daughter being dead, and having left Iſſue a Son, the Deviſe was to his Wife for Life, and after her Deceaſe, then the ſame to be equally divided among his Daughters or their Heirs. Godb. 362, 363.

4. If a Man deviſes Land to *A.* and *B.* and their Heirs, and *A.* dies in the Life of the Deviſor, *B.* ſhall take the whole Land. *Mich.* 16 *Car.* 2. between *Davis* and *Kemp*, *Cart.* 4, 5, 6. adjudged, the rather becauſe upon a Defect of his perſonal Eſtate, he had willed ſo much of theſe Lands as ſhould be ſufficient to be ſold for the Payment of his Debts.

Deviſe.

By the Statute-Law.

1. BY 32 *H.* 8. *cap.* 1. it is enacted, That every Perſon (a) having Manors, Lands, Tenements, or Hereditaments, held in Soccage, or of the Nature of Soccage-Tenure, and not having any Manors, *&c.* held of the King by Knights-Service, Soccage-Tenure in Chief, or of the Nature of Soccage-Tenure in Chief, nor of other Lord by Knights-Service, ſhall have Power to give, (b) diſpoſe, will, and deviſe, by Will (c) in (d) (e) Writing, or otherwiſe by Act executed in his Life, all his ſaid Manors, &c. any Law, Statute, &c. to the contrary notwithſtanding.

(a) Pl. Com. 344. b.

(b) A Deviſe of an Authority to Executors to ſell is within the Equity of the Act. Moor 341. Pl. 463. —And when the Executors ſell, it is a good Deviſe of the Land it ſelf by the Will. Cro. Jac. 145. per Tanfield. (c) A Man beyond Sea wrote a Letter, in which he declared his Will to be, That his Lands ſhould go in ſuch Manner, Moor 177. Pl. 314. adjudged a good Deviſe. —A good Will within this Act, though the Name of the Deviſor was not mentioned therein. 2 Leon. 35. 3 Leon. 79. —Though not ſealed. March 206. —Though in looſe Sheets. 1 Sid. 315. —Though not ſubſcribed by the Deviſor. 1 Sid. 315, 362. —Though in Form of an Indenture, and ſealed and delivered, being proved to be intended as a Will. 1 Mod. 117. —If a Man had ordered one to make his Will, and thereby to deviſe W. Acre to A. and his Heirs, and B. Acre to B. and his Heirs, and he had written the Deviſe to A. in the Life of the Deviſor, but before the Deviſe to B. was wrote, the Deviſor had died, yet as to A. this had been a good Deviſe. 3 Co. 31. b. —But if he had ordered him to deviſe W. Acre to A. and his Heirs upon Condition, and he had wrote the Deviſe to A. and the Deviſor had died before the Condition had been wrote, this had been void, for without the Condition the Deviſe was not perfect. 3 Co. 31. b. —But when the Order was to deviſe W. Acre to A. for Life, Remainder to B. and the Deviſor died after the Deviſe to A. was wrote, and before the Deviſe to B. was wrote, vid. N. Dyer 72. a. margine. —Where the Order was to deviſe an Eſtate for Life, and the Clerk in Writing put in an Eſtate in Fee, it was held abſolutely void. Moor 356. Pl. 483. —But when the Deviſor ordered a Deviſe of his Lands to his Wife for Life, and the Writer of his own Head inſerted a Proviſo; and upon reading, the Deviſor ſaid the Proviſo was no Part of his Will, but that the reſt ſhould ſtand, Cro. El. 100. the Proviſo was adjudged void, and the reſt of the Will ſtood. N. Dyer 72. a. Margine, cited; and ſaid, that as to the Proviſo the Will was countermanded by Parol. 1 Rol. Abr. 618. X. 1. (d) Where good though the Lawyer only took ſhort Notes, with Deſign to reduce it into Form, which he after did, but the Deviſor died before it was read to him. Brown and Brown, 1 And. 34. Kelw. 209. Dyer 72. a. Et vid. 1 Brownl. 44. —Where writ after he became ſenſeleſs. Al. 55. —But if a Man had by Parol declared what his Will was, and a Stander-by, for his own Remembrance, and without Appointment of the Deviſor, had wrote it down, this had not been a good Will. Naſh and Edmund, Cro. El. 100. 1 Leon. 113. But vid. 2 Leon. 35. 3 Leon. 79. Al. 54. —But though writ down without the Conſent of the Deviſor, if it had after been read to him, and approved by him, it had been well enough. Cro. El. 100. (e) Where good though gnawn to pieces by Rats in the Life of the Deviſor, if by joining the Pieces together the Contents can be known. Al. 2. —But if a Will continues in Writing at the Death of the Deviſor, though gnawn, burnt, or loſt after, it ſhall ſtand good. Al. 2. 55.

2. By the ſame Act it is enacted, That every Perſon having Manors, *&c.* held of the King in Soccage, or of the Nature of Soccage in Chief, and having any other Manors, *&c* held of any other in Soccage, or of the Nature, *&c.* and not having any Manors, *&c.* held of the King, or any other by Knights-Service, ſhall have Power to give, *&c.* by Will in Writing, or otherways by Act, *&c.* all his ſaid Manors, *&c.* any Law, *&c.* ſaving to the King, *primier Seiſin*, Reliefs, *&c.*

3. By the ſame Act it is enacted, That every Perſon having Manors, *&c.* of Eſtate of Inheritance, held of the King in Chief by Knights-Service, or of the Nature, *&c.* ſhall have Power by Will or Writing,

(f) or

(f) If he had conveyed any Part to the Uſe of his Wife or Children, though with Power of Revocation, he could deviſe no more by his Will, but to make

(f) or otherwiſe by Act, *&c.* to give, *&c.* (g) Two Parts of the ſame Manors, *&c.* in Three Parts to be divided, or elſe as much of the ſaid Manors, *&c.* as ſhall amount to the yearly (h) Value of Two Parts of the ſame, in Three Parts to be divided, in Certainty and by ſpecial Diviſions, that it may be known in Severalty, for the (i) Advancement of his Wife, Preferment of his (k) Children, and Payment of his Debts, or (l) otherwiſe at his Pleaſure; any Law, *&c.* ſaving to the King (m) the Cuſtody, *primier Seiſin*, *&c.* of a Third Part, and all Fines for Alienation, upon any Alteration of the Freehold or Inheritance, (n) by Will or otherwiſe.

the Land conveyed Two Parts of the whole, and if the Land conveyed amounted to Two Parts or more, he could deviſe nothing. Co. Lit. 11: b. Et vide Ivy and Tracy, Moor 148. Pl 296. 1 And. 146. —But if he had conveyed Two Parts to the Uſe of his Wife for Life only, he might have deviſed the Reverſion of thoſe Two Parts, for it was the Intention of the Act to give Power to deviſe Two Parts entirely. Co. Lit. 111. b. 10 Co. 81. though the Words of the Statute are in the Diſjunctive. Moor 734. (g) A Deviſe of the whole was good as to Two Parts, though not divided by the Will. 3 Leon. 29. adjudged upon a Will made between the 32 & 34 H. 8. the explanatory Act. 8 Co. 85. b. 1 And. 3, 4. 1 Leon. 76. (h) As it happened at the Time of the Death of the Deviſor, for then his Will took Effect. Co. Lit. 111. b. 80 Co. 84. b. (i) Ley. Rep. 66. (k) Extends to Grandchildren. 2 And. 207. Et vid. Moor 734. Pl. 1019. —But not to Baſtard-Children. Co. Lit. 78. a. 123. a, b. (l) Refers only to Wills. 6 Co. 76. a. b. 2 And. 206, 207. (m) This extended only in caſe of a Diſpoſal by Act executed, &c. for notwithſtanding any Will, a third Part deſcended, &c. 6 Co. 76, 77. 9 Co. 133. b. (n) A Pardon for ſuch Alienation was to be ſued of Courſe, paying a third Part of the yearly Value. 34 & 35 H. 8. c. 5. par. 13. But by 12 Car. 2. c 24. all Fines for Alienation, &c. are diſcharged.

4, By the ſame Act it is enacted, That every Perſon having Manors, *&c.* of Eſtate of Inheritance held of the King in Chief by Knights-Service, and having other Manors, *&c.* held of the King or any other by Knights-Service or otherwiſe, (o) ſhall have Power to give, *&c.* by Will in Writing, or otherwiſe by Act, &c. Two Parts of the ſame Manors, in Three Parts to be divided, or elſe as much of the ſame Manors, *&c.* as ſhall amount to the (p) yearly Value of Two Parts of the ſame, in Three Parts to be divided in Certainty, *&c.* for the Advancement, *&c.* ſaving to the King the Cuſtody, *primier Seiſin*, *&c.* of a Third Part, Fines for Alienation, *&c.*

(o) But this took not away the Cuſtom of Deviſing, for where Land deviſable by Cuſtom was held by

Knights-Service, the whole notwithſtanding might have been deviſed by Force of the Cuſtom. Co. Lit. 111. b. Kelw. 206. a. 215. Dal. 75. 9 Co. 133. b. Moor 70. Pl. 190. 1 And. 52, 147. 1 Leon. 267. N. Benl. 317. 1 Buſſ. 165. Ley 62. Styl. 476. 2 Sid. 153, 154. (p) But ſuch Hereditaments as were not of any yearly Value, as bona Felonum & Fugitivorum, Waifs, Strays, &c. could not be left to deſcend as Part of the Third Part, or be deviſed as Part of the Two Parts, Co. Lit. 111. b. 3 Co. 32. 10 Co. 81. a. 2 And. 21, 22. 2 Leon. 42. Godb. 17. —Yet ſuch Franchiſes of uncertain Value being held in Capite, would have prevented the Owner from deviſing all his Lands, and made his Deviſe of his Lands void for a third Part thereof. Co. Lit. 111. b. Moor 837.

5. By the ſame Act it is enacted, That if one holds any Manors, *&c.* only of any other than the King by Knights-Service, and other Lands and Tenements in Soccage, or of the Nature, *&c.* he may give, *&c.* (q) by Will or otherwiſe, by any Act, *&c.* Two Parts of the ſaid Manors, *&c.* held by Knights-Service, or as much thereof as ſhall amount to the yearly Value of Two Parts, in Manner aforeſaid, and all the Soccage-Lands, ſaving to the Lord, *&c.* by Knight-Service, for his Cuſtody, *&c.* as much as ſhall amount to the Third Part of the Lands held by Knights-Service.

(q) Not ſaid in Writing.

6. By the ſame Act it is enacted, That if one holds any Manors only of the King by Knights-Service, and not in Chief, and other Manors, *&c.* of any other by Knights-Service, and alſo other Manors, *&c.* of any other in Soccage, or of the Nature, *&c.* he may give, *&c.* (r) by Will or otherwiſe, by Act, *&c.* Two Parts of the ſame Manors, *&c.* held of the King by Knights-Service, and of the other Manors, *&c.* held by Knights-Service, or as much of either of them as ſhall amount

(r) Not ſaid in Writing.

to the yearly Value of Two Parts, in Manner aforeſaid, and all his Socage-Lands, ſaving the Cuſtody, *&c.* of ſo much of the Knight-Service as ſhall amount to the yearly Value of a Third Part thereof.

7. Whereas in ſeveral Branches of 32 *H* 8. it is contained, That every Perſon having any Manors, *&c.* of an (s) Eſtate of Inheritance, ſhould have Power to give, *&c.* by the Statute of 34 *&* 35 *H.* 8. *c.* 5. it is declared, That thoſe Words, *Eſtate of Inheritance,* ſhould be taken of Eſtates in Fee-Simple only.

(s) A Rent granted to A and his Heirs during the Life of B. was not deviſable by either of theſe Acts, being only a deſcendable Freehold. Gawin and Rants, Moor 625. Pl. 858. Cro. El. 804. Et vid. 1 Leon. 252. Poph. 91. 1 Rol. Rep. 334. Took and Glaſcock, 1 Saund. 261. Cart. 208. —But a determinable Fee-Simple was deviſable. Cro. El. 805. 1 Bulſ. 184. —But he that had an Eſtate pur auter vie in Lands, deviſable by Cuſtom, might deviſe it. Cro. El. 805. where Fitz. Title Deviſe 21. is cited: But by 29 Car. 2. c. 5. par. 12. Eſtates pur auter vie are deviſable.

8. By this Act of the (t) 34 *&* 35 *H.* 8. *c.* 5. it is enacted, That every Perſon (u) having a ſole Eſtate in Fee-Simple, or ſeiſed in Fee in Coparcenary or in Common in any Manors, *&c.* in Poſſeſſion, Reverſion, or Remainder, or of Rents or Services incident to any Reverſion or Remainder, and having no Manors, *&c.* held of the King or other Perſon by Knights-Service, ſhall have Power to give, *&c.* to any Perſon (except Bodies Politick) by Will in (w) Writing, or otherwiſe by Act executed in his Life, or by himſelf ſolely, or by himſelf and others jointly, ſeverally, or particularly, or by all thoſe Ways, or any of them as much as in him of Right is, all his Manors, *&c.* or any of them, or any Rent, Common, or other Profit out of the ſame, or out of any Part thereof.

(t) For the better Expoſition of this Act, vid. 8 Co. 84. b. 85. & Leon. Lovis's Caſe, 10 Co. 78. 2 Brownl. 103.

(u) 10 Co. 83. b. 2 Brownl. 103, 104. &c.

Et vide the Caſe of Weedon and Baldwin, 1 Levin. 18. 1 Sid. 55. Raym. 39. (w) If a Man deviſes, that his younger Children ſhall have ſuch Rent-Charges as are expreſſed in ſeveral Writings by him ſigned and ſealed, this is a good Deviſe in Writing of the Rents themſelves, for refereeing to the ſeveral Writings, it is as if ſpecially limited in the Will; but a Will cannot refer to Words only without Writing, for all the Will ought to be in Writing, therefore nothing can be added thereto by Parol-Averment dehors. Molineux's Caſe, Cro. Jac. 145. Noy 117. But for this, vid. 4 Co. 4. a.

9. By the ſame Act, every Perſon having a ſole Eſtate in Fee-Simple, or ſeiſed in Fee in Parcenary or Common, of any Manors, *&c.* in Poſſeſſion, Reverſion, or Remainder, or of any Rents or Services incident to any Reverſion or Remainder held of the King by Knight-Service, in Chief, or of the Nature, *&c.* ſhall have Power to give, *&c.* to any Perſon (except Bodies Politick) by Will in Writing, or otherways by Act executed, *&c.* Two Parts, as well of the ſaid Manors, *&c.* as of all his other Rents and Hereditaments, or any Rent, Common, or Profit out of the ſaid Two Parts, or any Part thereof, in Three Parts to be divided, or as much as ſhall amount to the yearly Value of Two Parts thereof, in Three Parts to be divided, of what Perſon ſoever held. And by the ſame Act it is enacted, That the Will ſhall be good (y) for Two Parts, though made of the whole, the Diviſion to be made by the Deviſor, by Will, or otherways by Writing; and in Default thereof, by Commiſſion out of the Court of Wards, and Enquiry of the Value by the Oaths of 12 Men, *&c.*

(x) If he had deviſed all his Lands, and then had ſold all his Capite Lands, or they had been recovered from him, the Will would have been good for all the Socage-Lands. Co. Lit. 111. b. 3 Co. 35. a. 10 Co. 84. a.

—If he had conveyed all his Capite Lands to his Son or Wife in Fee, and had after purchaſed Socage-Land, he might have deviſed all theſe in Fee. 10 Co. 84. a. 2 Brownl. 103, 104. 11 Co. 24. (y) If a Man ſeiſed of 3 Acres in Capite, deviſed one Acre to A. another to B. and the third to C. the Heir ſhould not have had the laſt Acre only, but a third Part of each, for the Will is entire, and took Effect at once. Moor 38. Pl. 124. 734. Pl. 1019. 2 And. 190. —Where ſeiſed of two Parts in Fee, and of the third Part in Tail, it ſhould have been good for the two Parts in Fee, Cro. El. 286. Et vid. Cro. El. 267.

10. By the ſame Act, every Perſon having a ſole Eſtate in Fee-Simple, or ſeiſed in Fee in Parcenary or Common, of any Manors, *&c.* in Poſſeſſion, (z) Reverſion, (a) or Remainder, or of any Rent or Service incident to any Reverſion or Remainder, held of the King by Knight-Service, and not in Chief, or held of any other Perſon by Knights-Service, ſhall have Power to give, *&c.* to any Perſon, (except Bodies Politick) by Will in Writing or otherways, by Act, *&c.* (b) Two Parts of the ſaid Manors, *&c.* held by Knight-Service, or any Rent, *&c* (c) out of the ſaid Two Parts, or as much as ſhall amount to the yearly Value of Two Parts thereof, *&c.* And by the ſame Act it is enacted, That the Will ſhall be good for Two Parts, though made of the whole, *&c.* held by Knight-Service, and alſo for the whole not held of the King by Knight-Service, in Chief or otherwiſe by Knight-Service, or of any (d) Rent, *&c.* out of the ſame, or any Part thereof, the ſame Diviſion to be made by Will, *&c.* or in Default thereof, for as much of the ſame Manors, *&c.* as concerns the King's Intereſt, by Commiſſion out of the Court of Wards, and for ſuch of the ſame Manors, *&c.* as concerns the Intereſt of any other Lord, by Commiſſion out of *Chancery*.

(z) This extends to a Reverſion expectant upon an Eſtate-Tail. Co. Lit. 111. b. Moor 837. Pl. 1130. Leon. Lovis's Caſe. 10. Co. 80. a. 81. b. 1 Brownl. 103, 107. Et vid. 11 Co. 24. a.

(a) Intended only of ſuch Remainders as drew Ward and Marriage by the Common Law, as if a Reverſion expectant upon an Eſtate for Life had been granted to one for Life, the Remainder in Fee. (b) Goulſ. 84. 3 Leon. 105. (c) If a Rent be deviſed out of the whole, two Parts only ſhall be charged therewith. Co. Lit. 111. b. 3 Co. 33. a. Con. 8 Co. 84. b. 85. a. Hob 80 (d) If he hath Lands held by Knight-Service, but none in Capite, he may charge two Parts of his Knights-Service Lands and all his Socage Lands therewith. Co. Lit. 111. b. During the Life of the Grantee for Life it was not within the Statute, but if he died, this was a Remainder within the Statute, though by and fruitleſs. Co. Lit. 111. b. 10 Co. 81. b. Et vid. Wethen and Baldwin, 1 Sid. 55, 56. Raym. 39. 1 Levin. 18.

11. By the ſame Act it is declared, That the Savings, *&c.* for the Cuſtody, *&c.* to the King in the former Act, and of the Wardſhip to other Lords, ſhould be expounded as follows, *viz.* That the King ſhould have for his Third Part ſuch Manors, *&c.* as ſhould by any (e) Means deſcend or come by Deſcent, as well in Tail as Fee, or in Tail only, to the Heir of the Deviſor, or by any Act executed in his Life, (f) immediately after the Death of the ſame Deviſor.

(e) Moor 726. Pl. 1013. 731. Pl. 1017. 10 Co. 84. b.

(f) Butler and Baker's Caſe, 3 Co. 27. 3 Leon. 271. Moor 224. Pl. 401. Poph. 87. 1 And 348. Et vid. Moor 734.

12. By 29 *Car.* 2. *cap.* 3. *par.* 5. it is enacted, That all Deviſes of Lands or Tenements deviſable by the Statute of Wills, or any Cuſtom, ſhall be in Writing, and ſigned (g) by the Party deviſing, or ſome other in his Preſence, by his Direction, and ſhall be (h) atteſted and ſubſcribed in his Preſence by 3 or 4 credible Witneſſes, or elſe ſhall be void.

(g) If he writes the Will with his own Hand tho' he does not ſubſcribe his Name, but ſeals and publiſhes it, and the Three Witneſſes ſubſcribe their Names in his Preſence, it is a good Will, for his Name being wrote in the Will, it is a ſufficient Signing, and the Statute does not direct whether it ſhall be at the Top, Bottom, &c. Lemayne and Stanly, 3 Levin. 1. adjudged per totam Curiam: And by Three Judges againſt One, the Sealing is a Signing within the Act. —And note, it is not ſaid in the Act, that the Signing ſhall be in the Preſence of the Three Witneſſes. 3 Mod. 219. (h) But if a Man ſubſcribes and publiſhes his Will in the Preſence of Two Witneſſes, and they ſubſcribe it in his Preſence, and after makes a Codicil in Writing, reciting, That he had made a former Will, and confirmed the ſame, (except what was excepted by the Codicil) and declares, That the Codicil ſhould be taken as Part of his Will, and publiſhes it in the Preſence of one of the ſame and another Witneſs, &c. this is not a good Will, for there were not Three ſubſcribing Witneſſes in the Preſence of the Teſtator, and one of the Witneſſes to the Codicil never ſaw the Will. Lea and Libb, 3 Mod. 262. adjudged; though objected the Will and Codicil made but one Will, and the Circumſtance of Three Witneſſes wanting to compleat the Will was perfected by the Codicil. —If a Man makes a Will in ſeveral Pieces of Paper, and there are Three Witneſſes to the laſt Paper, and none of them ever ſaw the firſt, this is not a good Will. 3 Mod. 263. per Curiam.

(a) Pleading.

1. IN Pleading a Deviſe, it muſt be ſhewed of what (b) Eſtate the Deviſor was ſeiſed at the Time of making the Will. *Mich.* 38 & 39 *Eliz.* between *Willis* and *Fletcher*, *Cro. El.* 530. adjudged.

(a) Where it muſt have been ſhewed the Land was held in Socage. Cro. El. 677. Verdict, vid. Eſtate, for if

1 Sid. 265. Bet vid. Dyer 229 b. —And whether neceſſary to be found in a ſpecial 2 Rol. Abr. 697. Pl. 4. and the Notes there. (b) And that he died ſeiſed of that diſſeiſed before his Death, the Will could not operate. 1 Mod. 217.

(a) (b) Diſceit.

Fol. 621.

(a) F. N. B. 96, 97. &c. Noy 152.

(A) (c) In what (d) (e) Caſes it lies.

1. IN a Precipe quod reddat, if the Tenant be ſummoned upon the Land according to the Common Law and the Summons returned, and the Tenant makes Default, upon which a Grand Cape iſſues, and thereupon Judgment is given, the Tenant may have a Writ of Diſceit by the Equity of the Statute of the 31 El. cap. 3. for that he was not ſummoned at the parochial Church according to the ſaid Statute, (f) for this is not Error, and ſo he is without Remedy for the Land, which was the Miſchief before the Statute, and he can only have an Action upon the Caſe againſt the Sheriff, if he cannot have this Writ. H. 37 Eliz. B. R. between Collet and Marſhal held, for the Statute intends to put it in equal Degree with a Non-Summons at Common Law.

(b) Where it may iſſue either de B. or B. R. whence the Execution was ſued, or de Cancellar', F. N. B. 99 G. 105. A.

(c) It properly lies where one Man does any Thing in the Name of another, by which the other is damaged and deceived. F. N. B. 95 E.

2 Inſ. 444. (d) Ibid. 1 Part 32. Pl. 6, 7, 8. 33. Pl. 13, 14, &c. 191. Pl. 1. 192. Pl. 2, 5, 6, 7. 193. Pl. 12, 13. (e) When againſt an Attorney for appearing, &c. without Warrant. Dyer 361. Pl. 13. (f) 1 Rol. Abr. 793. G. 5. S. C. which vide, with the Notes there.

2. If one without my Knowledge purchaſes a *Quare impedit* in my Name, returnable *in Banco*, and after cauſes it to be abated, or me to be nonſuit thereupon, I may have a Writ of Diſceit againſt him. *F. N. B.* 26. A.

3. If one forges a Statute-Merchant in my Name, and thereupon a *Capias* is ſued, upon which I am taken, I may have a Writ of Diſceit againſt him that forged it, and him that ſued the *Capias*, *&c. F. N. B.* 96. B.

4. It lies againſt him that imbezils or procures a Writ to be imbezilled. *F. N. B.* 98 E.

5. If a Notary, or others of their Covin, counterfeit the Seal of any Parſon or Vicar, and forge Letters of Reſignation of his Parſonage or Vicaridge in the Name of the Parſon, *&c.* he ſhall have a Writ of Diſceit thereupon. *F. N. B.* 99. K.

(B) Upon

(B) Upon what Recovery it lies.

1. (a) IN a Writ of Waſte, if at the great Diſtreſs the Sheriff enquires of the Waſte by Inqueſt, according to the Statute, the Defendant ſhall have a Writ of Diſceit, if he was not (b) ſummoned, though the Recovery was by Inqueſt, becauſe the Default is the Cauſe of the Loſs. (c) 17 Ed. 3. 51. b.

(a) F. N. B. 98. B. Co. Lit. 355. b. S. P.

(b) For this, the Mainpernors upon the Diſtreſs ſhall be examined. F. N. B. 99. C.

(c) Fitz. Diſceit 40. S. C.

2. But otherways 'tis in an Aſſiſe. 17 E. 3. 58. b.

3. If A. be Leſſee for Life, the Remainder in Tail to B. and a Precipe in Capite is brought againſt A. and B. as Joint-Tenants by Covin between the Demandant and A. and (d) procure one to anſwer for B. as Joint-Tenant, and join the Miſe, and after they make Default, by which a final Judgment is given againſt them, in this Caſe B. ſhall have a Writ of Diſceit, by which he ſhall be reſtored to the Land. 17 E. 3. 60. b.

(d) F. N. B. 96 E. like Point.

(e) F. N. B. 96. D.

4. (e) In a Plea of Land, if the Demandant recovers by the Default of the Attorney of the Tenant, if the Demandant be Party to this Diſceit, a Writ of Diſceit lies, and he ſhall recover the Land. 21 E. 3. (f) 45. b.

(f) I ſuppoſe this miſprinted, for I do not find the Book cited warrants this Opinion.

5. If a Man recovers in a *Precipe in Capite* by Default, where the Lands are not held of the King, and he had not the Lord's Licence to ſue in *B.* the Lord by Writ of Diſceit may recover his Damages, but the Recovery ſhall ſtand in Force, and (g) the Lord ſhall not have his Seigniory, but the Recoveror ſhall hold of the King by Eſtoppel. *F. N. B.* 98. N.

(g) In the Book it is & le S'n'rava' ſon S'n'ory; but I ſuppoſe it miſprinted, and that it ſhould be navera: And for this, vid. 2 Inſt. 39 where it is ſaid the Record of the Judgment ſhall ſtand in Force; and concerning the Concluſion of the Tenure, the Lord ſhall have Remedy againſt the King by Petition of Right.

6. If there be a Recovery by Default againſt a Man in Priſon, he ſhall not have a Writ of Diſceit, (h) if according to the Law of the Land he was ſummoned by Summoners and Veiors, and the Land taken into the King's Hand by the Pernor. *Co. Lit.* 259. b. but he may by Writ of Error avoid the Judgment.

(h) Co. Lit. 158. b. 2 Inſt. 253. Palm. 59. But for this vid. Title Summons, and the Diviſions thereof.

(C) Upon what Recovery and in what Action it lies.

1. IF a Man brings a Writ of Diſceit againſt him that recovers in the firſt Action, and the Sheriff returns him ſummoned, upon which, for the Non-Summons, in the firſt Action, the Recovery is reverſed upon the finding of a Non-Summons in the Firſt Action, the Defendant in this Writ of Diſceit ſhall not have a Writ of Diſceit upon this Recovery to recover the Land again, if he was not ſummoned, but he is put to his Remedy againſt the Sheriff. 8 H. 6. 2.

2. If a Man recovers by Default in a Reſummons, where the Tenant was not reſummoned, he ſhall have a Writ of Diſceit. 13 H. 4. 8. b.

3. If in a Scire facias upon a Recognizance, a Man recovers by Default, and hath the Lands delivered to him, a Writ of Diſceit lies to recover the Lands. (a) 17 Ed. 3. 12. b. adjudged. 18 Ed. 3. 28. adjudged. 1 Ed. 3. 25. b. ſaid to be adjudged.

(a) Fitz. Diſceit 36. S. C.

4. (b) If a Man recovers by Default in a Writ of Waſte, though he recovers in a Manner by Action tried, inaſmuch as the Sheriff enquires by Jury, yet a Writ of Diſceit lies. 29 E. 3. 42. b.

Fol. 622.

(b) F. N. B. 98. b. S. P.

5. (c) If a Man recovers by Default in a Scire facias to execute a Fine, though this Scire facias be given by the Statute, yet a Writ of Diſceit lies upon it; for if he was not ſummoned, the Statute is not duly purſued. 1 E. 3. 25. b. adjudged. 26.

(c) F. N. B. 97. D. S. P.

6. If A. brings Debt againſt B. upon a Bill, and the Defendant pleads in Abatement, and the Plea is over-ruled againſt the Defendant, and the Attorneys, by Diſceit between them, (d) that the Plaintiff ſhall recover his Debt, whereas the Judgment ought to be but a Reſpondeas ouſter, yet no Writ of Diſceit lies to reverſe the Record, but only to recover Damages. Mich. 13 Jac. B. R. between Waller and Dorrington, per Curiam.

(d) This is tranſlated according to the Original; but ſome Words ſeem to be wanting to perfect the Senſe.

7. (e) If a Man recovers in a *Quare impedit* by Default, *&c.* now if the Defendant was not ſummoned, *&c.* he may have this Writ, and the Summoners and (f) Pledges upon the Attachment ſhall be examined thereupon; and if the Diſceit be found, he ſhall have a Writ to the Biſhop, *&c.* *F. N. B.* 98. G.

(e) Dyer 353. Pl. 30. 1 Leon. 293.

(f) F. N. B. 99. c.

(D) At what Time it lies.

1. He againſt whom the Recovery is may have a Writ of Diſceit before (a) Execution made. 18 Ed. 3. 26. 17 Aſſ. 14. 41 Aſſ. Attaint 27. per Finchden.

(a) For if he could not have Diſceit before Execution ſued, perhaps the Demandant would not ſue Execution, or enter till the Summoners in the Præcipe quod reddat, and the Summoners, Veiors and Pernors, in the Grand Cape were dead, &c. F. N. B. 97. C.

2. It lies not after the Death of the (b) Summoners, Veiors, and Pernors, for ſummoned or not is triable by Examination of Summoners, Pernors, and Veiors. *F. N. B.* 97. C.

(b) But if the Summons, &c. by Four, ſo long as Two live, Diſceit lies. F. N. B. 98. D.

(E) Who ſhall have the Writ.

1. HE that loſes the Land ſhall have the Writ without Doubt. (a) 8 H. 6. 2.

(a) Fitz. Diſceit 9 S. C. Br. 16 S. C.

2. (b) So the Heir of him that loſes ſhall have the Writ. (c) 8 H. 6. 2.

(b) F N B. 98. Q. S. P.

(c) Br. Diſceit 16. S. C. Fitz. 9. S. C.

3. If in a *Scire Facias*, upon a Recognizance, Execution is awarded by Default, and the Defendant dies, his Executors may have a Writ of Diſceit, and be reſtored. *F. N. B.* 98. *R.*

4. If Tenant for Life loſe by Default when he was not ſummoned, *&c.* and dies, he in Reverſion ſhall not have a Writ of Diſceit, for he ſhould not have had Error before the Statute. *F. N. B.* 99. E.

(F) Againſt whom.

1. THE Writ lies againſt him that recovers without Doubt. (a) 8 H. 6. 2.

(a) Fitz. Diſceit 9 S. C. Br. 16. S. C.

2. So it lies againſt the Heir of him that recovers. (b) 8 H. 6. 2.

(b) Fitz. Diſceit. 9. S C. Br. 16. S. C.

3. If in a *Precipe quod reddat*, the Sheriff returns the Tenant ſummoned, when he was not, ſo that upon the Grand Cape returned, the Tenant loſes the Land by Default, the Tenant ſhall have this Writ againſt him that recovered, and againſt the (c) Sheriff for his falſe Return. *F N B.* 97 *C.*

(c) Who in this Writ ſhall be puniſhed for his Falſity. F.N B. 97. D.

4. If the Demandant that recovers by ſuch falſe Return of the Sheriff makes a Feoffment of the Land, then this Writ lies againſt the Demandant and his Feoffees and the Sheriff. *F. N. B.* 97. C.

(G) (a) Examination.

(a) Where ſummoned or not, ſhall be tried by the Examination of the Summoners, Veiors, and Pernors. F. N. B. 97.

1. IN a Writ of Diſceit, if the firſt Summoners come, and none of the other Veiors or Pernors, and the Summoners are examined, and it is found by them that the Summons was not made, the Judgment ſhall be reverſed. 29 E. 3. 34. But for this, vid. 2 Rol. Abr. 581. I. 582. H.

2. If in Diſceit the Sheriff returns one Summoner dead, yet the other Summoner ſhall be examined, *&c.* and if it be found that he did not make the Summons, *&c.* the Party ſhall be reſtored to the Land. *F. N. B.* 98. D.

3. So if it be found that one Veior or Pernor did not do that which he ought to do, the Party ſhall be reſtored, becauſe it ought to be done by both. *F. N. B.* 98. D.

(H) (a) At what Time.

1. IN a Writ of Diſceit, if one of the Summoners comes at the Day, he ſhall be examined preſently, for the Danger of Death, and what he ſays ſhall be entered, and Proceſs ſhall be awarded againſt the others. 26 Ed. 3. 61.

(a) Where, upon a Recovery in a Teſtavit in B. the Defendant remov'd the Record by Writ of Error in B. R. and after brought a Writ of Diſceit in B. The Earl of Northumberland againſt Salthill, Palm. 56, 57. Cro. Jac. 547. Hob. 218. by which laſt Report the Tenant before Execution brought a Writ of Diſceit; and becauſe that would not ſtay the Execution, he brought a Writ of Error alſo: And though both theſe Writs tended to avoid the Judgment, yet becauſe they were upon ſeveral Reaſons and Reſpects, they were both allowed.

2. If a Writ of Diſceit be ſued againſt the Party that recovers, and the Sheriff and they return nihil, but the Garniſhers are returned ſummoned, and appear at the Day, they ſhall preſently be examined, though the Party be abſent, for the Danger of their Death, by which the Plaintiff ſhall be without Remedy. 1 E. 3. 26. adjudged. 2 E. 3. 48. b. adjudged.

3. But though it be found that there was not any Summons, yet it ſhall not be preſently reverſed, but a Diſtringas ſhall iſſue againſt the Party, becauſe he may at the Return thereof plead a Releaſe. 2 E. 3. 48. b.

(I) Judgment.

Fol. 623.

At what Time it ſhall be given.

1. IN Diſceit againſt the Party that recovers, &c. if the Party be returned ſummoned, and makes Default, yet if upon Examination it appears there was not a good Summons, Judgment ſhall be given preſently, (a) without awarding more Proceſs againſt the Party that makes Default, becauſe if Judgment ſhall be ſtay'd till he comes, there may be a Diſtreſs infinite, and ſo the Plaintiff ſhall be diſinherited. (b) 8 H. 6. 1. b. 5. b. adjudged.

(a) In a Writ of Diſceit the Iſſue is contained in the Writ, and the Judges ſhall examine the Iſſue, without any Plea or Appearance of the Tenant, &c. 1 Leon. 294. N. Benl. 67. Pl. 113. (b) Fitz. Diſceit. 9. S. C. Br. 16. S. C.

(K) How for the Land.

1. THE Judgment ſhall be, That the Plaintiff ſhall be (a) reſtored to the Land again. (b) 8 H. 6. 5. b. (c) 17 E. 3. 12. b. 18 E. 3. 28.

(a) F. N. B. 97. C. 1 Leon. 294. Palm. 57, 59. (b) Br. Diſceit 16. S. C. Fitz. 9. S. C. (c) Fitz. Diſceit 36. S. C.

2. If a Parſon brings a Writ of Diſceit for forging Letters of Reſignation of his Parſonage, in the Name of the Parſon, *quære* if by this he ſhall be reſtored to his Benefice; it ſeems *quod non*, becauſe it is a Spiritual Amotion, *&c.* *F. N. B.* 99. K.

(L) Profits.

(L) Profits.

1. HE ſhall be reſtored to the Iſſues from the Day that the Defendant had Execution till the Day of this Writ purchaſed. 41 E. 3. (a) 21. (b) 17 E. 3. 12. b.

(a) This is miſprinted in the Original as here, and I ſuppoſe ſhould be 2; which vid. Fitz. Judgment 87. Br. Diſceit 8. (b) Fitz. Diſceit 12. S. C.

2. He ſhall alſo be reſtored to the Iſſues from the Day of the Writ purchaſed till the Judgment, and the King ſhall not have them. 43 E. 3. 32. (c) 17 E. 3. 12. b. 18 E. 3. 28. dubitatur (d) 41 E. 3. 2. (e) 1 H. 6. 5. b. Contra, 22 E. 3. (f) 34.

(c) Fitz. Diſceit 12. S. C. (d) Br. Diſceit 8. S. C. Fitz Judgment 87. S. C. (e) Fitz. Diſceit 9. S. C. Br. 16. S. C. (f) This is miſprinted, for there are not ſo many Folio's in that Year.

(a) Diſcent.

(a) Diſcent quid; and the Diverſity between a mediate and immediate, lineal and collateral Diſcent. 1 Sid. 198. 1 Vent. 414, 415.

(A) Diſcent by the (b) Cuſtom of (c) Gavelkind or (d) (e) Borough-Engliſh.

(b) If the King purchaſe Gavelkind Lands, and dies ſeiſed, leaving ſeveral Sons, the eldeſt only ſhall inherit, for the Crown, and the Lands whereof the King is ſeiſed Jure Coronæ, are concomitantia. Co. Lit. 15. b. Raym. 77. the Opinion in Pl. Com. to the contrary is denied by Twyſden, 1 Sid. 138. the Cuſtom is ſuſpended. (c) The Statute de Donis bringing in a new Inheritance by way of Intail, ſuch Eſtate in Gavelkind Lands hath been taken to deſcend to all the Brothers, becauſe it is Part of the Fee-Simple Eſtate. 1 Mod. 97 which vid. Noy 106. —So the youngeſt Son ſhall inherit an Eſtate in Borough-Engliſh Land. Noy 106. (d) Special Cuſtom that Lands in Fee ſhould deſcend to the younger Son, but Lands in Tail to the elder, is good. March 54, 55. per Curiam. —So that it ſhall deſcend to the youngeſt Son, if not of the half Blood, and if he be, then to the eldeſt. Co. Lit. 140. b. (e) Where the Cuſtom was laid, that if a Copyholder dies ſeiſed &c. and the Copyhold was granted to a Man and his Wife, and the Heirs of the Man, and he died. 2 Leon. 208. dubitatur whether within the Cuſtom. (f) Godb. 166. S. C. & S. P. per Curiam. 4 Leon. 242. S. C. & S. P. per Curiam.

1. IF the Cuſtom of a Copyhold be, That the eldeſt Daughter ſhall have the Land, the eldeſt Aunt ſhall not have it by the Cuſtom, for ſhe is not within the Cuſtom. Paſch. 8 Jac. B. (f) Ratcliffe and Chapman, per Curiam.

(g) By ſome Cuſtoms the youngeſt Brother ſhall inherit; but Conſuetudo loci eſt obſervanda. Co. Lit. 110. b. —So the general Cuſtom of Gavelkind Lands extends to Sons only; but by ſpecial Cuſtom, when one Brother dies without Iſſue all his Brothers may inherit. Co. Lit. 140. a, b. (h) Godb. 166 S. C. And per Curiam, if the Cuſtom be, that the youngeſt Son ſhall inherit, the youngeſt Brother ſhall not inherit by the Cuſtom; and ſaid, that it was ſo adjudged in one Denton's Caſe. 4 Leon. 242. S. C. & B. per Curiam. And vid. the Caſe of Bayley and Stephens, Cro. Jac. 198. where it is ſo agreed per Curiam. And vid. Cro. Car. 411.

2. (g) The youngeſt Brother ſhall not have Borough-Engliſh Land, for he is not within the Cuſtom. (h) Paſch. 8. B.

3. If a Cuſtom be, that if a Man dies without Heir Male, that his eldeſt Daughter ſhall have the Land, and if he hath no Daughter, that the eldeſt Siſter ſhall have the Land, and if he hath not a Siſter, the eldeſt Couſin; but if he hath an Heir Male, that he ſhall have it before any of them, and the Tenant of the Land hath ſeveral Daughters, but no Heir Male, and the eldeſt Daughter dies in the Life of the Tenant of the Land, having Iſſue a Daughter, this Grandchild is within the Cuſtom, and ſhall have the Land by Diſcent upon the Death of the Grandfather. Mich. 10 Jac. B. 21. b. between Godfrey and Bullock, per Curiam.

4. (i) If Borough-Engliſh Lands be let to a Man and his Heirs during the Life of *J. S.* and the Leſſee dies, the youngeſt Son ſhall enjoy it. *Co. Lit.* 110. b.

(i) Baxter and Dowdſwell S. P. for the Heir taking it as a diſcendible Freehold, the Cuſtom that runs with the Land guides the Diſcent to the younger Son. 2 Levin. 138. adjudged upon a ſpecial Verdict; though it was objected, the Heir took only by the ſpecial Limitation to prevent an Occupancy.

5. (k) If a Rent is granted out of Gavelkind Lands, (l) it is of the Nature thereof, and ſhall deſcend to all equally. *Trin.* 24 *Car.* between (m) *Randal* and *Writtle*, 2 *Leon.* 87. adjudged.

(k) Randal and Roberts S. P. Noy 15. adjudged con.

(l) That a Truſt ſhall deſcend accordingly, vide 2 Rol. Abr 780. Pl. 6. —And all the Sons of Ceſtuy que uſe that dies before Admittance, Ante 184. Pl. 2. (m) Randal and Jenkins, 1 Mod. 96. S. C. adjudged, becauſe the Rent is Part of the Profits of the Land, and iſſues out thereof.

(B) To whom it ſhall deſcend.

Fol. 624.

1. IF A. be ſeiſed of Copyhold Lands in Fee of the Nature of Borough-Engliſh Land, and ſurrenders it into the Hands of the Lord, ea Intentione that he ſhould regrant it to him and his Wife, and to the Heirs of himſelf, and the Lord regrants it accordingly, and there is a Cuſtom, That if any Perſon be ſeiſed in Fee of any ſuch Cuſtomary Land, and dies ſo ſeiſed, that the Land ſhall deſcend after his Death Filio juniori hujuſmodi Tenentis cuſtomar' ſic obientis ſeiſiti ſecundum Naturam of Borough-Engliſh Land; and after A. having Iſſue Three Sons, dies ſo ſeiſed, and after, 10 Years after his Death, the youngeſt Son dies in the Life of his Wife without Iſſue, it ſeems the eldeſt Son ſhall have this Land as Heir to the youngeſt, and not the middle Son; for the Cuſtom cannot extend to a collateral Diſcent, ſcilicet, to direct the Diſcent between Brothers, for this is out of the Cuſtom, and the Cuſtom was once ſatisfied by the Diſcent to the youngeſt, and the Cuſtom fixed the Land in the youngeſt, and there is an End of the Cuſtom; and when the Cuſtom fails, the Common Law ſhall guide the Diſcent; and by this ſpecial Cuſtom, this Son, which was the youngeſt at the Time of the Death of his Father, ought to have the Land, and not any other who ſhould come to be the younger after. Tr. 11 Car. B R. between (a) Reeve and Malſter, it was argued by the Court, and Brampſton and Barkley (b) inclined, that the Middle ſhould have the Land, and Jones and Croke econtra: But they all agreed, if this had not been cuſtomary Land, that the Eldeſt would have it as Heir to the Father, inaſmuch as this was a Reverſion expectant upon an Eſtate for Life, and no actual Seiſin in the youngeſt: And they differed only in this, Whether the Cuſtom ſhould guide in the Diſcent in the ſame Manner as in the Courſe of a Diſcent at Common Law? And Croke and Jones held, that upon this ſpecial Cuſtom, if the Copyholder died ſeiſed, having a Son, and his

(a) Cro. Car. 411. S. C. and the Court divided accordingly; Jon. 360, 361, &c. the Court divided accordingly, & adjornatur.
(b) In the Original it is ſemble.

his Wife enſeint of another Son, who is born after, that he ſhould not have the Land; but Brampſton and Berkly econtra. Intratur, Hill. 9 Car. Rot 583.

2. If the Cuſtom be, that the youngeſt Son ſhall inherit, and a Man has Iſſue Two Sons, and the eldeſt has Iſſue Two Sons, and dies, and after the Lands deſcend to the youngeſt Son, who dies without Iſſue, the eldeſt Son of the eldeſt Brother ſhall have the Land, becauſe the Cuſtom holds not in the tranſverſal Line, but only in the lineal Diſcent. M. 24 & 25 El. at Hertford Term, reſolved per Curiam. Cited, M. 10 Ja. B.

3. If there be a Cuſtom within the Manor of *T.* That if the Father dies, leaving no Son, but Two or more Daughters, that the eldeſt Daughter ſhall have his Land for her Life only, and after her Death it ſhall deſcend to the next Heir Male that can derive by Males, and for want of ſuch, that it ſhall eſcheat to the Lord; and there is another Cuſtom, That if the Tenant dies, and leaves a Wife, that ſhe ſhall have it for her Life; and a Copyholder of the Manor dies, leaving a Wife, and Two Daughters, and no Son, and his Wife enters, and the eldeſt Daughter dies, and after the Wife dies, the Second Daughter ſhall have the Land for Life within the Cuſtom; for though ſhe was not the eldeſt at the Death of her Father, yet ſhe was ſo at the Death of her Mother, whoſe Eſtate was a Continuance of the Father's Eſtate, (c) as in Caſe of Free Bench. *Trin.* 15 *Car.* 2. between (d) *Newton* and *Shaftoe*, 1 *Levin.* 172. adjudged accordingly, and that (e) the Cuſtom was good.

(c) For this, vid. 1 Rol. Abr. 502. Pl. 1. and the Notes there.

(d) 1 Keb. 925. 2 Keb. 111, &c. S C. 1 Sid. 167. S. C. adjudged; and that the Cuſtom was good, though ſaid in the Report thereof, that it ſeemed to be admitted by all, that ſuch Cuſtom, as to Fee-Simple Lands, would be void, it being wholly againſt the Nature of a Fee to eſcheat ſo long as there are Heirs: And 268. another Caſe was ſaid to have been adjudged accordingly upon Debate in B. R. 20 Car. 2. between Sampſon and Quinſey: But vid. that Caſe, 1 Levin. 293. adjudged without Argument, becauſe the Court ſaid, the Point had before been adjudged in the Caſe of Newton and Shaftoe. (e) Co. Lit. 140. b.

(C) Baſtard. (a) Mulier.

(a) The Signification of the Word. Co Lit. 243. b. 8 Co. 102. a.

1. If a Baſtard enters after the Death of the Father, and continues ſeiſed for an Year, and after aliens to another, and the Alienee dies ſeiſed without any Interruption, yet this Dying ſeiſed of the Alienee ſhall not bind the Right of the Mulier, for this is not within the Maxim. (b) 36 Aſſ. 2. adjudged.

(b) Fitz. Baſtardy 17. S. C. Br. 34. S. C. Br. Diſcent 29. S. C. Br. Entry Congeable 75. S. C.

(bb) 8 Co. 101. a. S. P.

2. (bb) If Baſtard-Eigne dies ſeiſed without Iſſue, and the Lord by Eſcheat enters, this ſhall not bar the Mulier, becauſe there is no Diſcent. *Co. Lit.* 244. a.

3. If Baſtard-Eigne dies ſeiſed, his Wife being enſeint with a Son, and the Mulier enters, and after the Son is born, the Iſſue of the Baſtard is barr'd; for to bind the Mulier there muſt be not only a Dying ſeiſed, but a Diſcent. *Co. Lit.* 244. a.

(c) 8 Co. 101. a, b. S. P.

4. (c) A Diſcent of Services, Rent, Reverſions expectant upon Eſtates-Tail or for Life, whereupon (d) Rents are reſerved, *&c.* ſhall bind the Right of the Mulier. *Co. Lit.* 244. a.

(d) In ſuch Caſe, if the Baſtard receives the Rent, and dies, it ſhall bar the Mulier. Co. Lit. 15.

5. If Baſtard-Eigne enters into the Land, has Iſſue, and then enters into Religion, this Diſcent ſhall bar the Mulier. *Co. Lit.* 244. a. 248. b.

(e) 1 Co. 101. b. S. P.

6. (e) If a Man hath Iſſue Two Daughters, Baſtard-Eigne and Mulier-Puiſne, and they enter, and make Partition, the Mulier is bound for ever. *Co. Lit.* 170. b. 244. b.

7. (f) If Baſtard-Eigne in the Life of his Father hath Iſſue, and dies, and then the Father dies ſeiſed, and the Son of the Baſtard enters as Heir to his Grandfather, and dies ſeiſed, this Diſcent ſhall bind the Mulier. *Co. Lit.* 244. b.

(f) 8 Co. 101. b. S. P.

(D) (a) Who ſhall be bound by the (b) Diſcent from the Baſtard.

(c) Baſtard and Mulier.

1. **If Tenant in Tail hath Iſſue Baſtard-Eigne and Mulier-Puiſne, and dies, and the Baſtard enters, and continues peaceably for his Life, and dies, and this deſcends to his Iſſue, this ſhall bind the Mulier, though this be an Eſtate-Tail.** 39 E. 3. 38. b. **admitted.**

(a) The collateral Heir ſhall be bound as well as where there be Two Sons. Co. Lit. 244. a.

(b) The Mulier is bound by the Diſcent before the Heir of the Baſtard enters. Co. Lit. 244. a. (c) Intended only where a Man has a Baſtard by a Woman, and after marries that Woman, &c. for ſuch Baſtard, by the Law of holy Church, is a Mulier. Lit. Sect. 400. For this, vid. 1 Part 729. Letter D. —And ſuch Baſtard being impleaded or vouched, ſhall have his Age. Co. Lit. 244. b. 248. b. 8 Co. 101. b. —And between ſuch Baſtard and the Mulier no Mort-danceſter lies in reſpect of the Proximity of Blood. Co Lit. 244. b. 2 Inſ. 97. 8 Co. 101. b. —Shall be vouched. Co. Lit. 377. b. But for this, vid. 2 Roll. Abr. 777. Pl. 1. —But what Privileges ſuch Baſtard ſhall have, vid. Co. Lit. 244, 245, 368. a. 2 Inſ. 233. Moor 10. Pl. 39. 6 Co. 65. a, b. 2 Rol. Abr. 43. Pl. 10.

2. **But it** (d) **ſeems the Iſſue of the Mulier ſhall not be bound by ſuch Diſcent, for then** * **this ſhould be a Bar of the Tail by the Act of his Father, which is againſt the Statute.**

* Fol. 625.

(d) In the Original it is ſemble.

3. **If there be Tenant in Tail, the Remainder over to another, and the Tenant in Tail dies, having Iſſue Baſtard-Eigne and Mulier-Puiſne, and the Baſtard enters, and dies ſeiſed, having Iſſue, the Diſcent from the Baſtard ſhall not bind the Right of him in Remainder, but he ſhall have his Action; for the Continuance of the Poſſeſſion by the Baſtard ſhall not be prejudicial to him.** 39 E. 3. 38. b.

4. (e) **If the Baſtard dies ſeiſed, the Mulier being** (f) **within Age, it ſhall bind him.** Contra, Brooke Diſcent 29.

(e) Co. Lit. 244. a. S. P. for the Iſſue of the Baſtard, in Judgment of Law, is become lawful Heir, and the Law prefers Legitimation before the Privilege of Infancy: Yet vid. 8 Co. 100. b. 101. a. where it is ſaid, that as to an Infant, Non compos, &c. being bound by ſuch Diſcent, the Opinions have been both Ways; but concludes it the better Opinion, that they ſhall be bound. Vid. Pl. Com. 372. (f) So if the Mulier be a Feme Covert. Co. Lit. 244. a.

5. If the Father leaſes for Life, or makes a Gift in Tail, rendring Rent, and dies, and the Baſtard receives the Rent, and dies, this ſhall bar the Mulier. *Co. Lit.* 15. a.

6. If Baſtard-Eigne enters, and the Mulier dies, his Wife priviment enſeint with a Son, and the Baſtard dies ſeiſed, leaving Iſſue, and after the Son of the Mulier is born, his Right is bound for ever. *Co. Lit.* 244. a.

7. So if a Man has Iſſue Two Daughters, the eldeſt being a Baſtard, and they enter, and occupy peaceably as Heirs, the Law, in Favour of Legitimation, adjudges not the whole Poſſeſſion in the Mulier, (who then has only right) but (g) in both, ſo as if the Baſtard has Iſſue, and dies, her Iſſue ſhall inherit. *Co. Lit.* 244. a.

(g) Co. Lit. 368. a. S. P. 8 Co. 101. b.

(E) Heir

(E) Heir.

What Things ſhall deſcend to the Heir or Executor.

(a) The Heir by Diſcent is intereſted in the Coat, and may have an Action. Cro. Jac. 367. reſolved.

1. IF a Nobleman, Knight, or Eſquire, be buried in a Church, and hath a (a) Coat of Armour and Pennons, with his Arms and ſuch other Enſigns of Honour as belong to his Degree or Order, put in the Church, or if a Grave-Stone or Tomb be laid or made, &c. for a Monument of him; in this Caſe, though the Freehold of the Church be in the Parſon, and theſe are annexed to the Freehold, yet the Parſon or any other cannot take them or deface them, but he is ſubject to an Action to the Heir and his Heirs, in Honour and Memory of whoſe Anceſtor they were put there. Mich. 10 Ja. B. (b) Pym's Caſe, per Curiam. Co. Lit. 18. b.

(b) Godb. 199, 200. S. C. & S. P. cited. Moor 878. Pl. 1232. S. C. but S. P. not cited. 12 Co. 104. S. C. & S. P. cited; for being put there for the Honour of his Anceſtor, they are in Nature of Heirlooms.

(c) Moor 878 Pl. 1232. a Caſe cited by the Chief Juſtice, where the Widow brought ſuch Action againſt the Parſon. 12 Co. 104, 105. cited. Godb. 200. cited.

2. And the (c) Wife or Executors that firſt erected them, may in the ſaid Caſe have an Action againſt thoſe that defaced them in their Time. Co. Lit. 18. b.

3. In ſome Places the Heir by the Cuſtom ſhall have the beſt Chattel of his Anceſtor, by the Name of an Heirloom. Co. Lit. 18. b.

(F) What Perſon may be Heir to another, and to whom.

(a) He cannot be an Heir, for eſt nullius Filius. Co. Lit. 8. a. 123. a. 2 Sid. 52. Noy 162. 1 Sid. 200.

1. (a) BAſtard-Brothers cannot be Heir one to another. 43 E. 3. 2. b.

2. A Monſter that has not humane Shape cannot be Heir, or inherit Land, though brought forth in Marriage; but though deformed in any Part, if he have humane Shape, he may be an Heir. *Co. Lit.* 7. b.

(b) 1 Part 321. Palm. 16.

3. If a Man hath Iſſue an Alien born out of the King's Ligeance, (b) he cannot be Heir, *propter Defectum Subjectionis.* *Co. Lit.* 8. a.

4. (c) So though made a Denizen by the King's Letters Patents. *Co Lit.* 8. a.

(c) The Denization of Two Brothers cannot make them inheritable the one to the other. 1 Sid. 195 Et vid. 1 Vent. 418, 419.

5. (d) Otherwiſe if naturalized by Act of Parliament. *Co Lit.* 8. a.

6. A Man attainted of Treaſon or Felony can (e) be Heir to no Man, nor (f) any Man Heir to him, *propter Delictum*; for by the Attainder his Blood is corrupted. *Co. Lit.* 8. a.

7. Ideots, Leapers, Madmen, Men attainted in a *Premunire*, or convicted of Hereſy, may be Heirs. *Co. Lit.* 8. a.

(d) 1 Part 323. (e) If the Iſſue in Tail be attainted of Felony, and after his Father dies, he cannot enter into the Lands, in reſpect of the Corruption of Blood upon the Attainder of himſelf. Co. Lit. 391. b. 392. a (f) But if pardoned, the Blood is reſtored, as to ſuch Iſſue as are born after. Co. Lit. 8. a. Co. Lit. 392. Dal. 14. —But having reſpect to thoſe whoſe Blood was corrupted at the Time of the Attainder, the Pardon removes not the Corruption of Blood either upward or downward. Co. Lit. 392. a.

(G) By Matter ſubſequent.

1. A (a) Baſtard may be Heir againſt a Stranger by (b) Continuance. 43 E. 3. 32.

(a) The Iſſue of Baſtard-Eigne may be Heir againſt the Mulier or Stranger, by his Father's Continuance of the Poſſeſſion to his Death. Co. Lit. 243. b. 244. a. —And though the Iſſue of the Baſtard endows the Wife of the Baſtard, yet is not the Entry of the Mulier lawful upon Tenant in Dower, for his Right was barr'd by the Diſcent. Co. Lit. 244. 8 Co. 101. b. (b) Otherwiſe where the Continuance of the Poſſeſſion is interrupted by the Mulier. Co. Lit. 245. a.

2. An Hermaphrodite, that is as well Male as Female, ſhall be Heir either as Male or Female, according to the Sex which prevails. Co. Lit. 8.

3. (c) If an Alien be made a Denizen, the Iſſue which he hath after ſhall inherit him, but not the Iſſue that he has before. Co. Lit. 8.

(c) 1 Part 322. Pl. 1. Cro. Jac. 593.

4. (d) If an Alien hath Iſſue in England Two Sons, theſe Sons are Denizens, and yet the one of them cannot be Heir to the other of them, becauſe there never was any inheritable Blood between the Father and them; and where the Sons could by no Poſſibility be Heir to the Father, the one of them ſhall not be Heir to the other. Co. Lit. 8.

(d) Palm. 18. S. P. arguendo. Noy 159. S. P. arguendo, con. 2 Sid. 150. S. P. per Glyn, Chief Juſtice, con. In Collingwood and Pais Caſe, 1 Levin. 60. S. P. cited; and ſaid, it was not the Opinion of my Lord Coke, for that he ſays only, that ſome have ſaid ſo; (but vid. his Co. Lit.) and the S. P. was in the Exchequer-Chamber agreed by Seven Judges againſt Three to be otherways, for that in a Mortdanceſter he might make Title as Heir to his Brother, without mentioning his Father. 1 Sid. 198. S. P. adjudged by all the Judges in the Exchequer-Chamber, except Three, this being ſaid to be the ſame as the principal Point there, viz. where Two Sons of an Alien were naturalized, &c.

5. If a Man hath Iſſue Two Sons, and after is attainted of Treaſon or Felony, the Sons may be Heir one to the other, for the Attainder of the Father corrupts the lineal Blood, but not the collateral Blood between the Brothers, which was veſted in them before the Attainder. Mich. 40, 41 El. in Scaccario, (e) Hobby's Caſe; quod vide, Co. Lit. 8.

(e) 4 Leon. 5. S. C. adjudged. Palm. 19. S. C. adjudged, the King and Bozaſton and Adams. Noy 158, 159. &c. largely and well debated, but no Judgment. 2 Rol. Rep. 93. S. C. cited, and agreed. Cro. Car. 543. S. C. cited. Lit. Rep. 28. S. C. cited con. 2 Sid. 25, 27. cited. Cro. Jac. 539. S. C. cited. 1 Vent. 425. S. C. cited.

6. (f) But if a Man be attainted of Treaſon or Felony, and after hath Iſſue Two Sons, in this Caſe they cannot be Heir one to the other, becauſe they never could be Heir to their Father, nor ever had any inheritable Blood in them. (g) Co. Lit. 8.

(f) 1 Sid. 201. S. P. con. and ſaid, that there was only the ſingle Opinion of my Lord Coke for it. (g) 2 Sid. 248. S. P. cited by Newdigate, Juſtice, and denied; and ſaid, that my Lord Coke confutes himſelf, Fol. 84. where he ſays, That if Feme Tenant in Chivalry marries an Alien, by whom ſhe hath Iſſue, ſuch Iſſue is inheritable; and yet ſuch Iſſue cannot have Two Bloods in him, his Mother being an Alien. Vid. 1 Inſ. 84. b. where it is admitted ſuch Iſſue ſhall be in Ward to the Lord; which could not be, if not capable of taking by Diſcent. And 1 Inſ. 12. it is ſaid, that ancient Authors have ſaid, that if a Man be ſeiſed of Lands in the Right of his Wife, and attainted of Felony, and after hath Iſſue, this Iſſue ſhall not inherit. But for this, vid. 3 Co. 41. a, b. Noy 159, 166, 168. Lit. Rep. 28. 1 Sid. 200. 1 Vent. 422.

7. He that is born deaf, and dumb, may be Heir to another. Co. Lit. 8.

Fol. 626.

8. So he that is born deaf, dumb, and blind, may be Heir to another. Co. Lit. 8.

9. If an Alien has Iſſue *A.* born in *Flandsrs*, and comes into *England*, and is made a Denizen, and after has Iſſue *B.* and dies, and *A.* is naturalized by Act of Parliament, and it is thereby enacted, (h) That *A.* ſhall be enabled to purchaſe, inherit and enjoy, as Heir to any Anceſtor lineal or collateral, and (i) ſhall be adjudged a natural Subject of *England* in every Reſpect to all Intents and Purpoſes, and *A.* after purchaſes Copyhold Lands, and dies without Iſſue, *B.* ſhall inherit. *Trin.* 17 *Jac.* between (k) *Godfry* and *Dixon*, *Cro. Jac.* 539. adjudged; though objected, that it was enacted, That *A.* ſhou'd be Heir to his Anceſtors lineal and collateral; but that it was not ſaid, that they ſhould be Heirs to him; and at the Death of his Father, *A.* had no inheritable Blood in him: And it was anſwered, that the Blood was not the Cauſe of the Diſability, but the Place of his Birth, for the Law reſpects not the Blood where there is no Allegiance.

(h) For the Effect and Expoſition hereof, vid. 1 Vent. 420, 421. the Argument of my Lord Chief Juſtice Hale.

(i) 2 Sid. 24.

(k) Palm. 13. 14. &c. S. C. adjudged.

2 Rol. Rep. 92, 93, &c. 113. S. C. adjudged. Godb. 275. S. C. adjornatur. 1 Sid. 201. S. C. cited. 1 Vent. 428. S. C. cited.

10. If an Alien has Iſſue *A. B.* and *C.* Aliens, and *B.* and *C.* are naturalized, and *B.* purchaſes Lands in Fee, and dies without Iſſue, *C.* may inherit theſe Lands, for he may make his Title thereto without mentioning his Father *Hill.* 1657. between (l) *Foſter* and *Ramſy*, 2 *Sid.* 23, 51, 148. adjudged *per totam Curiam.*

(l) Collingwood and Pais S. P.

the Words of the Naturalization being, That they ſhould inherit to any Anceſtor lineal or collateral, as fully to all Intents and Purpoſes as if they had been natural-born Subjects. 1 Levin. 55, 59. adjudged by Seven Judges againſt Three, upon an Adjournment into the Exchequer-Chamber, for the Diſcent between them is immediate, and he may make his Title in a Mordanceſter as Heir to his Brother, without mentioning his Father: And the Words of the Act of Parliament, which ſay he ſhall be inheritable to any Anceſtor lineal or collateral, are vain, if being deſcended from an Alien, he cannot have any Anceſtor. 1 Sid. 193, 198. S. C. adjudged by all the Judges except three, becauſe the Diſcent between the Brothers is an immediate Diſcent; and in caſe of an immediate Diſcent, there can be no Impediment but what is between the Parties themſelves; though it was argued by the Three Judges that held the contrary, that the Blood between the Brothers is communicated by the Parents, and the Impediment ariſes from the Failure of inheritable Blood in the Fountain. Et vid. 1 Vent. 413, &c. the Lord Chief Juſtice Hale's Argument in this Caſe: And 424. he ſays, That in a Diſcent between Brothers, the Law only reſpects the mediate Relation of the Brothers as Brothers, and not in reſpect of their Father; for if the Law took Notice of the Father as a Medium thereof, a Brother by a ſecond Venter might ſucceed the other Brother, becauſe he is Heir to his Father. 1 Vent. 424. Hard. 224.

(H) (a) What ſhall be an Impediment of a Diſcent.

(a) 1 Sid. 200. 1 Vent. 415, 416. &c. the Argument of my Lord Chief Juſtice Hale.

1. IF a Man hath Iſſue Two Sons, and the eldeſt is attainted of Felony, and (b) dies in the Life of the Father, and after the Father dies ſeiſed of Lands, this ſhall deſcend to the ſecond Son, or to the Daughters of the Father, if he hath no Son, for the Attainder of the elder Son did not corrupt the Blood between the youngeſt Son and the Father. (c) 46 Aſſ. 1. Curia. Co. Lit. 8. dubitatur. 27 E. 3. 77. b.

(b) This muſt be intended without Iſſue. Dyer 48. Pl. 16.

Hob. 334. Cro. Car. 435. 1 Jon. 34. (c) The Book warrants not the Opinion, therefore I ſuppoſe is miſprinted, and that it ſhould be Aſſ. Pl. 2.

2. (d) But if the eldeſt (e) Son being attainted of Felony, ſurvives the Father, (f) he ſhall be an Impediment (g) to his Brother or next Heir to have the Land by Diſcent from the Father. 26 Aſſ. (h) 1. adjudged. (i) 1 H. 4. Rotulo Parliamenti, Numero 132. a Petition was preferred, That where the eldeſt Son during the Life of his Father is attainted, the next Brother might notwithſtanding ſucceed as Heir to his Father, &c. To which it was anſwered by the King, (ii) Let the Common Law run. Co. Lit. 8.

(d) Cro. Car. 435. S. P. by Berkly, arguendo. 1 Jon. 34. S. P. arguendo.

(e) If a Man dies ſeiſed in Fee, leaving Iſſue only Two Daughters, one whereof was attainted of Felony in his Life-time, one Moiety ſhall deſcend to the one Daughter, and the other Moiety ſhall eſcheat. Co. Lit. 163. b. (f) 11 Co. 1. b. (g) And the Land ſhall eſcheat. Co. Lit 13. a. (h) This is miſprinted, and ſhould be 2. margine, cited. (i) N. Dyer 48. a. (ii) In the Original it is courge le commune Ley.

33. If a Man hath Iſſue an eldeſt Son, born out of the Allegiance of the King, and after hath Iſſue a younger Son born in the Realm, the youngeſt Son ſhall be Heir to the Father, and the eldeſt ſhall not be any Impediment to him, (k) becauſe the eldeſt never had any inheritable Blood in him. Co. Lit. 8.

(k) Diverſity where attainted, and where an Alien. 1 Levin. 60. 1 Sid. 195. 1 Vent. 413.

4. (l) If a Man has Iſſue a Son, and is after attainted of Treaſon or Felony, and then obtains his Pardon, and has Iſſue another Son, if the elder Son die, living the Father, the younger ſhall inherit, for the Pardon reſtored the Blood as to all Iſſue begotten afterwards. *Co. Lit.* 8. a.

(l) Co. Lit. 392. a. S. P.

5. (m) But if the eldeſt Son ſurvives the Father, the youngeſt cannot be Heir, becauſe he hath an elder Brother, which by Poſſibility might have inherited. *Co. Lit.* 8. a.

(m) Co. Lit. 392. a. S. P.

6. (n) If the Heir of the Crown be attainted of Treaſon, yet ſhall the Crown deſcend to him, and *eo inſtante*, without other Reverſal, the Attainder is utterly avoided, as it fell out in the Caſe of *Henry* VII. *Co. Lit.* 16. a.

(n) 7 Co. Calv. 12. a. S. P.

7. (nn) But if there be Grandfather, Father, and Son, and (o) the Father is attainted of Treaſon or Felony, and after is pardoned, and dies, the Son ſhall not demand the Land (p) as (q) Heir of the Grandfather, (r) for the Bridge is broke; and as the Father himſelf was barr'd, ſo is the Son. *Dalt.* 14. *per Bromley* and *Portman.*

(nn) Palm. 17. Cro. Car. 435.

(o) So if the Father had been an Alien, becauſe the Son could only inherit Jure Repreſentationis. 1 Sid. 195, 413. 1 Vent. 416, 417, 418, 423. (p) But if the Grandfather be Tenant in Tail, the Land in ſuch Caſe will deſcend to the Son, for the Attainder is no Corruption of Blood as to the Lands intail'd. 3 Co. 10 b. 8 Co. 166. a. per Formam Doni. (q) Nor as Heir of his Uncle, viz. his Father's Brother. Dyer 274. Pl. 40. Cro. Car. 543. 1 Vent. 416, 425. The Father's Corruption of Blood obſtructs the Tranſmiſſion of the hereditary Diſcent between the Grandfather and Son. Co. Lit. 1 Vent. 418.

(I) In

(I) In (a) what Cases a Man shall be said to be in by Discent or by Purchase.

(a) If the Daughter consents to a Ravisher, and the next Heir enters, and the Daughter dies, the Heir is now in by Discent. Lat. 72. Palm. 405.

1. If a Man devises Lands to one that is his Heir, this is void, and it shall operate by Discent. (b) Hobert's Reports 42. b. Couden's Case, for where there is not any Alteration of the Estate by the Devise of the Estate which the Law gives to him, he shall be in by Discent, which by Intendment is more for his Advantage, as to take away an Entry, and for a Warranty, and is the more ancient Title.

(b) Hob. Fol. 30. S. C. Vaugh. 271. S. P. Et vid. 2 Sid. 80.

(c) So if for Years. 2 Leon. 101. 3 Leon. 118. Hob. 30.

2. If a Man devises Lands to his Wife (c) for Life, the Remainder to J. S. who is his next Heir, in Fee, (d) this is a void Devise to J. S. and he shall be in after the Death of the Devisor by Discent; for the Alteration of the Estate in Reversion, which the Law gives him to a Remainder, which is given by the Devise, is not any Alteration of the Estate in point of Estate, and therefore he shall be said to be in by Discent, which is the more ancient and better Estate, and not by Purchase by Way of Remainder. Mich. 24 Car. B. R. between (e) Preston and Holmes, adjudged upon a special Verdict. Intratur, Tr. 23 Car. Rot. 252.

(d) If a Man makes a Lease for Life, or Gift in Tail, the Remainder to his own right Heirs, this is a void Remainder, and he hath the Reversion in him. Co. Lit. 22. b. —So if a Man leases for Life, the Remaindet to the Heirs Males of his own Body; for a Man cannat make his own right Heir a Purchaser without departing with the whole Fee-Simple out of him. Co Lit. 22. b. Hob. 30. 1 Vent. 372. —But if a Man makes a Feoffment in Fee to the Use of himself for Life, the Remainder to the Use of the Heirs Males of his Body, this is a good Estate-Tail executed in himself, and the Limitation good by Way of Use, because raised out of the Estate of the Feoffees, which the Feoffor departed with. Co. Lit. 22. b. —So if he covenants to stand seised to the Use of the Heirs Male of his own Body by a second Wife, for he took an Estate himself by Implication. Pybus and Wilford, 1 Vent. 372. 2 Levin. 75. Raym. 228. 1 Mod. 121, 159. Et vid. Southcot and Stowel, 1 Mod. 226, 237. 2 Mod. 207. (e) Styl. 148, 149. S. C. adjudged.

3. If a Man devises Lands held by Knights-Service to his Wife till J. S. who is his next Heir, comes to the Age of 24 Years, and at that Age he devises all to the said J. S. in Fee, and when he comes to the said Age of 24 Years, that his Wife shall have the third Part for her Life, and if J. S. dies before the Age of 24 Years, then the Land shall remain to the Wife during her Life, and after her Decease, (if J. S. have no Issue) the Remainder to his Daughter in Tail, the Remainder to the right Heirs of the Devisor; the Wife dies after the Heir comes to the Age of 24 Years: In this Case no Intail is made by the Will, but J. S. shall have it by Discent in Fee. D. 2, 3. Ma. 124, 38. adjudged.

4. If A. be seised of a Copyhold in Fee, and surrenders it to the Use of his Will, and after by his Will devises it to B. his Cousin for his Life, and after his Decease to the Heir of his Body begotten for ever: * In this Case the (f) Word Heir being limited to the Body of B. est Nomen collectivum, and all one with the Word Heirs; and the Words for ever, in Case of a Devise, makes a Fee, and is only put to shew his Intention, as is usual when Land is given to another and his Heirs for ever; and therefore in this Case this is a Fee executed in B. and his Heir is in by Discent, and not by Purchase; and it is not like to Archer's Case, Co. 1. where the Devise is to one for Life, and after to his Heir Male, and to the Heirs Male of such Heir Male; for there the Inheritance is limited to the Heir of the Body of the Heir

* Fol. 617.

(f) For this, vid. 1 Rol. Abr. 832. Pl. 1. and the Notes there.

Wale. P. 1651. adjudged in a Writ of Error upon a Judgment in Banco, upon a ſpecial Verdict between (e) Pawſey and Lowdall, and the Judgment given in Banco econtra reverſed for this Error. Intratur, P. 1650. Rot. 279. this reverſed by the Opinion of the Court, præter Juſtice Jermyn, who was of the contrary Opinion.

(e) Styl. 249, 273. S. C. adjudged.

5. If a Man leaſes to one for Life, the Remainder to the right Heirs of J. S. J. S. being dead at the Time, his right Heir hath the Remainder by Purchaſe. (f) 27 E. 3. 87.

(f) Fitz. Age 81. S. C.

6. (g) So the right Heir ſhall have the Remainder by Purchaſe, though J. S. was living at the Time of the Grant. (h) 27 E. 3. 87.

(g) Co. Lit. 22. b. S. P.

(h) Fitz. Age 81. S. C.

7. (hh) When the Anceſtor by any Gift or Conveyance (i) takes an Eſtate of (k) Freehold, and in the ſame Gift or Conveyance (l) an Eſtate is limited immediately to his Heirs in Fee or in Tail, there the Words, his Heirs, are Words of Limitation, and not of Purchaſe, for his Heir ſhall be in by Diſcent. Co. 1. Shelly 104. (m) 40 E. 3. 9. b. (n) 45 E. 3. 19. 17 E. 3. 43. b. 64. Contra, (o) 7 H. 4. 23. b.

(hh) For this bid. 2 Rol. Abr. 417. Pl. 3. 418. Pl. 4. and the Notes there.

(i) So where he retains an Eſtate. 1 Vent. 374.

(k) Otherways if for Years only. 1 Co. 104. a.

(l) But if a Leaſe is made to A. and B. and if A. dies before B. the Remainder to the Heirs of A. the Heirs of A. can take only by Purchaſe, for there was no Poſſibility that the Freehold and Fee could be conjoin'd in A. Lit. Rep. 258.

(m) Br. Diſcent 6. S. C.

(n) Br. Eſtates 7. S. C. Br. Nuper obiit 1. S. C.

(o) Fitz. Mortdanceſter 4. S. C.

8. So it will be if an Eſtate in Fee or in Tail to his right Heirs be limited mediately. Co. 1. Shelly 104. (p) 40 E. 3. 10. adjudged. (q) 11 H. 4. 74. (r) 24 E. 3. 36. (s) 27 E. 3. 87. b.

(p) Br. Diſcent 6. S. C.

(q) Fitz. Dower 27. S. C. Br. Dower 33. S. C.

(r) Fitz. Age 105. S. C.

(s) Fitz. Age 81. S. C.

9. If a Copyholder of Inheritance ſurrenders it to the Uſe of another and his Heirs, and he to whom the Surrender is made dies before Admittance, and after the Lord admits his Heir, (ss) he ſhall be ſaid in by Purchaſe, and not by Diſcent, for he is in by the Lord, for nothing was in his Father by the Surrender before Admittance. Tr. 40 El. B. Moore's Caſe.

(ss) If Borough-Engliſh, the youngeſt Son ſhall be admitted. Ante 184. Pl. 2.

10. If A. bargains and ſells Land to B. in Fee for Money, and after dies before Inrolment of the Deed, and after the Deed is inroll'd, his Heir ſhall be in by Diſcent; and if it be held in Capite, ſhall ſue Livery if he be of full Age, and ſhall be in Ward if within Age; (t) for upon the Inrolment it ſettles in the Bargainee, between the Bargainor and him, ab initio, by the Statute of Uſes; and the Statute of Inrolments ſays, That nothing ſhall paſs except it be inroll'd; ſo that if it is inroll'd, it veſts not by the Statute of Inrolments, but by the Statute of Uſes. (u) Hobert's Reports 184. Dimmock's Caſe.

(t) 1 Part 696.

(u) Hob. Fol. 136. S. C. Cro. Jac. 408. S. C. adjornatur. Ow. 149, 150. S. C. adjudged.

11. If *A.* being Tenant in Tail, hath Iſſue Two Sons, and the eldeſt having Iſſue a Daughter, dies, leaving his Wife priviment enſeint of a Son; and after *A.* covenants to ſuffer a Recovery to the Uſe of himſelf for Life, the Remainder to *C.* and *D.* for 24 Years, the Remainder to the Heirs Males of the Body of *A.* and dies at 5 in the Morning, and the Recovery paſſes the ſame Day, and an *Habere facias ſeiſinam* is immediately awarded, and in a few Days after executed, and the youngeſt Son enters, and after the Wife of the eldeſt is delivered of a Son; he may enter upon the youngeſt, for the youngeſt taking what his Anceſtor would have done if he had lived, he ſhall take it by Diſcent, and not by Purchaſe. *Trin.* 23 *Eliz.* (w) *Shelly's* Caſe, 1 *Co.* 93, 94, *&c.* adjudged, 98. ſeveral Caſes put upon the ſame Reaſon.

(w) Moor 136. Pl. 281. S. C. adjudged; for when the Heir takes that which his Anceſtor would have taken if living, he ſhall take it by Diſcent, and not by Purchaſe. 1 And. 69. S. C. adjudged.

(x) 3 Levin. 127, 128. S. P. per Curiam arguendo allowed.

12. (x) If a Man having only Two Daughters his Heirs, deviſes his Lands to them and their Heirs; (z) they take as Joint-tenants, and not as Coparceners, for the Deviſe giveth it them in another Degree than the Common Law would have it given them, and (a) for the Benefit of the Survivorſhip between them. (b) *Mich.* 37 *El. Cro. El.* 431. *per totam Curiam.*

(y) But if the Deviſe had been to one of them, and her Heirs, ſhe ſhould have taken the Whole by Deviſe, and nothing by Diſcent, for her Title was entire. Palm. 373. per Dodderidge. 2 Rol. Rep. 352. per Dodderidge. Et vid. 2 Sid. 79. (z) If to them and their Heirs, equally to be divided between them Share and Share alike, they are Tenants in Common. 2 Sid. 53, 78, 79. Et vid Godb. 362, 363. 3 Leon. 25, 26. Goulſ. 88. (a) If a Man deviſes Land to his Son and Heir apparent and a Stranger, they are Jointenants for the Benefit of the Stranger. Godb. 94. per Curiam. Ow. 65. (b) Ow. 65. S. C. & S. P. per Curiam.

(c) Cro. El. 833, 919, 920. S. C. adjudged, that the firſt Deviſe to the eldeſt Son and his Heirs in Fee

13. (c) If a Man deviſes Lands to his eldeſt Son, and his Heirs, paying 20 *l.* apiece to his younger Children, at their Ages of 21 Years, and upon Non-payment of the Legacies, deviſes the Lands to his younger Children, and their Heirs; the eldeſt Son is in by Diſcent, and there is no Limitation or Condition annexed to his Eſtate. *Hill.* 41 *Eliz.* between *Hamſworth* and *Pretty*, *Moor* 644. *Pl.* 891. adjudged.

being no more than the Law gave him, was void; but the Deviſe to the younger upon his Non-payment was good by Way of future or executory Deviſe. Vaugh. 271. S. C. cited. 3 Mod. 207. S. C. cited. 1 Rol. Abr. 411. Pl. 3. S. C. cited: Which vide, and the Notes there. 1 Leon. 101. 3 Leon. 216. 2 Sid. 79. 2 Mod. 7, 286.

14. If a Man deviſes Lands to his eldeſt Son and Heir, and his Heirs, upon Condition that he ſhall pay his Debts within a Year, and if he fails, that his Executors ſhall ſell the Lands, and pay his Debts, and dies, the Son hath it as a Purchaſer, being tied with a Condition. *Mich.* 5 *Car. Gilpin's* Caſe, *Cro. Car.* 161. adjudged.

15. If a Man being ſeiſed of Lands on the Part of his Mother, deviſes them to his Executors for 16 Years, and after to one who is his Heir *a Parte materna*, he ſhall take by Diſcent, for the Diſcent to the Heir *a Parte paterna* or *materna* is but a Conſequent dependent upon the Nature of the Eſtate. *Trin.* 35 *Car.* 2. between *Hedger* and *Row*, 3 *Levin.* 127. adjudged, tho' it was objected it was better for him to take by Purchaſe, for then the Heirs of the Part of the Father might inherit before the Heirs of the Part of the Mother, and ſo both Heirs would be inheritable.

(a) The Lands of the Crown concomitantia therewith, and deſcend to the half Blood. Co. Lit. 15. b. (b) Where there may be a Poſſeſſio Fratris of a Copyhold before Admittance, vid. 1 Rol. Abr. 502. Pl. 3. and the Notes there.

(K) (a) In what (b) Caſes it ſhall diſcend to the half Blood.

What ſhall be a (c) Seiſin to take away the Diſcent.

1. IF J. hath Iſſue Two Sons by ſeveral Venters, and dies ſeiſed of Socage Lands, and the Lord ſeiſes the Land to know who ſhall be his Tenant, and for the Safety of his Rent, and leaſes it for 7 Years for the Suſtainance of the Daughters of J. ſaving his Rent; this ſhall not make ſuch a Seiſin in the

(c) There may be a Poſſeſſio Fratris of an Uſe, Seigniory, Rent, Advowſon, and other Hereditaments. Co. Lit. 14. b. 3 Co. 41. b. 42. a. —So of Offices, Courts, Liberties, Franchiſes, Commons of Inheritance, &c. Co. Lit. 15. b. 3 Co. 42. a. —Of an Uſe. Dyer 10. Pl. 40. 274. Pl. 43. —But not of Dignities, as Duke, Marqueſs, &c. But the younger Brother being Heir to the Father, ſhall inherit the Dignity inherent to the Blood, as Heir to him that was firſt created Noble. Co. Lit. 15. b. And by no Act did he gain a meer actual Poſſeſſion (if it may be ſo call'd) than what by Law deſcended unto him. 3 Co. 42. b. Cro. Car. 601.

eldeſt, but that after his Death the ſecond Son ſhall have the Land. 34 Aſſ. 10. adjudged.

2. So if the eldeſt Son being an Infant, releaſes to the Abator after the Death of his Father, this does not make ſuch a Seiſin in him, but that it ſhall deſcend to the youngeſt Son. (d) 34 Aſſ. 10. adjudged.

3. But if the eldeſt Son being an Infant, enters upon the Abator, and makes a Feoffment, this ſhall bar the youngeſt of the half Blood, for this Entry made a Seiſin in him. 34 Aſſ. 10.

Fol. 628.

4. (e) If a Man leaſes for (f) Life, rendring Rent, and dies, having Iſſue Two Sons by ſeveral Venters, and the eldeſt Son dies before the Rent-Day, the ſecond Son ſhall have it as Heir to his Father, becauſe the eldeſt had not the actual Poſſeſſion. (g) 35 Aſſ. 2.

(d) Fitz. Diſcent 29. S. C.

(e) Cro. Car. 411. S. P. arguendo agreed per Curiam.

1 Jon. 361. S. P. arguendo agreed per Curiam. Et vid. N. Benl. 143. Pl. 202. 1 And. 31.
(f) If for Years, the Poſſeſſion of the Leſſee is the Poſſeſſion of the eldeſt. Co. Lit. 15. a. 243. a. 1 And. 47, 48. Kelw. 110. a. the Caſe there I preſume muſt be ſo intended. —So if Guardian by Knights-Service or in Socage enters, &c. Co. Lit. 15. a. (g) Br. Diſcent 28. S C. Br. Seiſin 25. S. C.

5. (h) But otherways it would have been if the Rent-Day had incurred in the Life of the eldeſt, and if he had received the Rent, for this would have made an actual Seiſin in him. (i) 35 Aſſ. 2.

(h) Co Lit. 15. a. dubitatur.

(i) Br. Diſcent 28. S. C. Br. Seiſin 25. S. C.

6. (k) If there be a Gift to the Baron and Feme in ſpecial Tail, the Remainder to the right Heirs of the Baron, and they have Iſſue, and the Feme dies, and the Baron takes another Feme, and hath Iſſue and dies, and the eldeſt Son enters, and dies without Iſſue, the ſecond Son of the half Blood ſhall have the Remainder, (l) becauſe the eldeſt was not ſeiſed thereof in his Demeſne. (m) 37 Aſſ. 14. adjudged; but there the Reaſon is given becauſe the Remainder did not commence till after the Gift. (n) 24 E. 3. 30. b. 31.

(k) Co. Lit. 14. b. S. P.

(l) Dyer 90. Pl. 5.

(m) Br. Diſcent 30. S. C. Fitz. Aſſiſe 327. S. C.

7. If Land be given to J. for Life, the Remainder to R. his Son in Tail, the Remainder to the right Heirs of J. and J. dies, and R. enters as Tenant in Tail, and dies without Iſſue, T. the Son and Heir of J. of the half Blood to R. ſhall have the Land by Diſcent, and not the Heirs of R. becauſe R. was never ſeiſed of the Fee in Demeſne. 39 E. 3. Diſcent 5.

(n) Fitz. Diſcent 11. S. C.

8. (nn) So if a Gift be to another in Tail, the Remainder to his own right Heirs, and after the Donee dies, having Iſſue a Son by one Venter, and a Son by another, and the eldeſt Son enters, and dies without Iſſue, his Brother of the half Blood ſhall have the Land by Force of the Remainder as Heir to his Father, becauſe his Brother was never ſeiſed of this Eſtate in Demeſne.

(nn) Co. Lit. 281. a. S. P.

9. So if the eldeſt Son be ſeiſed in Tail, with a Remainder or Reverſion by Diſcent to him from his Father in Fee, and dies without Iſſue, his Brother of the half Blood ſhall have this Remainder or Reverſion by Diſcent, becauſe his Brother was never ſeiſed thereof in Demeſne. 32 E. 3. Diſcent 9. adjudged. 5 E. 3. Diſcent 14. adjudged.

10. (o) If a Man ſeiſed of an Advowſon in Gross hath Iſſue a Son and a Daughter by one Venter, and a Son by another, and dies, and the eldeſt Son dies before any Preſentation, the youngeſt Brother ſhall have the Advowſon, becauſe the elder never had any Seiſin thereof. (p) 3 H. 7. 5.

(o) Co. Lit. 15. b. S. P.

11. But if the eldeſt had preſented, and died without Iſſue, the younger Brother ſhould not have had the Advowſon, becauſe this Preſentation put the Seiſin in him. Fitz. Nat. 36. Econtra, 19 E. 2. Quare impedit 177. adjudged.

(p) Br. Diſcent 32. S. C. Fitz. Diſcent 3. S. C.

12. If

12. If two Daughters by several Venters made Partition of an Advowson in Gross, to present by Turns, and after one dies without Issue, before any Presentation, the other shall have the Advowson, because there was no Seisin thereof. Fitz. Natura 34 E.

13. But otherways it would have been if she that had died had presented after the Partition. Fitz. Nat. 34 E.

14. If Lands descend to Two Coparceners, and they make Partition, being of the half Blood, and after one dies without Issue, the other shall not have it, because she ought to have it as Heir to her, and not as Heir to the Ancestor. Contra, 19 E. 2. Quare impedit 177.

15. If after the Entry of the eldest Son, the Wife of the Father is endowed of a third Part, and then the eldest dies, the younger of the half Blood shall have the Reversion of the third Part, because the actual Seisin which the elder Brother got was by the Endowment defeated. *Co. Lit.* 15. a.

16. Otherways if the eldest Son (q) had made a Lease for Life, and the Lessee had endowed the Wife of the Father. *Co. Lit.* 15. a.

(q) If having a Reversion expectant upon a Freehold, he grants it for Life, it shall cause a Possessio Fratris. Co. Lit. 191. b.

Fol. 629.

(L) To the half Blood.

Of what Estate.

(a) Co. Lit. 15. b. S. P. 3 Co. 41. b. S. P. (b) Br. Discent 31. S. C.

1. (a) AN Estate Tail may descend to the half Blood, notwithstanding an actual Seisin in the half Blood before, for there he comes in by the Statute de Donis, and so as Heir to the Donee. (b) 37 Ass. 15. adjudged. 32 E. 3. Discent. 8. adjudged. 19 E. 2. Quare impedit 177.

(c) Br. Discent 31. S. C. (d) Br. Mortdancester 27. S. C.

2. But an Estate in Fee shall not descend from him that is actually seised in Demesne of the Estate to his Brother, Sister, or Cousin of the half Blood. (c) 37 Ass. 15. admitted. (d) 40 Ass. 6. adjudged.

(M) (a) To take away an Entry.

In what Cases where the Entry is given by a Record.

(a) One of the Reasons of this ancient Law may be, for that by Intendment of Law the Heir cannot know the true State of his Title. Co. Lit. 237. b.

1. (b) IF a Man recovers against another that is seised in Fee, and after the Recoveree dies seised, and it descends to his Heir, yet this Discent shall not take away the Entry of the Recoveror, because he had but a Title of Entry, and the Entry is to execute the Judgment, and so relates to it, being executory against the Heir that is privy to the Judgment, that it binds the Blood. Contra, (c) 49 E. 3. 23. b. 7 H. 7. 14. b. 16 H. 7. 8. b. agreed clearly per Curiam. 3 E. 4. 7. (d) 6 E. 4. 11. b. 3 H. 7. 3. per Browne. 5 H. 7. 31. b. (e) 21 H. 8. 6. 17. b.

(b) Co. Lit. 238. a. S. P.

(c) Fitz. Entry congeable 35. S. C. (d) Br. Discent 37. S. C. Fitz. Mortdancester 3. S. C.

(e) Br. Bar 26. S. C.

2. So if the Recovery be againſt Tenant in Tail that dies ſeiſed, this Diſcent to the Iſſue ſhall not take away the Entry of the Recoveror, for the Cauſe aforeſaid. 33 E. 3. Entry Congeable 51.

3. So if I acknowledge the Right to another by Fine, and he grants and renders it to me again, and after dies ſeiſed, this Diſcent ſhall not take away my Entry, becauſe the Fine was executory; (it ſeems 33 E. 3. Entry congeable 51. is intended of a Fine come ceo which is executed.)

4. If a Man recovers againſt A. who after dies, having Iſſue Baſtard eigne and Mulier puiſne, and the Baſtard enters and dies ſeiſed, and this diſcends to his Iſſue, this Diſcent ſhall not take away the Entry of the Recoveror, for the Continuance of the Baſtard hath made him as Heir, and ſo privy to the Recovery. (f) 5 H. 7. 2. But quære, the Iſſue himſelf cannot baſtardize his Father. (f) Br. Entry congeable 104. S. C.

5. If a Man recovers Land, and after a Stranger to the Recovery dies ſeiſed, yet this ſhall not take away the Entry of the Recoveror, becauſe it was but a Title, and the Title relates to execute the Recovery of the Judgment.

6. (g) If a Man recovers againſt another, and entees and ſues Execution, and after the Recoveree diſſeiſes him, and dies ſeiſed, this Diſcent ſhall take away the Entry of the Recoveror, for the Recovery was executed, and cannot be returned again; and this is a puiſne Title. 3 E. 4. 7. Contra, (h) 10 H. 7. 5. b. Quære, 7 H. 7. 15. 5 H. 7. 31. b. (g) Co. Lit. 238. S. P. Kelw. 46. S. P. con. 170. a, b. a Diverſity taken where the Recoveree and where a Stranger enters, &c. But quære. (Fitz. Title 63. S. C.

7. If after Recovery againſt Tenant for Life he dies, and he in Remainder enters before Execution, and dies ſeiſed, the Entry of the Recoveror is not taken away, becauſe he is privy in Eſtate. *Co. Lit.* 238. a.

(N) Of what Things a Diſcent ſhall take away an Entry.

1. (a) If a Copyholder in Fee in Facto upon an Admittance dies ſeiſed of a Copyhold, and it diſcends to his Heir, yet it ſhall not take away the Entry of another that has Right to the Copyhold. Mich. 15 Ja. B. R. between Lee and Browne, agreed per Curiam, upon Evidence at the Bar. (a) Graveſnor and Ted S.P. 4 Co. 23. adjudged. Poph. 35. adjudged, becauſe coming in by Admittance of the Lord, his Occupation can be no Tort to him, and the Eſtate of which he died ſeiſed, by the Common Law, was only an Occupation at Will. Et vid. 4 Co. 22. a. Cro. Jac. 36. March 6.

2. A Diſcent of ſuch Things as lie in Grant, as Advowſons, Rents, Commons in Groſs, *&c.* puts not him that has Right to an Action. *Co. Lit.* 237. b.

(O) (a) Continual Claim.

(a) How to be made. Co. Lit. 252. b. 253. b. 254, &c. —Is an Entry in Law, and is * Fol. 630. as ſtrong and forcible as an Entry in Deed, and therefore upon ſuch an Entry an Aſſiſe lies. Co. Lit. 253. —It ſhall veſt a Seiſin and Poſſeſſion in him that makes it for his Advantage, but not for his Diſadvantage, and therefore if pending an Aſſiſe the Diſſeſee makes Claim, it ſhall not abate his Writ. Co. Lit. 253. b. 263. a. (b) So in Caſe of a Reverſion. Co. Lit. 252. a.

In what Caſes the Claim made by one ſhall ſerve for another.

1. If there be Tenant for Life, the Remainder over, and Tenant for Life makes a Claim, and after the Diſſeiſor, or he that is ſeiſed, &c. dies ſeiſed * within the Year, and after the Leſſee dies before Entry, yet he (b) in Remainder ſhall have Advantage of this Claim, becauſe he himſelf could not have made a Claim, and the Diſcent ſhall not bind the Leſſee; and therefore ſhall not bind the Remainder. Lit. S. 416.

(c) Co. Lit. 252. S. P. becauſe he in Remainder might have made Claim himſelf. Co. Lit. 252. a.

2. (c) But it ſeems in this Caſe, that if the Leſſee for Life makes a Claim, and dies, and after the Diſſeiſor dies ſeiſed within the Year, that this Diſcent ſhall bind the Remainder, becauſe he might have made a Claim after the Death of the Leſſee, and he is not privy to the Claim of the Leſſee not coming under him, and the Claim ought to be continuing till the Death, which it is not here; ergo,

(d) Co. Lit. 252. a. S. P.

3. (d) If Two Jointenants are diſſeiſed, and one makes Claim, and after the Deſſeiſor dies ſeiſed within the Year, it ſeems this ſhall not take away the Entry of the other Jointenant, but that this Claim by one ſhall ſerve for both, becauſe the Entry of one is the Entry of both, and otherways there would be a Severance of the Jointure, which cannot be by ſuch an Act.

4. But it ſeems in this Caſe, that if that Jointenant that made a Claim dies, and after the Diſſeiſor dies ſeiſed within the Year after the Claim made, that this Diſcent ſhall take away the Entry of the Survivor for the Whole; for that though the Claim of one ſhould ſerve for both during their Lives, by a Conſequence to avoid the Severance of the Jointure, yet this Miſchief is not in this Caſe, and the Survivor comes paramount the Claim, and ſo not privy to it, and ſo the Claim is determined before the Death of the Diſſeiſor, and as it ſeems the Claim ought to continue till the Dying ſeiſed. But quære this, for it hath been argued for a Point.

5. If the Tenant be diſſeiſed, and make continual Claim, and dies without Heir, and after the Diſſeiſor dies ſeiſed within the Year, this ſhall bind the Lord by Eſcheat, becauſe he comes paramount the Claim, and not in Privity thereof; and he might have made a Claim after the Eſcheat.

6. If the Baron makes a continual Claim, and dies, and after the Diſſeiſor dies ſeiſed within the Year after the Claim, yet it ſeems the Wife ſhall be bound, becauſe ſhe is not privy to the Claim, nor comes under it, and ſhe her ſelf might have made a Claim: But quære this.

(e) Co. Lit. 250. b. S. P. con. for the Claim made by the Father ſhall never avail him that might have made Claim himſelf (f) Where the Diſcent is caſt in the Time of the Father, the Right of Entry which the Father gained by his Claim diſcends to his Son. Co. Lit. 250. b.

7. (e) If the Father be diſſeiſed, and makes concinual Claim, and dies, and (f) after the Diſſeiſor dies ſeiſed within the Year after the Claim, yet this ſhall not bind the Heir of the Father, becauſe he comes in under the Father, and in Privity of Blood

and Eſtate, and therefore he ſhall have Advantage of the Claim of the Father, without any new Claim by himſelf, (g) 9 H. 4, 5. Curia. Lit. S. 421. admit the Claim ſhall ſerve for him and his Heirs. Contra, 15 E. 4. 22.

(g) Br. Continual Claim 1. S. C.

8. If a Prior be diſſeiſed, and makes continual Claim, and dies, and after the Diſſeiſor dies ſeiſed within an Year after the Claim, in the Time of the Succeſſor, this ſhall not bind him, becauſe he comes in in Privity of him that made the Claim, and under him. Contra, (h) 22 H. 6. 37. b.

(h) Br. Continual Claim 2. S. C.

Baſtard Eigne.

(a) Interruption of his (b) Poſſeſſion.

(a) What Act ſhall be vid. Co. Lit. 245. b.

1. IF a Baſtard Eigne enters, and is ouſted by the Mulier, and after the Baſtard diſſeiſes the Mulier, and dies ſeiſed, and his Iſſue enters, the Right of the Mulier is not bound, but he may have a Writ of Entry *ſur Diſſeiſin, &c.* againſt the Iſſue of the Baſtard, *&c. Lit. Sect.* 401.

(b) To bar the Mulier, he muſt enter in vacuam Poſſeſſionem, and continue during Life without Interruption. Co. Lit. 245. b.

2. But if the Mulier enters upon the Baſtard, and the Baſtard after recovers the Land in an Aſſiſe againſt the Mulier, and after the Baſtard dies ſeiſed, this ſhall bar the Mulier, for the Interruption was avoided. *Co. Lit.* 245. b.

(a) Diſcent.

To take away an Entry.

Who ſhall be bound thereby.

(a) In ſuch Caſes only where there is a Dying ſeiſed. Co. Lit. 237. b. —Not upon an Entry into Religion. Co. Lit. 248. b.

1. A Diſcent ſhall not take away the Entry of an Infant. *Lit. Sect.* 402.

—Upon a Diſcent, not upon an Eſcheat. Co. Lit. 240. a. —Nor where upon a Dying ſeiſed, Lands go to another by Succeſſion. Co. Lit. 240. a. 2 Inſt. 255.

2. Nor of a Feme Covert, where the Wrong was done to her during the Coverture. *Lit. Sect.* 403.

3. But if a Feme Sole is diſſeiſed, and then takes Husband, and the Diſſeiſor dies ſeiſed, and her Husband dies, ſhe cannot enter, for it ſhall be accounted her Folly to take ſuch a Husband as would not enter before a Diſcent. *Co. Lit.* 246. a.

4. Otherways if the Woman was under Age when ſhe took Husband. *Co. Lit.* 246. b.

5. It ſhall not take away the Entry of one that is *Non compos. Lit. Sect.* 405.

6. Nor of him that is diſſeiſed, and a Diſcent caſt while he is (b) in Priſon. *Lit. Sect.* 436. b.

(b) So if out of the Realm. Lit. Sect. 440.

7. (c) But if diſſeiſed while at large, and a Diſcent is caſt during his Impriſonment, it will bind him. *Co. Lit.* 259. a.

8. So if (d) diſſeiſed, being in the Realm, and a Diſcent is caſt while he is out of the Realm. *Co. Lit.* 261. b.

(c) Lit. Rep. 88. S. P. arguendo. (d) If being diſſeiſed when out of the Realm, he returns into the Realm, and after goes out of the Realm, and then the Diſſeiſor dies, &c. Dyer 143. Pl. 57. quære. Et vid. 1 And. 311.

9. If

9. If an Abbot had died, and a Man during the Vacation had entred upon the Lands of the Monaſtery, and thereof died ſeiſed, and after an Abbot had been made, this Diſcent would not have barr'd his Entry, for that the Convent in Time of Vacation could not make continual Claim. *Lit. Sect.* 444.

10. If the Lord of a Manor leaſes it to one for Life, and a Tenant of the Manor dies without Heir, and a Stranger enters, and dies ſeiſed, and the Tenant for Life dies, *&c.* (e) the Diſcent binds the Lord; for it was his Folly that he would leaſe the Manor to one that would not enter. *Kelw.* 144. *per Keble*, who ſaid he might have a Writ of Eſcheat.

(e) Where ſuch Leſſor might make continual Claim, and conſequently for Want thereof ſhall be bound by the Diſcent. Co. Lit. 250. b. Et vid. 1 Rol. Abr. 630. Pl. 1. Jon. 324.

In Reſpect of his Right or Eſtate.

1. IF *A* enfeoffs *B.* upon Condition, and *B* is diſſeiſed, and the Diſſeiſor dies ſeiſed, and the Condition is broke either before or after the Diſcent, the Entry of *A.* is not taken away, for the Eſtate is ſubject to the Condition, into whoſe Hands ſoever it comes. *Lit. Sect.* 391, 392. The Title of Entry in the Feoffor or Donor, that hath but a (a) Condition, cannot be taken away by any Diſcent, becauſe he has no Remedy by Action to recover the Land; and if a Diſcent ſhould take away his Entry, it ſhould bar him for ever. *Co. Lit.* 240. a. And the Condition remains in the ſame Eſſence it was at the Time of the Creation, and cannot be diveſted, and put out of Poſſeſſion as Lands, *&c.* 240. b.

(a) So of a Title of Entry upon a Limitation. Cro. El. 920. Noy 51. — Or Power given by Will to ſell Lands. Kelw. 40. b.

2. (b) So he that has Title to enter upon a Mortmain ſhall not be barr'd by a Diſcent, becauſe then he ſhould be without Remedy. *Co. Lit.* 240. b.

(b) 1 Leon. 210. S. P. per Curiam.

3. And if *A.* deviſes Lands to *B.* and dies, and the (c) Heir of *A.* enters, and dies ſeiſed before any Entry made by *B.* this Diſcent ſhall not take away the Entry of *B.* (d) for if it ſhould take away his Entry, it ſhould bar him of his Right, and leave him utterly without Remedy. *Co. Lit.* 240. b.

(c) Diverſity where the Heir and where a Stranger enters, and dies ſeiſed, &c. 2 Leon. 190. Cro. El. 920. Ow. 97. But Q. of this Diverſity: Et vid. 1 Leon. 210, 211. 2 Leon. 147. Noy 51. Cro. Car. 200, 201.

(d) But where Lands were deviſable by Cuſtom, a Man might have a Writ of ex gravi Querela, without any particular Uſage, as incident to the Cuſtom; and a Diſcent in ſuch Caſe ſhould have bound the Deviſee. Co. Lit. 111. a.

4. So of him that has Title to enter for Conſent to a Raviſhment of the Patentee of the King, *&c.* *Co. Lit.* 240. b.

5. If a Man dies ſeiſed of Lands, his Wife being privement enſeint of a Son, and a Stranger abates, and dies ſeiſed, and after the Son is born, he ſhall not be bound by the Diſcent, becauſe at that Time he had no Right to enter. *Co. Lit* 245. b.

6. The Entry of Tenant for Years, Tenant by Statute-Merchant, *&c.* that have but a Chattel, is not taken away by any Diſcent, for by their Entry upon the Heir they take no Freehold from him. *Co. Lit.* 249. a.

Diſcent.

To take away an Entry.

(a) In what Caſes.

(a) At Common Law, if the Diſſeiſor, Abator, or Intruder, had died ſeiſed ſoon after the Wrong done, the Diſſeiſee and his Heirs had been barr'd of their Entry. Co. Lit. 238. a.

1. IF a Diſſeiſor make a Gift in Tail, and the Donee diſcontinues, and diſſeiſes the Diſcontinuee, and dies ſeiſed, the Entry of the Diſſeiſee is not taken away, for the Diſcent of the Fee-ſimple is vaniſhed and gone by the Remitter, and the Iſſue is in by Force of the Eſtate-Tail, of which the Donee did not die ſeiſed *Co. Lit.* 238 b.

2. If a Man be diſſeiſed in Time of Peace, and a Diſcent caſt in the Time of War, this will not take away the Entry of the Diſſeiſee. *Co. Lit.* 249. b.

3. By 32 *H.* 8. *c.* 33. Whereas divers have entred by Strength, and without Title, *&c.* the Dying ſeiſed of (b) ſuch (b) Diſſeiſor ſhall not take away the Entry of any Perſon or Perſons, or their (d) Heirs, (e) which at the Time of the ſaid Diſcent had Title of Entry, except ſuch Diſſeiſor had been in peaceable Poſſeſſion by the Space of 5 Years after the Diſſeiſin, without Entry or continual Claim, *&c.*

(b) The Statute is taken favourably for the Advancement of Juſtice, and extends to a Diſſeiſin without Force. Co. Lit. 238. a. Dyer 219. Pl. 7. (c) The Statute being penal, extends not to Abators or Intruders, but only to Diſſeiſors, which was the moſt common Miſchief. Co. Lit. 238. a. —Nor to the Feoffee of a Diſſeiſor. Co. Lit. 238. a. 256. a (d) Extends to the Succeſſors of a Body Politick diſſeiſed, Co. Lit. 238. a. (e) If Leſſee for Life is diſſeiſed, and the Diſſeiſor dies ſeiſed within five Years, the Leſſee may enter; but if he dies before Entry, the Entry of him in Reverſion or Remainder is not lawful. Co. Lit. 238. a. —But if Leſſee for Life had died firſt, and then the Diſſeiſor had died ſeiſed, he in the Reverſion, &c. had been within the Remedy of the Statute, becauſe he had Title of Entry at the Time of the Diſcent. Co. Lit. 238. a. —Where the Diſſeiſee dies without Heir, vid. Hob. 243.

(a) In ſuch Caſes only where the Diſcent is immediate.

(a) Dal. 116 a.

1. IF a Diſſeiſoreſs takes Husband, has Iſſue, and dies ſeiſed, and after the Husband dies, and the Iſſue enters, *&c.* the Diſſeiſee may enter, for that the Iſſue came not to the Land immediately by Diſcent after the Death of his Mother, but by the Death of his Father. *Lit. Sect.* 394. And the Eſtate of the Tenant by Curteſy commenced by having Iſſue, and was conſummate by the Death of the Wife, ſo as the Fee and Freehold did not after the Death of the Wife immediately deſcend to the Heir. *Co. Lit.* 241. b.

2. If the Diſſeiſor dies without Heir, his Wife being enſeint, and after the Iſſue is born, and enters into the Land, though he has it by Diſcent, yet the Entry of the Diſſeiſee is not taken away, becauſe the Iſſue came not to the Land immediately by Diſcent, *Co. Lit.* 241.

In Reſpect of the Perſons.

Not where both Claim by the ſame Title.

1. IF a Man having Iſſue Two Sons, dies ſeiſed of Land in Fee-Simple, and the (a) younger Son enters by Abatement, hath Iſſue, (b) and dies ſeiſed, the Entry of the elder or his Iſſue is not taken away, for it ſhall be preſumed the younger entred claiming by the ſame Title, *viz.* as Heir to his Father. *Lit. Sect.* 396. So though many Diſcents are caſt in his Line, yet may the eldeſt or his Heirs enter. *Co. Lit.* 242. b.

(a) Though of the half Blood, for he is of the whole Blood to the Father. Co. Lit. 242. b.

(b) But if he makes a Feoffment, and the Feoffee dies ſeiſed, &c. the Entry of the elder is taken away, becauſe the Privity of Blood fails. Co. Lit. 242. b.

2. But if the elder Son enters after the Death of his Father, and the (c) younger diſſeiſes him, has Iſſue, and dies ſeiſed, the Entry of the elder is taken away, for entring by Diſſeiſin upon his Brother it cannot be intended he claimed as Heir to his Father, any more than if a Stranger had diſſeiſed the elder Brother. *Lit. Sect.* 397.

(c) So if a Stranger abates and the younger diſſeiſes him, and dies ſeiſed, &c. Co. Lit. 242. b.

3. But if Lands are given to Husband and Wife and the Heirs of their Two Bodies, and they have Iſſue a Daughter, and the Wife dies, and the Husband has Iſſue a Son by another Wife, and dies, and the Son abates, and dies ſeiſed, this Diſcent takes away the Entry of the Daughter. becauſe they claimed not by one Title. *Co. Lit.* 242. b.

4. So if the Father leaſes (d) for Life, and dies, and the Tenant for Life dies, and the younger Son intrudes, and dies ſeiſed, the Entry of the elder is not taken away. *Co. Lit.* 243. a.

(d) If for Years, &c. the Poſſeſſion of the Leſſee makes an actual Freehold in the eldeſt. Co. Lit. 243.

Diſcent.

To take away an Entry.

(a) Of what Eſtates.

(a) In Fee or Tail. Lit. Sect. 385, 386. —Not for Life only. Lit. Sect. 387. —Muſt be of the Fee and Freehold. Lit. Sect. 388.

1. IF a Diſſeiſor leaſes to *A.* and his Heirs during the Life of *J. S.* and *A.* dies, living *J. S.* this takes not away the Entry of the Diſſeiſee, becauſe the dying ſeiſed was of a Freehold only, and Heirs were added to prevent an Occupancy. *Co. Lit.* 239. a.

2. But if the Reverſioner diſſeiſes the Tenant for Life and dies ſeiſed, this Diſcent ſhall take away the Entry of the (h) Tenant for Life. *Co. Lit.* 239 a.

(b) But not of a Stranger. Hob. 323.

3. If the Diſſeiſor of the King's Tenant for Life dies ſeiſed, this takes not away the Entry of the Tenant for Life, becauſe the Diſſeiſor had but an Eſtate of Freehold during the Life of the Leſſee. *Co. Lit.* 239. a.

4. If the Diſſeiſor of an Infant dies ſeiſed, and after the Infant comes of Age, and the Heir of the Diſſeiſor dies before Entry, though he died not ſeiſed of an actual Seiſin, but of a Seiſin in Law, and in Pleading the ſecond Heir muſt make himſelf Heir to the Diſſeiſor, yet this dying ſeiſed takes away the Entry of the Diſſeiſee. *Co. Lit.* 239. b.

5. If a Diſſeiſor leaſes for Years, and dies ſeiſed of the Reverſion, the Entry of the Diſſeiſee is taken away, becauſe he died ſeiſed of the Fee and Freehold. *Co. Lit.* 239. b.

6. Otherways if he had leaſed for Life, *&c.* *Co. Lit.* 239 b.

7. If a Diſſeiſor leaſes for his own Life, and dies, the Entry of the Diſſeiſee is not taken away, for though the Fee and Freehold deſcends to the Heir of the Diſſeiſor, yet the Diſſeiſor died not ſeiſed of the Fee and Freehold. *Co. Lit.* 239. b.

Where the Entry that was taken away is revived.

1. IF a Diſſeiſor makes a Gift in Tail, and the Donee hath Iſſue and dies ſeiſed, the Entry of the Diſſeiſee is taken away; but if the Iſſue dies without Iſſue, (a) ſo as the Eſtate-Tail which deſcended is ſpent, the Entry of the Diſſeiſee is revived. *Co. Lit.* 238. b.

(a) But if the Diſſeiſor dies ſeiſed, and the Heir of the Diſſeiſor dies without Heir, the Diſſeiſee cannot enter upon the Lord by Eſcheat. Co. Lit. 240. a.

2. So if the Son diſſeiſes one, and enfeoffs the Grandfather, who dies ſeiſed, and the Lands diſcend to the Father, now is the Entry of the Diſſeiſee taken away; but if the Father after dies ſeiſed, and the Lands diſcend to the Son, the Entry of the Diſſeiſee is revived. *Co. Lit.* 238. b.

3. So if after ſuch Diſcent caſt, the Diſſeiſor (b) takes back an Eſtate (c) for Life or in Fee, the Diſſeiſee may enter upon him. *Co. Lit.* 238. b.

(b) Cometh to the Land again either by Diſcent or Purchaſe. Co. Lit. 242.
(c) Though he takes back but an Eſtate for Life, yet when the Diſſeiſee enters upon him, he ſhall diveſt the Reverſion, for the Eſtate of Freehold is that whereupon a Præcipe lies, and the Entry of the Diſſeiſee is as available in Law as if he had recovered in a Præcipe. Co. Lit. 241. a.

4. If a Diſſeiſor leaſes to an Infant for Life, and he is diſſeiſed, and a Diſcent caſt, and the Infant enters, the Diſſeiſſee may enter upon him. *Co. Lit.* 238. b.

5. If after a Diſcent caſt, the Heir of the Diſſeiſor, *&c.* endows the Wife of the Diſſeiſor of a third Part, the Diſſeiſee may enter into this third Part, for the Wife ſhall not be in by the Heir, but immediately by her Husband by Title paramount the Diſcent; and therefore, in Judgment of Law, the Freehold and Poſſeſſion which the Heir had by the Diſcent, is taken away by the Endowment. *Co. Lit.* 241. a.

6. If after the dying ſeiſed of the Diſſeiſor, the Diſſeiſee abates, and the Wife of the Diſſeiſor recovers Dower againſt him by Confeſſion in a Writ of Dower, though the Diſcent be avoided, yet the Diſſeiſee cannot enter upon the Tenant in Dower, becauſe the Recovery was againſt himſelf. *Co. Lit.* 241. a. But if he had aſſigned her Dower in *Pais*, ſome ſay he ſhould have entred upon her.

7. If an Infant being a Diſſeiſor aliens in Fee, and the Alienee dies ſeiſed, and the Infant enters upon the Heir of the Alienee, the Deſſeiſee may enter upon him; for by the Entry of the Infant the Diſcent is defeated. *Lit. Sect.* 407, 408.

8. If the Diſſeiſor makes a Feoffment upon Condition, and the Feoffee dies ſeiſed, and the Feoffor enters upon the Heir for Breach of the Condition, the Diſſeiſee may enter upon him, becauſe by the Entry of the Diſſeiſor the Diſcent is utterly defeated. *Lit. Sect.* 409.

Continual Claim.

Who may make it.

1. THE Leſſor upon a Leaſe for Life or Years may enter to make Claim. *Co. Lit.* 250. b.

2. If the Diſſeiſee made continual Claim, and the Diſſeiſor died ſeiſed within the Year, his Heir being within Age, and the King by Office was entitled to the Wardſhip, though the Entry of the Diſſeiſee was not lawful, yet might he make continual Claim to avoid a Diſcent. *Co. Lit.* 250. b.

Diſclaimer.

(A) Of what Things and Eſtates a Diſclaimer may be, and of what not.

(a) Fitz. Diſclaimer 10. S. C. Br. 7. S. C.

1. A Man cannot diſclaim in the Principal, and not in the Incidents, as he that is vouched becauſe of a Reverſion cannot diſclaim in the Reverſion, ſaving the Seigniory. (a) 40 E. 3 27.

(B) In what Actions.

Fol. 631.

(a) Br. Diſclaimer 9. S. C.

1. A Man cannot diſclaim in a Writ of Meſne. Quære, (a) 44 E. 3. 2. b. Temp. E. 1. 65. b. William Affordeby's Caſe adjudged; and by this the Meſne is forejudged of his Meſnalty.

2. The Plaintiff in a Recaption may diſclaim. 47 E. 3. 22.

(b) Fitz. Diſclaimer 8. S. C. Br. 12. S. C.

3. In a Per quæ ſervitia the Tenant ſhall not diſclaim, but ſhall ſay that he did not hold of him the Day of the Note levied. (b) 11 H. 4. 72. b.

(C) What Perſons may.

1. SUch Perſon as cannot loſe the Thing perpetually in which he diſclaims ſhall not be ſuffered to diſclaim.

(a) Lit. Sect. 146. S. P.

2. (a) As an Abbot cannot diſclaim. (b) 40 E. 3. 27. b. 20 H. 6. 46. Curia.

(b) Br. Diſclaimer 10. S. C. Br. 7. S. C.

3. (c) A (d) Biſhop cannot diſclaim, for he cannot diveſt the Right out of the Church. (e) 40 E. 3. 27. b.

(c) Co. Lit. 102. b. (d) So of a Dean, Archdeacon, Prebend, &c. or other ſole Corporation ſeiſed in auter Droit. Co. Lit. 102. b. 103. a. (e) Br. Diſclaimer 10. S. C. Br. 7. S. C.

4. Baron and Feme may diſclaim for the Feme. 3 H. 6. 29.
5. If the Baron hath nothing but in the Right of his Feme, he cannot diſclaim. Contra. (f) 9 H. 6. 52.
6. In an Avowry Baron and Feme cannot diſclaim, for if they have Matter of Diſclaimer, they ought to plead it. (g) 22 E. 3. 5. b.
7. An Infant Vouchee, becauſe of a Reverſion deſcended to him, cannot diſclaim in the Reverſion. 50 E. 3. 25. b.
8. (h) In a *Quo warranto*, at the Suit of the King againſt a Biſhop, Abbot, or Prior, for Franchiſes and Liberties, if the Biſhop, Abbot, or Prior, diſclaimed in them, this ſhall bind their Succeſſors. *Co. Lit.* 803. a.

(f) Br. Diſclaimer 44. S. C. Br. Baron 79. S. C.
(g) Fitz. Diſclaimer 14. S. C.
(h) 3 Bulſ. 15. S. P.

(D) Who in Reſpect of their (a) Eſtates may diſclaim.

(a) The Lord avows upon Two Jointenants, and one diſclaims, and the other pleads in Bar. Kelw. 121 b. debated, whether the Diſclaimer was good.

1. If Leſſee for Years brings a Replevin, and an Avowry is made upon the Leſſor, who joins to the Leſſee, they both may diſclaim. (b) 45 E. 3. 8.
2. So if the meſne joins to the Tenant, they may diſclaim. (c) 45 E. 7. b.
3. In an Avowry upon Leſſee for Life for Rent he cannot diſclaim for the Prejudice of him in Reverſion. 20 H. 6. 46. 28 E. 3. 96. for the Lord cannot have a Writ of Right upon the Diſclaimer of ſuch Leſſee; ergo,
4. He in Reverſion being vouched by Tenant in Dower, cannot diſclaim in the Reverſion, 50 E. 3. 25. b. againſt his own Leaſe. 20 H. 6. 24. 17 E. 3. 39. b.
5. But the Heir may diſclaim, being vouched upon a Leaſe made by his Anceſtor. 20 H. 6. 24. 18 E. 3. 42. b. adjudged; 38 E. 3. 32. b.
6. So if a Man be vouched becauſe of a Reverſion purchaſed by Fine, he may diſclaim againſt the Fine. 20 H. 6. 24. Contra, 17 E. 3. 39 b. Curia.
7. A Diſſeiſor may diſclaim. 45 E. 3. 8.
8. If a Man be vouched becauſe of a Reverſion upon a Leaſe made by himſelf, he cannot diſclaim. 17 E. 3. 39. b. Curia.

(b) Br. Diſclaimer 12. S. C. Br. 10. S. C.
(c) Br. Diſclaimer 12. S. C.

(E) The Place

1. The Diſclaimer refers to to Place where the Avowry is made. 40 E. 3. 33.

(F) How it may be.

(a) Fitz. Diſclaimer 14. S. C.
(b) Br. Diſclaimer 18. S. C. 40. S. C.

1. In an Avowry the Plaintiff cannot diſclaim by Attorney becauſe the Avowant cannot have a Writ of Right ſur Diſclaimer thereof. (a) 22 E. 3. 6. b.
2. in a Mortdanceſter the Tenant may diſclaim for his Maſter. (b) 22 Aſſ. 25.

(G) Writ thereupon.

Againſt whom the Writ of Right *ſur Diſclaimer* lies.

(a) Fitz. Diſclaimer 12. S. C.

1. IT is not neceſſary that the Writ ſhould be brought againſt him that diſclaims, for it ſhall be but only againſt him that is found Tenant of the Land, and againſt no other, be he a Stranger, it is not material. (a) 45 E. 3. 7. b.

(b) Fitz. Diſclaimer 12. S. C.

2. If the Meſne joins to the Tenant, and both diſclaim, the Writ ſhall be brought only againſt the Tenant. (b) 45 E. 3. 7. b.

Diſclaimer.

The Effect thereof.

(a) By the ſame Services as the Meſne diſclaiming held before. Co. Lit. 102. a.

1. IF the Lord diſclaims in his Seigniory in a Court of Record, it is extinct, and the Tenant ſhall (a) hold of the Lord next paramount to the Lord diſclaiming. *Lit. Sect.* 146.

2. In a Formedon in Deſcender, if the Tenant diſclaims, the Demandant cannot aver his Writ, and ſay he is Tenant, as the Writ ſuppoſes, but pray his Judgment, and enter. *Lit. Sect.* 691. *Co. Lit.* 361. b.

3. But in a Writ of Entry *ſur Diſſeiſin* in the *per*, againſt the Heir of the Diſſeiſor, if the Heir diſclaims in the Tenancy the Demandant may aver his Writ, that he is Tenant as the Writ ſuppoſes, in order to recover his Damages. *Lit. Sect.* 692.

4. In a Formedon in Reverter, if the Tenant pleads Non-tenure generally, the Demandant may maintain his Writ that he is Tenant, though he can recover no Damages. *Trin.* 4 *Will. & Mar.* between *Hunlock* and *Peter*, 3 *Lev.* 330. adjudged by all the Court, and that *Lit.* and *Co.* were not to be intended of a Simple Plea of Non-tenure, but of Non-tenure with a Diſclaimer, as the Pleadings were uſually in *Littleton*'s Time; for upon the Simple Plea of Non-tenure, ſuppoſing the Tenant hath no Freehold, but a Reverſion in Fee, the Demandant ſhall not be reſtored to the Fee, for Nothing is diſown'd by the Simple Plea of Non-tenure but only the Freehold, which may be true, and yet he may have the Reverſion in Fee; but when the Tenant diſclaims or pleads Non-tenure, and diſclaims, the Demandant ſhall be reſtored to the Whole, becauſe he hath diſclaimed the Whole.

(a) Diſcontinuance.

(a) Quid eſt. Co. Lit. 326.

(A) What Act or Thing ſhall make a Diſcontinuance.

1. (b) If a Tenant in Tail of a Copyhold (admitting there may be an Eſtate Tail thereof) ſurrenders the Copyhold to certain Uſes, &c. this is no Diſcontinuance. Mich. 15 Ja. B. R. between Lee and Browne, upon Evidence at the Bar, the Court ſeemed to incline ſo, and admitted it in their Charge to the Jury; but they ſaid it had been a great Queſtion.

(b) For this, vid. 1 Leon. 95. 1 Brownl. 44, 79. Moor 637. Pl. 877. Cro. El. 485. Vid. ante 192.

2. But by a Cuſtom ſuch Surrender may be a Diſcontinuance, Mich. 15 Ja. B. R. between Lee and Browne, upon Evidence at the Bar, the Court directed the Jury to enquire whether there was ſuch Cuſtom.

3. If a Baron ſeiſed of a Copyhold in the Right of his Wife, ſurrenders it to the Uſe of another in Fee, who is admitted accordingly, this is not any Diſcontinuance to the Feme. Co. 4. (c) Bullock and Dabley 23. adjudged.

(c) Moor 596. Pl. 813. S. C. adjudged. Poph. 138 S. C. adjudged; yet vid. Cro. Jac. 105.

4. A Livery in Law will not make a Diſcontinuance.

5. An (d) Exchange will not make a Diſcontinuance.

6. (e) As if Tenant in Tail exchanges with another, that is not any Diſcontinuance, for his Iſſue may enter. 9 E. 4. 22. 13 E. 4. 3. Perkins S. 294, 295.

(d) Becauſe no Livery of Seiſin is requiſite thereupon. Co. Lit. 332. b. 1 Co. 44. b. —So of Partition between Parceners, Co. Lit. 173. a. (e) Co. Lit. 332. b. S. P.

7. (f) To every Diſcontinuance it is neceſſary there ſhould be a diveſting or diſplacing of the Eſtate, and turning the ſame to a Right, for if it be not turned to a Right, they that have the Eſtate cannot be driven to an Action. *Co. Lit.* 327. b.

(f) Co. Lit. 332. ſame Rule.

8. (g) If Tenant in Tail is diſſeiſed, and after releaſes to his Diſſeiſor all his Right, yet this is no Diſcontinuance, for that nothing of the Right paſſes to the Diſſeiſor but only for the Life of the Tenant in Tail releaſing. Otherways where Tenant in Tail makes a Feoffment, for by that the Fee-Smple paſſes by Force of the Livery. *Lit. Sect.* 598, 599.

(g) 3 Rep. 85. b. S. P.

9. (h) But if Tenant in Tail being diſſeiſed, releaſes all his Right to the Diſſeiſor, and binds himſelf and his Heirs to Warranty, and dies, and the Warranty deſcends (i) upon the Iſſue in Tail, this is a Diſcontinuance, (k) by Reaſon of the Warranty. *Lit. Sect.* 601.

(h) 3 Rep. 85. b. S. P.

(i) So that it is not the Warranty only that makes the Diſcontinuance, but the Warranty and Diſcent upon him that Right hath together. Co. Lit. 329. a. (k) Viz. That if Aſſets deſcend, he to whom the Releaſe is made may plead the ſame, and bar the Demandant. Co. Lit. 328. a. b.

10. Tenant in Tail of a Rent diſſeiſes the Tenant of the Land, and makes a Feoffment in Fee with Warranty, and dies; this is no Diſcontinuance of the Rent, but the Iſſue may diſtrain for the ſame; for though the Warranty extends to the Rent, yet that by the Rule of *Littleton* lies not in Diſcontinuance. *Co. Lit.* 332.

11. If

11. If by the Cuſtom of the Manor Plaints have been made in the Court of the Manor, in Nature of real Actions, if there be ſuch a Recovery againſt Tenant in Tail of a Copyhold, (admitting it may be intail'd) (l) it will be a Diſcontinuance, and take away the Entry of the Iſſue in Tail. *Trin.* 36. *Eliz.* between (m) *Deal* and *Rigden*, 4 *Co.* 23. adjudged; for inaſmuch as Plaints in Nature of real Actions are warranted by the Cuſtom, it is an Incident by Law annexed to the Cuſtom that ſuch Recovery ſhall make a Diſcontinuance.

(l) Cro. El. 380, 392.

(m) Cro. El. 372. S. C. adjournatur. Moor 358. Pl. 488. S. C. adjudged.

(B) What Conveyance will make a Diſcontinuance.

1. If Tenant in Tail levies a Fine (a) ſur conuſance de droit tantum, this is not any Diſcontinuance till Execution, for if he dies before Execution, the Iſſue may enter. 36 Aſſ. 8.

(a) If a Fine be levied to Tenant in Tail, and he grants and renders the Lands to the Conuſor and his Heirs, and dies before Execution, this is no Diſcontinuance. Otherwiſe if executed in the Life of Tenant in Tail. Co. Lit. 333. b.

2. If a Gift be made to Baron and Feme, and the Heirs of the Body of the Baron, the Remainder to A. in Tail, the Remainder to B. in Tail, the Remainder to D. in Tail, the Remainder to the right Heirs of the Baron, and the Baron and Feme and B. join in a Feoffment, and after in a Fine to the Feoffee, this is a Diſcontinuance of the Remainders, ſo that A. cannot enter upon the Death of the Baron without Iſſue, becauſe the Baron was ſeiſed by force of the Tail; and the Joining of the Feme and him in the mediate Remainder in the Feoffment and Fine does not alter the Caſe at the Common Law, but it enures as their * Confirmation, and ſo operates, that it is not any Diſcontinuance within the Statute of 32 H. 8. but a lawful Bar. Mich. 9 Car. B. R. between (b) King and Edwards, adjudged upon a ſpecial Verdict per Curiam, præter Jones, who doubted whether the Baron was ſeiſed by force of the Tail, but agreed with the Court in the reſt.

* Fol. 633.

(b) Cro. Car. 220. S. C. adjudged accordingly, and that the Wife's Eſtate being barr'd by the Fine, ſo that ſhe cannot enter, thoſe in Remainder may not enter, but are in the ſame Caſe as they were at Common Law. 1 Jon. 323, 324. S. C. adjudged. Et vid. 2 Rol. Rep. 311.

3. If there be Tenant in Tail, the Remainder to his right Heirs, and he makes a Feoffment in Fee, this is a Diſcontinuance, though he hath the Fee in him that made the Feoffment. 13 H. 7. 22. b. admitted. Paſch. 11 Car. B. R. in the Caſe between (c) Baker and Hacking, agreed per totam Curiam.

(c) Cro. Car. 387, 405, 406. S. C. & S. P. agreed per Curiam. 1 Jon. 358. S. C. & S. P. agreed per Curiam. Hut. 126. S. C. & S. P. ſeems to be admitted.

4. If Donee in Tail and Donor by Deed join in a Leaſe for Life, reſerving a ſmall Rent, this is a Diſcontinuance preſently, ſo that the Donor cannot deviſe his Reverſion during the Life of the Leſſee, becauſe it is a Rule of Law, That when Tenant in Tail makes a Feoffment or Leaſe for Life, the Leſſor being ſeiſed by force of the Tail, that this ſhall be a Diſcontinuance, and this is a Leaſe of the Donee during his Life. Paſch. 11 Car. B. R. between (d) Baker and Hacking, adjudged upon a ſpecial Verdict by Bramp-

(d) Cro. Car. 387. S. C. adjudged. 1 Jon. 358. S. C. adjudged. Hut. 126, 127. S. C. adjudged; and that it was the Leaſe of Tenant in Tail only, and the Confirmation of him in Remainder.

ſton, Jones, and Berkley, againſt the Opinion of Croke, who held it ſhould not be a Diſcontinuance till the Death of the Donee, and conditionally that he died during the Life of the Leſſee, and ſo by Conſequence the Donor may in the mean Time diſpoſe of his Reverſion, inaſmuch as the Intent of the Parties was ſo; but tota Curia againſt him, and that rather it ſhall be conſtrued to be a preſent Diſcontinuance, to be altered upon the Death of the Leſſee and Donee without Iſſue. Intratur, Hill. 8 Car. B. R. Rot. 346.

5. If a Biſhop ſeiſed in Fee of a Manor makes a Leaſe for Life of Parcel of the Demeſnes, not warranted by the Statute of 1 Eliz. of Biſhops, yet this is not any Diſcontinuance, but the Reverſion thereof continues Parcel of the Manor. Paſch. 11 Car. B. R. between (c) Walter and Jackſon, adjudged in a Writ of Error upon a Judgment in Banco: And Juſtice Berkley ſaid, That it was ſo adjudged in B. in the ſame Term, and now the Judgment was affirmed per Curiam, ſcilicet, that the Reverſion of this Parcel ſhall paſs with the Attornment of the firſt Leſſee by the Grant of the Manor.

(c) 2 Rol. Abr. 58. Pl. 3. S. C.

6. If Tenant in Tail of a Manor makes a Leaſe for Life, not warranted by 32 H. 8. of Part of the Demeſnes, this is a Diſcontinuance of this Parcel, and makes it to be not Parcel of the Manor, nor ſhall paſs by the Grant of the Manor with the Attornment of the Leſſee; in the ſaid Caſe of (d) Walter and Jackſon, it was ſaid by Berkley, that it was ſo agreed in the ſaid Caſe in Banco.

(d) 2 Rol. Abr. 58. Pl. 3. S. C.

7. (e) If Tenant in Tail leaſes for Years, and after levies a Fine, this is a Diſcontinuance, for a Fine is a Feoffment upon Record, and the Freehold paſſes. *Co. Lit.* 332. a.

(e) 1 Bulſt. 162. S. P. by Croke, arguendo. 2 Rol. Reports 484. And vide poſt, 576. Pl. 5.

8. But if Tenant in Tail leaſes for his own Life, and after levies a Fine, this is no Diſcontinuance, becauſe the Reverſion expectant upon an Eſtate of Freehold which lies only in Grant, paſſed thereby. *Co. Lit.* 332. a.

9. If Tenant in Tail leaſes for the Life of the Leſſee, by this the Tail and Reverſion thereupon is diſcontinued; and if the Tenant in Tail by Deed grants his Reverſion in Fee to another, and the Tenant for Life attorns, and (f) after the Tenant for Life dies, (g) living the Tenant in Tail, *&c.* (h) this is a Diſcontinnance in Fee. *Lit. Sect.* 620.

(f) So if Tenant for Life ſurrenders to the Grantee, or the Grantee recovers in Waſte, enters for the Forfeiture, &c. Co. Lit. 333. b. Lit. Sect. 621, 629. 1 Jon. 210. Lat. 65. (g) If Tenant in Tail leaſes for Life of the Leſſee, and after levies a Fine with Warranty, though this is not any Diſcontinuance, ſo as to take away the Entry of him in Reverſion after the Death of the Tenant for Life, unleſs executed in the Conuſee by the Death of the Tenant for Life in the Life of Tenant in Tail, yet the Grantee hath an abſolute Fee, to which the Warranty being annexed, and deſcending upon the Reverſioner, will be a Bar. Sawl and Clerk, 1 Jon. 210. adjudged. Cro. Car. 152. adjudged, for by the Eſtate for Life the Tail was diſcontinued, and a new Fee gained; which Reverſion in Fee being granted with Warranty, the Warranty was annexed to the Fee, and bound thoſe that had Right. Lat, 64, 72. debated. (h) Where the Reverſion is executed in the Life of Tenant in Tail, it is equivalent in Judgment of Law to a Feoffment, for the Eſtate for Life paſſed by Livery, Co. Lit. 333. b.

10. (i) If Tenant in Tail leaſes for Three Lives, according to 32 *H.* 8. this is no Diſcontinuance of the Eſtate-Tail, or (k) of the Reverſion,

(i) Ruddal and Miller S. P. 1 Leon. 299. by Two Judges. Sav. 77. Cro. El. 602. S. P. adjudged. 4 Leon. 191. S. P. by Three Judges: And as to Salvin and Clerk's Caſe, as reported in Cro. Car. I take that Book to be miſprinted, and that the Leaſe in that Caſe was a Leaſe not warranted by the Statute, as appears by the Report of the ſame Caſe, by the Name of Sawl and Clerk, 1 Jon. 208. Lat. 64, 72. Et vid. Vaugh. 383. 4 Leon. 118, 119. (k) But if Tenant in Tail levies a Fine with Proclamations, and after dies without Iſſue, the Donor is put to his Formedon. 4 Leon 191. Vid. the Diverſity there taken upon the different Words of the ſeveral Acts. 10 Co. 96. a. Et vid. Foy and Hind, Cro. Jac. 696, 698 1 Jon. 56, 57. But by the Report in this Book, the Proclamations were not found. Godb. 351. 2 Rol. Rep. 346, 467, 477, 484. Stephens and Bittridge, 1 Sid. 83. Raym. 36. 1 Lev. 36.

(l) Dyer 57. Pl. 1. Ow. 28. 2 Leon. 46.

(l) becauſe it is authorized by Act of Parliament, whereunto every Man in Judgment of Law is Party. *Co. Lit.* 333. a.

(m) Co. Lit. 330. b.

11. (m) If the Husband and Wife had made a Leaſe for Life, by Deed, of the Wife's Land, reſerving a Rent, and the Husband had died, this at Common Law was a Diſcontinuance for Life, and yet the Reverſion was not diſcontinued, but remained in the Wife. *Co. Lit.* 333. a.

(n) So if he leaſes for Years, the Remainder in Fee, and makes Livery of Seiſin accordingly. Lit. Sect. 631.

12. If Tenant in Tail leaſes (n) for Life, the Remainder in Fee, this is an abſolute Diſcontinuance, though the Remainder is not executed in the Life of Tenant in Tail, becauſe all but one Eſtate and paſſeth by one Livery. *Co. Lit.* 333. b.

13. If *A.* being Tenant in Tail, makes a Gift in Tail to *B.* and after *A.* releaſes to *B.* and his Heirs and dies, and after *B.* dies without Iſſue, the Iſſue of *A.* may enter upon the collateral Heir, becauſe *A.* had not Seiſin and Execution of the Reverſion of the Land in his Demeſne as of Fee. *Co. Lit.* 333. b.

14. But if Tenant in Tail leaſes for the Life of the Leſſee, and after releaſes to him and his Heirs, this is an abſolute Diſcontinuance, becauſe the Fee-Simple is executed in the Life of Tenant in Tail. *Co. Lit.* 333. b.

15. If Tenant in Tail leaſes for Life, and after grants the Reverſion in Fee, and the Leſſee attorns, and after the Grantee grants it over, and the Leſſee attorns, and then the Leſſee for Life dies, ſo as the Reverſion is executed in the Life of Tenant in Tail, yet this is no Diſcontinuance, but that after the Death of Tenant in Tail the Iſſue may enter, becauſe (o) he is not in of the Grant of Tenant in Tail, but of his Grantee. *Co. Lit.* 333. b.

(o) Co. Lit. 340 b. 3 Rep. 63. a, b. 85. b.

16. If Tenant in Tail leaſes for Life, and after by Deed indented and inrolled according to the Statute, bargains and ſells the Reverſion to another in Fee, and the Leſſee dies, ſo as the Reverſion is executed in the Life of Tenant in Tail, though the Bargainee is not in the Per by the Tenant in Tail, yet inaſmuch as he claims the Reverſion immediately from him which is executed in his Life-time, it is a Diſcontinuance. *Co. Lit.* 333. b.

17. So if Tenant in Tail had granted the Reverſion to the Uſe of another and his Heirs. *Co. Lit.* 333. b.

18. If Tenant in Tail leaſes for Life, and after diſſeiſes Leſſee for Life, and makes a Feoffment in Fee, and the Leſſee dies, and then Tenant in Tail dies, though the Fee was executed, yet becauſe it was not executed by lawful Means, it is no Diſcontinuance. *Co. Lit.* 333. b.

(p) Co Lit. 302. b. S. P. Peck and Channel S. P. Cro. El. 827. adjudged. Moor 634. Pl. 870. adjudged. Ow. 129. adjudged. Et vid. Piggot and Earl of Salisbury, 2 Levinz 254. 2 Jon. 58.

19. (p) If there be Tenant for Life, Remainder in Tail, Remainder in Tail *&c.* and Tenant for Life and he in the firſt Remainder in Tail levy a Fine, this is no Diſcontinuance of either of the Remainders, becauſe each of them paſſed only what he lawfully might. *Bredon's* Caſe, 1 *Co.* 76. a. *per Curiam.*

(q) Toft and Tompkins S. P. Cro. El. 135. admitted. 1 Leon. 127. admitted. Et vid. Dyer 324. Pl. 35. 1 And. 286. Et vid. Cro. El. 36. 6 Co. 15. 1 Sid. 83. where it is ſaid this Point in 1 Co. hath been often denied; and that it was adjudged in Baker and Hickin's Caſe by Brampſton Chief Juſtice, and his Companions, That it was a Diſcontinuance, becauſe a Feoffment is of a different Nature from a Fine.

20. (q) If Tenant for Life and he in the firſt Remainder in Tail make a Feoffment by Deed, this is no Diſcontinuance of the ſecond Remainder, for each gave what he lawfully might. 1 *Co.* 76. b.

21. But if ſuch Feoffment was made by Parol, it was held a Surrender by the Tenant for Life, and the Feoffment of him in Remainder *ut res magis valeat*, and Conſequently a Diſcontinuance. 1 *Co.* 77. a.

22. If Tenant in Tail by Indenture inroll'd bargains and sells to *J. S.* and his Heirs, and after levies a Fine, with Proclamations, to the Bargainee and his Heirs, and dies without Issue, this is no Discontinuance of the Remainder, because the Remainder is not touched or displaced thereby; for no Freehold passes by the Fine, but the Fine only corroborates the Estate of the Bargainee by the Statute. *Mich.* 10 *Jac.* (r) *Seymor's* Case, 10 *Co.* 96. b.

(r) 1 Bulst. 162. S. C. adjudged, for by the Bargain and Sale all the Right which Tenant in Tail had passed, and the incumbent Fine, amounts only to a Release.

(C) What Act or Thing shall make a Discontinuance in Respect of the Person (a) to whom it is made.

(a) Baron and Feme Jointenants for Life, the Baron enfeoff'd him in Remainder in Fee, this was

1. (b) If Tenant in Tail enfeoffs the Donor, this is not any Discontinuance, because the Donor hath the immediate Estate. Co. 1. Chudleigh 144.

not a Discontinuance. Kelw. 42. a. per Frowich. (b) Lit. Sect. 625. S. P.

2. If a Copyholder in Tail (admitting it may be intail'd) surrenders to the Lord to make his Will, and he regrants it to the Copyholder, this is not any (bb) Discontinuance, though a Surrender to the Use of a Stranger should be admitted to make a Discontinuance, for the Surrender to the Lord cannot make a Discontinuance, inasmuch as he hath the Reversion. Mich. 15 Jac. B. R. between Lee and Brown, upon Evidence at the Bar, agreed and resolved per totam Curiam.

(bb) Post, 577. Pl. 1.

3. (c) If there be Tenant in Tail, the Remainder in Tail, and the Tenant in Tail enfeoffs him in Reversion in Fee, this is a Discontinuance. Co. 1. Chudleigh 140.

Fol. 634.

(c) Co. Lit. 335. S. P; because there is a mean Estate. Kelw. 42. a. S. P. per Frowich. Con. Dyer 10. Pl. 32.

4. If the Donee enfeoff the Donor and a Stranger, (d) this is a Discontinuance of the whole Land. *Co. Lit.* 335. a.

(d) Conditionally, viz. if the Stranger survive. Dyer 12. Pl. 53. Cro. Car. 406.

(D)(a) Who may make a Discontinuance.

(a) Where by Custom an Infant above the Age of 15 may make a Feoffment, and being Tenant in Tail, he makes a Feoffment,

(b) Not he that is not seised by Force of the Intail.

1. (c) If there be Baron and Feme Tenants in special Tail, and the Baron aliens in Fee, this is a Discontinuance of the Intail, for he is seised of the Whole entirely. Co. 8. Greenly 71. b. resolved.

it is no Discontinuance, because the Custom will not enable one to do a Tort. Cro. Jac. 80. (b) Tenant in Tail grants totum Statum suum, and the Grantee makes a Feoffment, this is no Discontinuance. 10 Co. 97. a. (c) Co. Lit. 326. b. S. P. viz. That it was a Discontinuance at Common Law, for the Title of the Issue being as Heir of both their Bodies, his Entry must ensue his Title or Action.

2. But

2. But if the Baron be seised of Land in the Right of his Wife in Tail, and aliens in Fee, this is not any Discontinuance of the Tail, for he is not seised by Force of the Tail: (But Fitz. Nat. 193. is, That the Issue shall not have a Sur cui in vita, because this Writ is for Estates at Common Law, but he shall have a Formedon:) But it seems this is no Proof that it is a Discontinuance of the Tail; for if he should not have a Formedon, he should be without Remedy. Co. Lit. 326.

(c) Vide 2 Rol. Abr. 395. Pl. 2.

3. (c) If Land be given to Baron and Feme, and the Heirs of the Body of the Baron, and the Baron makes a Feoffment in Fee, this is a Discontinuance, for the Baron is seised by Force of the Intail, and so it shall be pleaded. Mich. 9 Car. B. R. between (d) King and Edwards, per Curiam, præter Justice Jones who doubted thereof: Adjudged upon a special Verdict. Intratur, Trin. 7 Car. Rot. 992.

(d) Cro. Car. 320. S. C. adjudged. 1 Jon. 323, 324. S. C. adjudged.

4. So if in the said Case Baron and Feme join in a Feoffment, and after also levy a Fine to the Feoffee, yet this is a Discontinuance of the Intail, for this will be the Feoffment of the Baron, in the said Case of Mich. 9 Car. between (e) King and Edwards, B. R. adjudged; though the Feme survived the Baron, as it was found by the Verdict.

(e) Cro. Car. 320. S. C. adjudged. 1 Jon. 323. 324. S. C. adjudged.

5. (f) If there be Tenant for Life, the Remainder in Tail, and he in Remainder enters upon the Lessee, and disseises him, and makes a Feoffment over, this is not any Discontinuance, because he was not seised by Force of the Intail. Tr. 2 Jac. B. between Mogridge and White, adjudged.

(f) Lit. Sect. 658. S. P. Et vid. 2 And. 110. Raym. 37. S. P. arguendo. — 1 Rol. Rep. 188. a Diversity where he in Remainder in Tail upon a Lease for Years, and where upon a Lease for Life, levies a Fine. Moor 747. Et vid. Styl. 158, 159. 1 Bulst. 162. And vide ante 573. Pl. 7, 8.

6. If there be Lessee for Years, the Remainder in Tail to J. S. and (g) J. S. enters upon the Lessee, and makes a Lease for Life, or Feoffment in Fee, (h) this is a Discontinuance, for he was seised by Force of the Intail at the Time of the Feoffment. Pasch. 11 Car. B. R. between Sir Kenelm Digby and Jorden, resolved and ruled per Curiam, upon a Trial at Bar.

(g) So if he makes a Deed of Feoffment with a Letter of Attorney to J. N. to make Livery and he enters and ousts the Lessee, &c. Moor 91. Pl. 226. Dyer 363. Pl. 22. (h) Though the Lessee re-enters. Moor 281. Pl. 6.

7. An Estate Tail cannot be discontinued, but where he that makes the Discontinuance was once seised by Force of the Intail, unless by Reason of a Warranty. *Lit. Sect.* 637, 641.

8. As if the Tenant in Tail is disseised by the Issue in Tail, who makes a Feoffment without Warranty, *&c. Lit. Sect.* 637.

9. But if the Feoffment had been with Warranty, it would have wrought the Effect of a Discontinuance. *Co. Lit.* 339. a.

(i) Dyer 98. Pl. 55. S. P. dubitatur. Moor 256. Pl. 402.

10. (i) If Tenant in Tail is disseised, and dies, and the Issue in Tail releases to the Disseisor, with Warranty, though the Issue was never seised by Force of the Intail, yet it hath the Effect of a Discontinuance, by Reason of the Warranty. *Co. Lit.* 339.

(k) Kelw. 121. S. P. dubitatur.

11. (k) If Tenant in Tail leases to one for Life, and hath Issue, and dies, and the Reversion descends to the Issue, and the Issue (l) grants the Reversion to another in Fee, and the Tenant for Life attorns, and dies, and the Grantee enters, and is seised in Fee in the Life of the Issue, and the Issue in Tail hath Issue a Son, and dies, this is no Discontinuance, but the Son may enter, *&c.* for that his Father had never any Thing in him by Force of the Intail. *Lit. S.* 638.

(l) So tho' the Grant had been with Warranty. Co. Lit. 339, b. Et vid. 1 Jon. 210. Cro. Car. 156. Lat. 62, 72.

12. If a Man covenants to stand seised to the Use of himself for Life, Remainder to his Wife for Life, the Remainder to the Heirs Males which he shall beget on the Body of his Wife, Remainder to his eldest

Son by a former Wife, *&c.* and after the Husband and Wife levy a Fine with Warranty, and die without Iſſue Male, this is no Diſcontinuance of the Remainder, becauſe the Eſtate-Tail was not executed by Reaſon of the intervening Eſtate limited to the Wife, which Eſtate is not drowned, but remains diſtinct. *Trin.* 14 *Car.* between (n) *Stephens* and *Bittridge*, 1 *Sid.* 83. adjudged; but it was agreed by all, That if the Eſtate-Tail had been executed, this Fine had been a Diſcontinuance of the Remainder in Tail, and ſo the Warranty diſcending upon him in Remainder, would have barred.

(n) Raym. 36, 37. S. C. adjornatur. 1 Levin. 36. S. C. adjudged.

(E) Of what Things it may be.

1. A Diſcontinuance may of a Copyhold in Tail, (admitting this to be intail'd) (*) as by a Recovery in a real Action in the Court of the Lord. Co. 4. Deal 23. (But note, That this is more properly a Bar for the Time than a Diſcontinuance, as it ſeems to me.) Mich. 43, 44 Eliz. B. R. per Curiam. Morris's Caſe, Hill. 8 Jac. B.

(*) Ante 192. Pl. 2. vide, and the Notes there.

2. If Baron and Feme are ſeiſed of Lands in the Right of the Feme, and leaſe it to another for Life, this is not any Diſcontinuance, for this is the Leaſe of the Feme till Diſagreement. Contra, 18 Ed. 2. 39, 54. 18 Aſſ. Pl. 2.

3. If *A.* being Tenant in Tail, makes a Gift in Tail to *B.* and *B.* makes a Feoffment in Fee, and dies without Iſſue, and *A.* hath Iſſue, and dies, the Iſſue of *A.* may enter; for though the Feoffment of *B.* did diſcontinue the Reverſion of the Fee-Simple, which *A.* had gained upon the Eſtate-Tail made to *B.* yet could it not diſcontinue the Right of Intail which *A.* had, which was diſcontinued before, and therefore when *B.* dies without Iſſue, the Diſcontinuance of the Eſtate-Tail of *A.* which paſſed by his Livery ceaſes, and conſequently the Entry of the Iſſue of *A.* is lawful. *Co. Lit.* 327.

4. (a) A Grant by Deed or Fine of ſuch Things as lie in Grant, and not in Livery, works no Diſcontinuance, for ſuch Grant works no Wrong either to the Iſſue in Tail, or to him in the Reverſion or Remainder, for nothing paſſes but only during the Life of Tenant in Tail, which is lawful, and every Diſcontinuance works a Wrong. *Co. Lit.* 332. a.

(a) Co. Lit. 327. b. Lit. Sect. 627. 628.

5. (b) But if Tenant in Tail of a Rent-Service, *&c.* or of a Reverſion or Remainder in Tail, *&c.* grants the ſame in Fee, (c) with Warranty, leaving Aſſets in Fee-Simple, and dies, this is neither Bar nor Diſcontinuance to the Iſſue, but he may diſtrain for the Rent or Service, or enter into the Land after the Death of Tenant for Life; but if the Iſſue brings a Formedon in Diſcender, and admits himſelf out of Poſſeſſion, he ſhall be barr'd by the Warranty and Aſſets. *Co. Lit.* 333. b.

(b) 3 Co. 85. a. S. P.

(c) Tenant in Tail of an Advowſon in Groſs grants the ſame in Fee, and after a collateral Anceſtor releaſes to the Grantee, with Warranty, and dies, this is a good Bar for ever. 1 Leon. 111. ſaid by Anderſon to have been adjudged. Et vid. 2 Aud. 110.

6. (d) If the Reverſion or Remainder (e) be in the King, the Tenant in Tail cannot diſcontinue the Eſtate-Tail. *Co. Lit.* 335. a.

(d) 2 And. 156, 210. 2 Leon. 157. 158. 3 Leon. 75, 75.

7. But if there had been Tenant in Tail, the Reverſion, *&c.* in the King, before 34 *H.* 8. he might have (f) barr'd the Tail by a Common Recovery: but that Common Recovery neither barr'd nor diſcontinued the King's Reverſion. *Co. Lit.* 335. a.

(e) Tenant in Tail, Remainder to another for Years, Remainder in Fee to the Tenant in Tail, and he in Remainder for Years conveys his Eſtate to the King, and the Tenant in Tail makes a Feoffment, this is a Diſcontinuance notwithſtanding the Term in the King, for by this Term he has no Poſſeſſion in the Land. 2 And. 210. (f) And where ſuch Tail may now be barr'd by Fine, without diſcontinuing the King's Remainder, Jackſon and Dracy, Moor 115. Pl. 258. 2 Leon. 57. 4 Leon. 40. Et vid. 1 And. 46. Kelw. 213.

Discontinuance.

(a) By what (b) Persons it may be.

(a) For the Reason why an Alienation by Tenant in Tail hath been accounted a Discontinuance, vid. Co. Lit. 327. b.

1. (c) A Sole Body Politick (d) that hath the absolute Right in him, as an Abbot, Bishop, *&c.* (e) might make a Discontinuance; but a Corporation aggregate of many, as Dean and Chapter, Master and Felllows, Mayor and Commonalty, *&c.* cannot make a Discontinuance, for if they join, the Grant is good, and if the Dean, Warden or Mayor, make it alone, where the Body is aggregate of many, it is void, and works a Disseisin. *Co. Lit.* 325. b.

(b) Not by the King, because he can do no Wrong. Pl. Com. 233. a. 2 And. 155. (c) Co Lit. 341. b. (d) But a Parson or Vicar cannot. Co. Lit. 341. a. Dyer 239. Pl. 41. Hetl. 88. (e) But at this Day Bishops, Deans, Masters of Hospitals, &c. are restrained, &c. Co. Lit. 325. b. 342. a.

Discontinuance.

Who bound thereby.

Not he that claims by Title Paramount.

(a) Co. Lit. 187. b. 188. a. S. P.

1. (a) IF Land had been given to Husband and Wife, and a third Person, and to their Heirs, and the Husband before 32 *H.* 8. had made a Feoffment in Fee, this had been a Discontinuance of one Moiety, and a Disseisin of the other Moiety; but if the Husband had died, and then the Wife had died, the Survivor should have entered into the Whole, for he claimed not under the Discontinuance, but by Title Paramount from the first Feoffor. *Co. Lit.* 327.

Discontinuance.

(a) Removed.

(a) Where the Estate that made the Discontinuance is determined by Entry for the Condition broke or otherways, Co. Lit. 336, 337. 8 Co. 44. a.

1. THE Reversion might be revested, and yet the Discontinuance remain. *Co. Lit.* 335. a.

2. As if a Feme Covert had been Tenant for Life, and the Husband had made a Feoffment in Fee, and the Lessor had entred for the Forfeiture, the Reversion was revested, and yet the Discontinuance remained at Common Law. *Co. Lit.* 335. a.

Discontinuance.

What Persons are restrained by Parliament from making one.

1. BY 11 *H.* 7. *cap.* 20. If any Woman having an (a) Estate in Dower, or for Life or (b) Tail, jointly with her Husband, or only to her self, or to her Use, in any Manors, (c) *&c.* of the (d) Inheritance or (e) Purchase (f) of the Husband, or (g) given to the Husband and Wife, in Tail or for Life, by any Ancestor of the Husband, or other Person seised to the Use of the Husband, or his Ancestor, and being sole, or with (h) other after taken Husband, (i) discontinue,

(a) So if a Woman having only a Title of Dower enters before she is endowed, and levies a Fine. 2 Leon. 168. 3 Leon. 78. cited by Rhodes to have been adjudged. (b) But this extends not to Estates in Fee. Dyer 248. Pl. 78. 4 Co. 3. b. Moor 716. Pl 1000. Bridg. 136. Cro. El. 524. adjudged, for it may go to a collateral Heir. (c) Extends not to Copyholds. 2 Sid. 41, 73 adjudged. (d) If one seised in the Right of his Wife levies a Fine, and the Conusee grants and renders the Land to the Husband and Wife in special Tail, the Remainder to the Heirs of the Wife, and they have Issue, and the Husband dies, and the Wife takes another Husband, and they levy a Fine, this is directly within the Words but out of the Meaning of the Act, because the State of the Land moved from the Wife. Co. Lit. 366 a. Easton and Stud, Pl. Com. 459.. adjudged. Kelw. 214. adjudged. N. Bendl. 238. Pl. 266, &c. And with this agrees Cro. El. 524. Moor 715. Pl. 1000. —May Cro. El. 2. it is said to have been adjudged, if Baron and Feme levy a Fine of such Land, and the Conusee grants a Rent to them in Tail, it is out of the Act, for the Rent is in lieu of the Land. —So if the Ancestor of the Baron makes a Feoffment in Fee, upon Condition that the Feoffee shall give it to the Baron and Feme in Tail, &c. this is within the Meaning of the Act, though out of the Words, for they are in by the Feoffment, and not by the Ancestor of the Baron. Moor 93. Pl. 231 per Plowden said to have been so adjudged. Lynch and Spencer, Cro. El. 514. 2 And. 44, 45. Moor 455. Pl. 624. 3 Co. 50. —'Tis within the Act, though the Gift by the Husband or his Ancestors, by which the Feme takes, was made as well in Consideration of Money paid by the Feme, or her Father, as of the Marriage. Dyer 146. a, b. Kelw. 208. Moor 93. Pl. 331. Cro. Jac. 474. —Otherwise if the Lands had moved from the Ancestor of the Feme, as if settled by the Father of the Feme, in Consideration of the Marriage, and of Money paid by the Baron for the Lands moving from her Father, it shall be intended that her Advancement was the principal Cause of the Gift, and not the Money. Kynaston and Lloyd, Cro. Jac. 624. adjudged. 1 Jon. 13. adjudged. Palm. 213, 218. adjudged. Copland and Pyot, Cro. Car. 244. adjudged. 1 Jon. 13. adjudged. Et vid. Moor 93. Pl. 231. 2 And. 45. —But where conveyed by a Stranger, in Consideration of the Wife's Fortune paid by her Father to the Vendor, and other Money paid by the Baron, this is the Purchase of the Husband within the Act. Moor 250. Pl. 398. —If A. in Consideration of good Service done by B. conveys Lands to B. his Man, and C. his Cousin, and the Heirs of their Bodies, &c. this is not within the Act, not being made by the Baron or his Ancestor; and being in Consideration of Service done, it is not such a Purchase as the Law intends. Ward and Walthew, Cro. Jac. 173, 174. adjudged: And though C. was named Cousin by the Deed, it was said that was not material, because it did not appear to be any Part of the Consideration; but however being found in Fact that she was his Cousin, and that a Marriage was intended, it was said it should be presumed the Marriage was as well the Cause of the Gift as the Service. Noy 122. adjudged. Yelv. 101. adjudged Moor 683. Pl. 943. adjudged. (e) Baron and Feme being Joint-Copyholders in Fee, the Baron purchases the Freehold thereof to him and his Wife, and the Heirs of their Bodies, they have Issue, the Baron dies, and the Feme enters, and suffers a Recovery, &c. this is a Forfeiture within the Act, for the Copyhold by Acceptance of the new Estate was extinct. Cro. Eliz. 24. agreed per Curiam. (f) If a Man and Woman being Jointenants, intermarry, and after levy a Fine to a Stranger, who renders to them in Tail, &c. as to one Moiety, this is within the Act, but as to the other not. Cro. El. 524. Moor 715. Et vid. Cro. Jac. 175. Yelv. 101. Noy 123. (g) If a Man devises Lands to his Wife in Tail, this is within the Words but not within the Meaning of the Act. Foster and Pitfall, 1 Leon. 261. Cro. El. 2. (h) A Man seised in Fee levied a Fine to the Use of himself for Life, and after to the Use of his Wife, and the Heirs Males of her Body by him begotten, for her Jointure, and after he and his Wife levied a Fine, and suffered a Recovery, and the Husband and Wife died, and it was held the Issue upon this Act might enter; for though it was not within the Words, yet it was held within the Remedy intended to prevent the Disinherison of Heirs. Co. Lit. 365. b. But in the Case of Kirkman and Thompson, Cro. Jac. 474. this Point is adjudged con. and that such Alienation was neither within the Words nor Intention of the Act; which I take clearly to be Law. (i) Vide Jones and Philpot, 1 Levinz 49. 1 Sid. 62.

(k) alien, releaſe, or confirm with (l) Warranty, or by Covin ſuffer (m) any Recovery againſt them, all ſuch Recoveries, Diſcontinuances, &c. ſhall be (n) void, and (o) every (p) Perſon to whom the Intereſt, &c. after the Death of the Woman in the Manors, &c. ſhould belong, may enter, &c. as if no Diſcontinuance, &c. had been; and if ſuch Husband and Wife make ſuch Diſcontinuance, the (q) Perſon to whom the Manors, &c. ſhould belong after the Death of the Woman may enter, and hold according to ſuch Title as he ſhould have had if the Woman had been dead, and no Diſcontinuance, &c. as againſt the Huſband during his Life; provided the Woman after the Death of her Huſband may re-enter, &c. but if ſole when the Diſcontinuance, &c. ſhe ſhall be barr'd for ever, and the Perſon to whom the Intereſt belongs may enter, &c. Provided the Act ſhall not extend to any Recovery or Diſcontinuance to be had (r) with the (s) Heir next Inheritable, nor where he that next after the Death of the Woman ſhould have an Eſtate of Inheritance, ſhall be aſſenting to the ſaid Recovery, where the Aſſent is of Record or inroll'd.

(k) If ſuch Feme Tenant in Tail accepts a Fine ſur Conuſance de Droit, &c. and thereby renders the Land for 1000 Years, &c. this is an Alienation within the Act, elſe it would be to little Purpoſe.

3 Co. 51. b. ſaid to have been ſo reſolved. Moor 250. Pl. 398. adjudged. 2 Leon. 161. adjudged. 3 Leon. 78. adjudged. Et vid. Cro. El. 514. 2 And. 58. —Diverſity where ſuch Leaſe made by Fine, and where by Deed only. Cro. Jac. 629. Bridg. 28. 1 Jon. 60. Et vid. 2 Rol. Rep. 490. where it is ſaid by two Judges, that though ſuch Leaſe be made by Fine, yet it not being any Diſcontinuance, or prejudicial to the Iſſue, he cannot enter till after her Death. (l) This relates only to Releaſes and Confirmations, which are no Diſcontinuance without, ſo that a Leaſe by ſuch Feme Tenant in Tail made for Three Lives without Warranty, if not purſuant to 32 H. 8. is a Forfeiture within the Act. Sir George Brown's Caſe, 3 Co. 50. b Cro. El. 514. (m) Extends to ſuch where ſhe comes in only as Mouchee. Moor 716. Pl. 1000. (n) Yet it continues as to the Parties, and all others, except him to whom the Intereſt, &c. by whoſe Entry it is to be avoided. 3 Co. 59. b. 60. Hob. 166. (o) Unleſs he hath diſabled himſelf by levying Fine, ſuffering Recovery, &c. Ward and Walthew, Cro. Jac. 175. adjudged. Yelv. 101. adjudged. Noy 122. adjudged. —And where he hath concluded himſelf by ſuffering a Recovery, &c. to enter, his Iſſue, whom he had Power to bar, ſhall not enter. Lincoln College 3 Co. 61. a. 2 And: 31, 32. —But if after ſuch Feme Tenant in Tail ſuffers a Recovery, the Iſſue in Tail releaſes to the Recoveror, yet the Iſſue of that Iſſue is not barr'd thereby. 3 Co. 59. a. cited from Doctor and Student, and 3 Co. 61. a. agreed to be Law. —But if the Iſſue in ſpecial Tail, the Remainder being to him in Fee, levies a Fine, (with Proclamations, though not found) and after his Mother (being Tenant in Tail within this Act) leaſes for Three Lives, (not warranted by 32 H. 8.) living the Iſſue, the Conuſee may enter, for the Tail was extinct by the Fine, and the Conuſee was the Perſon to whom the Intereſt, &c. belonged after the Death of the Woman. Sir George Browne's Caſe, 3 Co. 51. b. adjudged. Cro. El. 514. adjudged. Moor 455. Pl. 624. adjudged. 2 And. 44, 45. adjudged; and there ſaid, That the Record of the Fine being in the ſame Court, they may inſpect it to ſee the Proclamations. 1 Rol. Abbr. 878. Pl. 7. 3 Co. 61. —But if the Reverſion in Fee had been in another, then the Conuſee taking nothing by the Fine but by Eſtoppel, could not enter, nor could the Heir, becauſe concluded by the Fine. Ward and Walthew, Cro. Jac. 175. adjudged. Yelv. 101. adjudged. Noy 222. adjudged; but in this laſt Book the Caſe is not fully ſtated, for there is no Notice taken of the laſt Fine levied by the Woman alone after the Death of her ſecond Husband, which made the Forfeiture. (p) The Statute intended only to prevent ſuch Prejudice as might ariſe to the Heirs of the Baron by whom advanced, and not where the immediate Intereſt upon the Death of the Wife was ſo limited as to belong to a Stranger. Foſter and Pitfall. Cro. El. 2. 1 Leon. 261. (q) But if ſuch Woman be Tenant for Life, Remainder for Life, Remainder in Fee, and the Two Tenants for Life join in a Feoffment, the Entry of him in Remainder in Fee is lawful by this Act, per 1 Leon. 262. But I take this to be ſuch a Forfeiture for which the Remainder Man in Fee might by the Common Law enter. Co. Lit. 251. b. (r) If the Baron being ſeiſed to him and his Feme, and the Heirs of the Body of the Feme, dies, and in the Life of the Wife his Iſſue (then being Tenant of the Freehold, as pleaded, which muſt be intended by Diſſeiſin, no Surrender or Forfeiture being alledged) ſuffers a Recovery (which binds not the Tail, he being in of another Eſtate) by Agreement that the Recoverors ſhould enfeoff J. S. and that the Wife ſhould releaſe to him with Warranty, which ſhe does accordingly, and dies, and the Warranty deſcends, &c. this ſhall bind, for not being prejudicial, but intended to perfect the Aſſurance of the Heir, 'tis not reſtrained by this Act, for the Woman joining with the Heir by Fine or Recovery might have barr'd the Tail; and it was never intended to prevent a Warranty, being made to him that had the Land by the Conveyance of the Heir himſelf, Lincoln College Caſe 60. a, b. adjudged. (s) But if ſuch Heir being a Daughter joins, and after a Son is born, he may enter. 3 Co. 61. b.

2. (u) By 32 *H.* 8. *cap.* 28. No Fine, Feoffment or other Act, made, (x) ſuffered, or done, by the Husband (y) only, of any Manors, *&c* being the (z) (a) Inheritance or Freehold of his Wife during the Coverture, ſhall make a Diſcontinuance thereof, or ſhall be prejudicial to the (b) Wife or (c) her Heirs. or to ſuch as (d) ſhall have (e) Right, Title or Intereſt to the ſame by the Death of ſuch Wife, but that the (f) Wife or her Heirs, and (g) ſuch other to whom ſuch Right ſhall appertain after her Death, may enter into ſuch Manors, *&c.* according to their Rights and Titles therein, any Fine, Feoffment, or other Act of the Husband notwithſtanding; Fines levied by the Husband and Wife (whereunto the Wife is party and Privy) only except.

3. By the 1 *Eliz.* 13 *El. c.* 10. *&* 1 *Jac. c.* 3. All Eccleſiaſtical Perſone are diſabled to alien or diſcontinue any of their Eccleſiaſtical Livings. *Co. Lit.* 325. b.

(u) This Act being made to prevent a Wrong, the King is bound thereby. 2 Inſt. 681.

(x) The Husband cauſes a Precipe to be brought againſt him and his Wife upon a feigned Title, and ſuffers a Recovery without any Voucher, and Execution to be had againſt him and his Wife, this is an Act within the Statute, ſuffered by the Husband. Co. Lit. 326. a. (y) Though Feoffment made by the Husband and Wife, for this in Subſtance is the Act of the Husband only. Co. Lit. 326. a. (z) Where during the Coverture Lands are given to the Husband and Wife, and the Heirs of their two Bodies, this is the Inheritance of the Wife within the Act; ſo that if the Husband makes a Feoffment and dies, ſhe or her Iſſue may enter. Co. Lit. 326. a. 2 Inſt. 681. 8 Co. 72. 1 Brownl. 131. adjudged. —But if the Husband levies a Fine with Proclamations, the Iſſue is barr'd, though the Wife is helped by this Statute. Kelw. 205, 213. b. Dyer 351. Pl 24. 1 And. 39. 8 Co. 72. a. —But if the Husband is Tenant in Tail, Remainder to the Wife in Tail, and the Husband makes a Feoffment in Fee, if the Husband dies without Iſſue, the Wife may enter. Co. Lit. 326. a. 8 Co. 72. But there ſaid, if he ſuffers a Recovery, ſhe is barr'd. (a) This extends not to the Wife's Copyhold of Inheritance. Moor 596. Pl. 813. (b) If after a Feoffment made by the Husband they are divorc'd, Cauſa precontractus, ſhe may enter within this Act, and is not driven to her cui ante divortium, as at Common Law, though by the Statute the Entry is given to the Wife, and now upon the Matter ſhe was never his lawful Wife, for at the Time of the Alienation ſhe was his Wife de facto, and when the Husband dies ſhe is not his Wife at the Time of the Entry. Co. Lit. 326. a. 8 Co. 73. a. ſhe may enter though her Husband is living; But vid. Moor 58. Pl. 164. (c) But her Heirs by the Common Law could have no Remedy, nor by this Act can enter during the Life of the Husband. Co. Lit. 326. 8 Co. 72, 73. (d) But if the Wife before Entry dies without Heirs, the Lord by Eſcheat ſhall not enter, for though an Entry is given by the Act, yet the Feoffee, &c. is in by Title as before. Hob. 243, 261. (e) But if the Husband levies a Fine, &c. the Wife muſt enter within 5 Years after his Death, elſe ſhe is barr'd by the Statute of 4 H. 7. for this Act helps the Diſcontinuance, but not the Bar, and mentions a Fine, but not a Fine with Proclamations, Co. Lit. 326. a. Dyer 72. Pl. 3. 8 Co. 72. b. and the Power of Entry is given only according to their Rights and Titles therein. 2 Rol. Rep. 410. (f) But if the Husband makes a Feoffment and dies, and the Wife before Entry levies a Fine, this ſo ſtrengthens and fortifies the Diſcontinuance, that ſhe or thoſe in Remainder can never enter. And though by the Statute it is enacted, That the Feoffment of the Baron ſhall not be a Diſcontinuance, but the Wife may enter, yet it is a Diſcontinuance till Entry. 2 Rol. Rep. 311. Cro. Car. 320. Et vid. 1 Rol. Abr. 632. Pl. 2. (g) By theſe Words the Entry of him in Reverſion or Remainder is preſerved. Co. Lit. 326. b. Hob. 261.

Fol. 633.

(a)(b) Diſmes, or Tithes.

(a) Tithes are an Eccleſiaſtical Inheritance, collateral to the Eſtate of the Land, and of their proper Nature due only to Eccleſiaſtical Perſons by the Eccleſiaſtical Law, and therefore no Unity of Poſſeſſion can either extinguiſh or ſuſpend them, but notwithſtanding any Unity they remain in Eſſe, ſo that they may be demiſed or granted to any Spiritual Man, notwithſtanding any ſuch Union. 11 Co. 13. b. Et vid. Moor 50. Pl. 151. 219. Pl. 356. 528. Pl. 697. Dav. 6. a. —If a Man hath a Portion of Tithes out of a Rectory, and he purchaſes the Rectory, by this the Portion of Tithes is not extinct, but remains grantable; for the Portion of Tithes may be more ancient than the Rectory. 2 Rol. Rep. 161. adjudged. (b) Where the Word Alteragium ſhall be expounded according to the Uſe; ſo that if by Vertue of this Word in an ancient Compoſition the Vicar hath always uſed to have the Tithes of Wood, it ſhall be continued to him, elſe not. Lit. Rep. 244. Herl. 135. 2 Bulſt. 27. Winch 70.

(a) Predial.

1. CORN is a predial Tithe, though it comes in Part of the Induſtry of Man, and Part of the Ground. Mich. 8 Jac. B Co. Magna Charta 649.
2. Pigs are predial-mix'd. Mich. 8 Jac. B.
3. So Wool and Lamb are predial-mix'd. Mich. 8 Jac. B.
4. Vinum is a predial Tithe. Co. Magna Charta 649.
5. Linum & Canabum is a predial Tithe. Co. Magna Charta 649.
6. Canabum is a predial Tithe. Co. Magna Charta 649.
7. Hops are properly predial Tithes. Mich. 8 Jac. B.
8. Thoſe that come from the Fruits of the Earth, as Poma, Pira, Pruna, Volena, & Fructus Hortorum, and Maſts of Oak and Beech, are predial Tithes. Co. Magna Charta 649.

(B) Mix'd.

1. MIx'd Tithes are thoſe that come of Cheeſe, Milk, &c. or ex Fœtibus Animalium que ſunt in Paſcuis & gregatim paſcuntur, ut in Agnis, Vitulis, Hœdis, Capreolis, Pullis, &c. Co. Magna Charta 649.
2. Tithes of Pigs are mix'd Tithes. Mich. 8 Jac. B.
3. Wool and Lamb are mix'd Tithes. Mich. 8 Jac. B.
4. Tithes of Cheeſe, Calves, and Lambs, are mix'd Tithes. Co. Magna Charta 649.

(C) Of what Things they ſhall be paid *de Jure*.

1. (a) TIthes ought to be paid in Kind de Jure, of Wax and Honey or Bees in an Hive. Mich. 15 Car. B. R. between (b) Barefoot and Norton, adjudged in a Prohibition upon Demurrer and a Conſultation granted.

(a) F. N. B. 51. G. S. P.
(b) Cro. Car. 559 S. C. adjudged.
1 Jon. 447. S. C. adjudged.

2. Tithes

2. Tithes ſhall be paid (c) de Jure of young Pigeons. Mich. 14 Jac. B. between Whately and Hanbury reſolved; 15 Jac. B. R. reſolved, and a Prohibition denied in one (d) Gaſtrell's Caſe of the Inner Temple.

(c) That they may be paid by Cuſtom vid. Lit. Rep. 13. 1 Rol. Abr. 642.

2 Mod. 77, 1 Vent. 5. Hard. 188. Et vid. 2 Rol. Rep. 458. Lit. Rep. 13. 311. Pl. 5. 644. Pl. 4, 5, 6. (d) Jones and Gaſtrill, 2 Rol. Rep. 2. S. C. adjudged.

3. No Tithes de Jure without a Cuſtom ought to be paid for (e) Coneys, (f) becauſe they are feræ Naturæ. Trin. 8 Car. B. R. between Worden and Benet, after a Prohibition granted, a Conſultation denied per Curiam for the Cauſe aforeſaid. P. 13 Car. B. R. between Sir John Bruen and Dr. Bradiſh per Curiam, and a Prohibition granted accordingly. Hill. 13 Car. B. between Vincent and Tutt, a Prohibition granted, and for a Prohibition pleaded by the Parſon to have them by Preſcription. Mich. 14 Car. B. Regis, between Williams and Wilcox, a Prohibition granted. Mich. 15 Car. B. R. between Dampart and Onge, a Prohibition granted.

(e) And where Tithes ſhall be paid of them, vid. 2 Rol. Rep. 2, 458. March 56. 1 Vent. 5. Hetl. 147. Lit. 13. Hard. 188.

(f) No Tithes ſhall be paid of Beaſts that are feræ Naturæ, as Deer, &c. 2 Inſt. 651.

4. No Tithes (g) de Jure are to be paid for Fiſh taken in a common River. Paſch. (h) 5 Car. B. R. a Prohibition granted to ſtay a Suit for Tithes of Eels taken in a common River within the Pariſh of Barton in Weſtmorland; and (i) Hill 9 Car. a Prohibition was granted to ſtay a Suit * for Tithes of Trouts in the ſame River; but the Court ſeemed to be divided whether Tithes were due or not, but they granted a Prohibition, for that the Law ſhould be decided thereupon; and this was between Dawes and Huddleſtone.

(g) They may be paid by Cuſtom.

* Fol. 636.

March. 17. 1 Vent. 5. Et vid. Dav. 56.

(h) Cro. Car. 339. S. C. cited. (i) Cro. Car. 339. S. C. debated; but appears not whether a Prohibition was granted or not.

5. If a Man hath Pheaſants, and keeps them within an incloſed Wood, and clips the Wings of the Pheaſants, and from the Eggs hatches and brings up young Pheaſants, no Tithes ſhall be paid of theſe Eggs or young Pheaſants, (k) becauſe they are not reclaimed, but continue feræ Naturæ, and would go out of the Incloſure if their Wings were not clipp'd. Mich. 11 Car. B. R. between Winbroke and Evans, a Prohibition granted; but it was ſurmiſed that no Tithe was paid for them in a great Circuit called the Chilterne in the ſame County, ſcilicet of Bucks, and ſo preſcribed in non decimando; but the Court granted it becauſe they were feræ Naturæ.

(k) Tithes ſhall not be paid of Turkeys, or of their Eggs, nor of tame Partridges or Pheaſants, quia feræ Naturæ.

Moor 599. Pl. 822. ſo held; but Q. Et vid. Sir Sim. Deg. Fol. 179.

6. No Tithes ſhall be paid in kind, without a Cuſtom, (l) for Fiſh taken in the high Sea out of any Pariſh. Hill. 14 Car. B. R. between Long and Dircell, per Curiam, and a Prohibition granted accordingly: And Juſtice Jones ſaid, That upon an Appeal to the Delegates out of Ireland in (m) the Lord Deſmond's Caſe it was agreed, that for ſuch Fiſh ſo taken only perſonal Tithes are due, deductis Expenſis.

(l) For they are feræ Naturæ, and the Sea is not within any Pariſh. Noy 108. Cro. Car. 264. Et vid.

2 Rol. Rep. 419. where and how payable by particular Cuſtom. (m) Cro. Car. 264. ſeems to be the ſame Caſe. 1 Rol. Abr. 656. M. 2.

n) Palm. 527. S. P. ſeems to be admitted. Lit. Rep. 311.

(o) In the Original it is Eſtange.

(p) March 15. ſeems to be a Note of the ſame Caſe.

(q) In the Original it is et, and ſo appears miſprinted.

7. (n) No Tithes ſhall be paid in Kind de Jure, without a Cuſtom, for Fiſh taken in a common River which is not incloſed, as in a (o) Stew incloſed, becauſe they are feræ Naturæ, though they are taken by one that hath a ſeveral Fiſhery there, and though the Place where they are taken be within the Pariſh of that Parſon that claims them; for this is a perſonal Tithe, in which Tithes ought to be paid deductis Expenſis. (p) Paſch. 15 Car. B. R. between Gold and Arthur and others, a Prohibition granted, where the Suit was for the Tithes (q) of Salmons in the River of Exe. Mich. 15 Car. B. R. between Wiſlake and the ſaid Arthur and others; a like Prohibition granted upon the ſame Matter between other Parties.

(a) 2 Inſt. 651. 652.

(b) Cro. El. 276. S. P. agreen. Moor 912. Pl. 1286. S. P. agreed. Cro. Car. 596. —That Tithes were payable before 37 H. 8. but the Quota. doubtfull. Vid. Hard. 116.

(D) (a) For what Things they ſhall be paid *de Jure*.

Of Freehold.

1. NO Tithes ſhall be paid for ſuch Things as do not grow and renew from Year to Year by the Act of God. Co. 11. Dr. Grant 16.

2. (b) No Tithes ought to be paid de Jure (c) for Houſes of Habitation. Co. 11. Dr. Grant 16.

(c) But where in London 2 s. and 9 d. per Pound of the Rents of Houſes, &c. except Houſes of Noblemen and Women kept in their own Hands, and Halls of any Company not let, ſhall be paid by a Decree confirmed by Parliament, and the Perſons refuſing to pay, &c. ſhall by the Lord Mayor be committed to Priſon. Vide 37 H. 8. c. 12. and the Decree there at large. 2 Inſt. 663. —Though otherways exempt by 31 H. 8. for this ſubſequent Act is a Repeal thereof. Green and Pipe, Moor 912. Pl. 1286. adjudged. Cro. Eliz. 276. adjudged. — Such Tithes muſt be ſued for according to the Form preſcribed by the Act. Per Hob. 11. Cro. Car. 596. 2 Inſt. 660. —But that a Suit may be for them in the Exchequer, there being no negative Words, vid. Hard. 116.

3. Nor for any Rent reſerved upon a Demiſe made of Houſes of Habitation. Co. 11. Dr. Grant 16.

4. 5 H. 4. Rotulo Parliamenti, Numero 66. the Commons pray, That whereas many of the Lieges of the King are often vexed and troubled by Parſons and Vicars of Holy Church, by Citations and Cenſure of Holy Church, for Tithes of (d) Stone and Slat wrought and drawn out of Quarries, of which no Tithes are paid, that he would pleaſe to grant, that if any Prohibition be made in the Caſe, that no Conſultation be granted to the contrary.

(d) In the Original it is de peres & ſclatts overes & trahes hors de quarers de ſi come nul diſme ent pay.

(E) (a) Anſwer. The King will adviſe.

Fol. 637.

(a) This is printed here as in ths Original.

1. (b) NO Tithes ſhall be paid of Quarries, (c) Becauſe they are Part of the Freehold. Hill. 11 Jac. B. R. per Curiam.

2. (d) No Tithes ſhall be paid de Jure for Cole. Hill. 14 Jac. B. R. per Houghton.

3. So no Tithe ſhall be paid for (e) Turf which is to burn. Hill. 14. Ja B. R. per Houghton. Hill. 11 Ja B. R. per Curiam.

4. 33 E. 1. Libro Parliamentorum 105. de Parſonis & Vicariis petentibus Decimam in Cornubia, ubi Rex ſolvit annuatim Epiſcopo Exoniæ pro Decima prædicta; ita reſponſum fiat, ſicut fieri conſuevit Tempore Comitis & Regis: And above this it is writ, STAGMEN CORNUBIÆ, it ſeems intended Tithes de Stanno. Vide Rotulum Parliamenti, 8 Ed. 2. Membrana 15.

5. No Tithes ſhall be paid of (f) Lime becauſe it is Part of the Freehold. Mich. 13. Jac. B. between Thomas and Petrie, per Curiam.

(b) Moor 901. Pl. 1275. S. P. adjudged. Et vid. Lit. Rep. 147. 2 Inſt. 651.

(c) Of Stone. March. 58.

(d) Moor 908. Pl. 1275. S. P. adjudged.

(e) Not of Turf, Gravel, and Chalk, becauſe they are part of the Freehold. 1 Mod. 35.

(f) Nor of Brick or Clay, March 58. ſaid to be adjudged. 2 Mod. 77. per Curiam. But by Cuſtom Tithes may be payable of a Lime-Kiln. 1 Rol. Abr. 642. Pl 7.

6. If a Man be ſeiſed of Lands within a Pariſh that uſed to pay Tithes, and makes a Nurſery thereof for Imps and Plants of ſeveral Kinds of Fruit, as Apples, Pears, Plumbs, &c. and of Aſhes, and after ſells ſeveral of them to Strangers (g) out of the Pariſh to be tranſplanted, he ſhall pay Tithes of this Nurſery to the Parſon, for though the Imps are Part of the Freehold ſo long as they continue there, yet when they are tranſplanted, they are ſevered and taken from the Freehold; and if this ſhall be permitted, the Parſon may be defeated of the Tithes of all the Land in his Pariſh by making of it into Nurſeries. Hill. 14 Car. B. R. between (h) Gibbs and Wiburn, adjudged per Curiam upon a Demurrer, and a Conſultation granted accordingly. Intratur, Mich. 14 Car. Rotulo 75.

(g) So if tranſplanted in the ſame Pariſh. Hard. 380.

(h) Cro. Car. 526. S. C. adjudged. 1 Jon. 416. S. C. adjudged. Et vid. Hard. 380, 381.

7. If a Man cuts a Coppice of Wood, and thereof pays his Tithe, and after, before any new Germins grow he grubs up the Roots and Stumps of the Trees, he ſhall not pay Tithe of them, becauſe they are Parcel of the Freehold, and not annually renewing. Mich. 15 Car. B. R. between (i) Bedford and Dr. Skinner, per Curiam and a Prohibition granted accordingly.

(i) March 58. 64, 65. S. C.

(a) (F) Tithe of Wood.

(a) This is printed as in the Original, though I ſuppoſe it was intended by my Lord Roll, that the ſame Title

1. (b) ROtulo Parliamenti, 17 Ed. 3. Numero 51. the Commons pray, That No Man be drawn in Plea in Court Chriſtian for Tithes of Wood or Underwood, unleſs in ſuch Places where ſuch Tithes have been uſed to be given.

ſhould have been continued. (b) 2 Inſt. 642. ſame Record cited. 2 Rol. Rep. 122. ſame Record cited. Palm. 38. ſame Record cited; and ſaid, That Tithes were not paid of Wood till Stradford Archbiſhop of Canterbury made a Conſtitution in 17 E. 3. That Tithes ſhould be paid within his Juriſdiction de Silva cædua, of which the Commonalty complained at the next and every Parliament till the 17 Rich. 2. Et vid. Lit. Rep. 153. 2 Leon. 80.

(a) This is printed as in the Original.

(a) (G) Anſwer.

(b) In the Original it is eins ceo heures.

1. LET it be done of this as it hath uſed to be done (b) before theſe Days.

2. 18 Ed. 3. Numero 12. the Commons pray, That as a Conſtitution is made by the Prelates to take Tithes of all Manner of Wood, which Thing was never uſed, and that Niefs and Wives might make Teſtaments, which is againſt Reaſon, that it would pleaſe by him and his good Council to ordain a Remedy, and that his People ſhould remain in the ſame State as they had uſed to be in the Time of all his Progenitors, and that Prohibitions ſhould be granted to all thoſe who are impleaded of the Tithes of Wood without having a Conſultation.

Fol. 638.

(a) This is printed as in the Original.

(a) (H) The King will that Law and Reaſon be done.

(b) 2 Inſt. 642. ſame Record cited.

1. (b) 21 Ed. 3. Numero 48. THE Commons pray'd, That whereas the Archbiſhops and Biſhops had lately ordained a Conſtitution to give Tithes of Underwood ſold only, whereas before theſe Days no Tithes were given; now the People of Holy Church by Force of the ſaid Conſtitution, take and demand Tithes alſo of groſs Wood, as well as of Underwood, ſold and not ſold, againſt what they have uſed Time out of Mind, to the great Damage of the Common Law, of which they pray a Remedy.

(a) This is printed as in the Original.

(a) (I) Anſwer.

1. THE Archbiſhop of Canterbury, and other Biſhops, have anſwered, That ſuch Tithe is not demanded by Reaſon of the ſaid Conſtitution, but of Underwood.

2. 25 Ed. 3. Parte Numero 37. the Commons pray'd, That no Tithes ſhall be paid of Wood, but where it hath uſed to be paid, and not of groſs Wood.

(a) This is printed as in the Original.

(a) (K) Anſwer: The King will adviſe.

1. 43 Ed. 3. Numero 17. THE Commons pray'd, That it be declared in what Caſe Tithe of Wood or Underwood ought to be given of Right in Places where it has not been given before theſe Days; and alſo that it be put in certain what Manner of Wood ought to be called Silva cædua; and that in caſe any be impleaded in Court Chriſtian of Tithe of Wood or Underwood, that a Prohibition be granted thereafter, and an Attachment thereupon in Chancery, as well to the Judges as Parties, as is accuſtomed in other Caſes, without having a Conſultation.

(a) (L) Anſwer.

(a) This is printed as in the Original.

1. LET the Statute in this Caſe ordained be kept and held. 2. 45 Ed. 3. Numero 23. Item, the Earls, Barons, Knights, and other of the Commons, complain, That where they ſell their (b) groſs Wood of the Age of (c) 20, 30, or 40 Years or of greater Age, to Merchants, to the Profit of themſelves, and in Aid of the King in his War, Parſons and Vicars of Churches implead and trouble the ſaid Merchants in Court Chriſtian for the Tithes of the ſaid Wood, (d) naming it by theſe Words, Silva cædua, whereby they cannot ſell their Wood (e) at the true Price, to the great Damage of them and of the Realm, of which they pray the King and his Council to apply a fit Remedy, and declare and interpret openly theſe Words, Silva cædua, as to the Intent of the Commonalty Underwood is compriſed in theſe Words, and not Trees of ſuch Age.

(b) It is to be obſerved, that this Word Groſs, and not Hautboys or Grandboys, is uſed here, and is intended of ſuch Wood as by the Common Law or Cuſtom of the Country is uſed as Timber: And the Statute of 43 E. 3. extends not to other Wood that hath not been nor will ſerve for Timber, though of the Greatneſs or Bigneſs of Timber. 2 Inſt. 642. Pl. Com. 470. b. (c) But if under that Age, Tithes ſhall be paid for it. Cro. El. 1. —But vid. Cro El. 55. (d) The Words in the Original are el nom ceſtes parolls Silva cædua. (e) The Words of the Original are averry pris.

(a) (M) Anſwer.

(a) This is printed as in the Original.

1. LET there be a Prohibition granted, and an Attachment thereupon, (b) as hath been uſed before theſe Days. Nota, That upon this the Statute is imprinted. (c) 45 Ed. 3. cap. 3.

2. H. 4. Rotulo Parliamenti Numero 59. the Commons in a Petition recited the Statute of 45 Ed. 3. &c. and ſaid, That notwithſtanding this * Statute, Parſons and Vicars claiming Tithes of all manner of Wood, as before they were wont, becauſe that Conſultations in this Caſe in Chancery have ſo eaſily been granted by Colour of this Word Sylva cædua, they pray, That he would pleaſe to ordain, that no Conſultation be granted by theſe Words, Sylva cædua, if it be ſo that the Wood of which he claims Tithes be of the Age of 20 Years or more at the Time of the Cutting, and a Pain thereupon ordained in this preſent Parliament.

(b) So that this Act is only declaratory of the * Fol. 639. Common Law. 2 Inſt. 632. Pl. Com. 470. a, b. (c) 2 Inſt. 642, and 643. it appears, that there having been ſome Doubt whether this was only an Ordinance or Statute in 47 Ed. 3. it was in Parliament declared to be a Statute.

(N) Anſwer.

1. LET it be uſed as it hath been done before theſe Days. 2. 2 H. 5. 2. Parte Numero 7. the Commons prayed, That whereas they are often impleaded in Court Chriſtian for Tithe of Groſs Wood of the Age of 20 Years, and of 40 Years and more, by the Name of this Word Sylva cædua; and in the Statute made in 45 Ed. 3. it is contained, That a Prohibition be granted in this Caſe, and thereupon an Attachment, as it hath been uſed before theſe Days, by which Statute no full Declaration is made what Wood is titheable, and what not; wherefore the Juſtices of the Land are of ſeveral Opinions concerning the ſaid Matter: That it pleaſe the Lord our King to limit and ordain, by the Advice of the Lords of this preſent Parliament, that all Manner of Wood, which is of the Age of 20 Years or more, ſhall

ſhall not be titheable in any Manner for the Time to come; and if it be within the Age of 20 Years, it ſhall be titheable if the Cuſtom of the Country where ſuch Wood grows demands it, and that in this Caſe a Prohibition be granted, and thereupon an Attachment, without granting a Conſultation in this Caſe.

(O) Anſwer.

1. BEcauſe the Matter of the Petition requires great and mature Deliberation, the King's Declaration will, that the Matter aforeſaid be adjourned and remitted till the next Parliament, and that the Clerk of the Parliament cauſe this Article to be brought before the King and his Lords at the Beginning of the next Parliament, to have it there declared.

2. 47 E. 3. Numero 21. All the Commons of the Realm pray, That as at the laſt Parliament held at Wincheſter the Lords and Commons of the Land made their Complaint, that Parſons and Vicars of the Holy Church travailed them in Court Chriſtian for the Tithes of great Wood, ſcilicet, of the Age of 20 Years and above, by Colour of this Word, Silva cædua, at their Requeſt it was ordained, That no Wood which was or ſhould be of the Age of 20 Years and more, ſhould be titheable; and the Parſons of the Holy Church intending that this Ordinance ſhould not reſtrain them of their ancient Incroachment, ſurmiſing that this was not affirmed for a Statute, (d) purſued in Court Chriſtian, contrary to the Ordinance aforeſaid, to the great Damage of the People, that it would pleaſe the King to affirm the ſaid Ordinance, for a Statute to endure for the Time to come, and that a ſpecial Prohibition upon the ſame Statute ſhould be made thereof in Chancery, forbidding thoſe in Court Chriſtian to hold Plea of Tithes of Wood of the Age aforeſaid.

(d) In the Original it is ſont Decaſions.

(P) Anſwer.

1. LET There be ſuch a Prohibition granted as hath been of ancient Time.

Fol. 640.

2. Regiſter, Fol. 44. a Conſultation granted to the Court Chriſtian to proceed there for Tithes of Silva cædua, ſo that de groſſis arboribus in hac parte non agatur.

(Q) Of what Things they ſhall be paid.

1. (a) IF a Man tops Oaks within the Age of 20 Years, and (b) after leaves the Top to grow above 20 Years, no Tithes ſhall be paid of them, for this is become Timber. Mich. 16 Jac. B. per Coke.

(a) 2 Leon. 83. S. P. adjudged. Godb. 175. S. P. ſaid by Coke Chief Juſtice to have been of late twice adjudged. (b) But if lopp'd before 20 Years, and after the 20 Years it is lopp'd every 10 or 7 Years, Tithes ſhall be paid thereof. Moor 980. Pl. 1272, 1273. Lit Rep. 149. —But 1 Brownl. 33. con. per totam Curiam. Et vid. Cro. Jac. 101. 2 Rol. Rep. 495. Moor 938. Pl. 1271.

2. (e) If Oaks above the Age of 20 Years become putrid and rotten, by which they are not fit for Timber, yet no Tithes ſhall be paid of them, becauſe they were once privileged. Trin. 38 Eliz. B. R. between (d) Parſon Ram againſt Patterſon. Mich. 3 Jac. B. between (e) Brook and Rogers, per Curiam con. (c) 2 Rol. Rep. 426. S. P. adjudged. 2 Inſt. 643. S. P. Moor 541. S. P. per Curiam.

(d) Cro. El. 477. S. C. adjudged. Moor 908. Pl. 1272. S. C. adjudged. Goulſ. 145. S. C. adjudged. (e) 11 Co. 49. S. C. cited. Moor 908. Pl. 1273. S. C. adjudged. Cro. Jac. 100. S. C. adjudged. 1 Rol. Rep. 100. S. C. cited.

3. If Oaks above the Age of 20 Years have uſed to be topp'd and lopp'd within every 20 Years, yet no Tithes ſhall be paid of theſe Tops and Branches cut within their Age of 20 Years, (f) becauſe their Stock is diſcharged. Trin. 38 Eliz. B. R. between (g) Parſon Ram and Patterſon, Co. 11. between Sampſon and Worthington, 48. b. adjudged. (f) Pl Com. 470 b. (g) Cro. El. 477. S. C. & S. P. per Curiam. Moor 908. Pl. 1273.

4. (h) If a Man cuts down Trees of Timber no Tithes ſhall be paid for the Germins which grow ex (i) Radicibus ſeu Stipitibus, becauſe the Root is privileged. Co. 11. 48. b. (k) Liford's Caſe.

S. C. & S. P. (h) Cro. El. 55. S. P. adjudged. 2 Inſt. 642. S. P. becauſe the Root is Parcel of the Inheritance. (i) So of the Roots. March 58, 65. (k) 1 Rol. Rep. 100. S. C.

5. (l) Tithes ſhall be paid of (m) Beeches, though they are above the Age of 20 Years, for they are not Timber. Trin. 38 Eliz. cited in one Leonard's Caſe, the Prothonotary, to be ſo adjudged. (l) Otherwiſe if in a Country where reputed Timber, as Buckinghamſhire, &c. 1 Rol. Rep. 355. 1 Brownl. 94, 95. 2 Rol. Rep. 13. Moor 541. Pl. 716.

(m) Not of Oak, Aſh, or Elm, being included within the Word Groſs-boys in the Statute of 43 E. 3. c. 3. and ſo is Beech, Horſe-Beech, and Horſe-Beam, becauſe they ſerve for Building, Reparation of Houſes, Mills, &c. contrary to the Judgment in Pl. Com. 470. 2 Inſt. 643. Et vid. 1 Leon. 80. 2 Rol. Rep. 83. —So of Aſp, becauſe it may ſerve for Building. 2 Inſt. 643. 2 Rol. Rep. 83. Goulſ. 161. —So of Birch. Cro. Eliz. 1. adjudged. Moor 907. Pl. 1270. adjudged. Cro. Jac. 199.

6. Tithes ſhall be paid of (n) Hazel, Willows, Holly, Alder, and Maple, though they are above 20 Years of Age. (o) Mich. 5 Jac. B. reſolved, and a Conſultation granted accordingly. (n) Pl. Com. 470 b. (o) Cro. Jac. 199. S. C. & S. P. per Curiam.

7. No Tithes ſhall be paid of Willows in ſuch Countries where they are uſed for Timber. Hobart's Reports, Caſe (p) 288.

8. But if Willows are fell'd which grow in the View of an Houſe, though it be Waſte to ſell them, yet Tithes ought to be paid of them. Hobart's Reports, Caſe (q) 288. (p) Hob. Fol. 219. S. C. (q) Hob. Fol. 219 S. C.

9. (r) If a Man cuts Timber-Trees, no Tithes ſhall be paid for the Bark. Co. 11. (s) Liford's Caſe 49. (r) 2 Inſt. 643. S. P. (s) 1 Rol. Rep. 100. S. C. & S. P.

10 (t) Tithes ſhall be paid of (u) Acorns of Oak, becauſe this is an yearly Encreaſe. Co. 11. (w) Liford's Caſe 49. (t) Moor 762, Pl. 1058. S. P. per Curiam. 2 Inſt. 643. S. P.

11. Of the After-moath, ſcilicet, of the ſecond Moath, Tithes ſhall be paid de Jure, without a (x) ſpecial Preſcription to be diſcharged by the Payment of Tithes out of the firſt Moath, and then they ſhall be diſcharged. Paſch. (y) 41 El. B. R. per Curiam. Hill. 10 Jac. B. Parſon of Stanfield in Suffolk, per Curiam, a Prohibition granted.

(u) Otherways if they drop from the Trees, and the Hogs eat them; but when gathered and ſold, then Tithes ſhall be paid for them. Lit. Rep. 40. Hetl. 27. (w) 1 Rol. Rep. 100. S. C. & S. P. (x) For ſuch ſpecial Preſcriptions, vid. 648. D. 1, 2, &c. (y) Moor 910. Pl. 1280. S. C. & S. P. appears. Et vid. Godb. 44.

12. (z) If a Man pays Tithes of Hay, no Tithes de Jure ought to be paid for the Paſture of the ſame Land for the ſame Year, (a) for he ſhall not pay Tithes twice in the ſame Year for the ſame Thing. Paſch. 16 Ja. B. between Nichols and Hooper, per Curiam 3 Jac. B. R. and there ſaid per Towſe, that it was ſo adjudged between Spencer and Johnſon; and otherways adjudged between (b) Hall and Fettiplace, becauſe the After-paſture is but the Relicts of the Hay of which he had paid Tithes before. Paſch. 17 Jac. B. Kinniſton.

13. 2 H. 4. Rotulo Parliamenti, Numero 93. not for Agiſtments in ſuch After-graſs.

14. (c) If a Man pays Tithes of Corn, he ſhall not after pay any Tithes for the * Stubble that grows the ſame Year upon the ſame Land. Hill. 6. Jac. B. Placito 13. Smith's Caſe, per Curiam. Et Paſch. 7 Jac. per Curiam, ſame Caſe.

15. 9 Jac. between (d) Backſter and Hope, for the After-paſture.

16. 2 H. 4. Rotulo Parliamenti, Numero 93. (e) not for the Agiſtments in ſuch After-graſs.

(z) Green and Auſtin S. P. Yelv. 86. adjudged. Cro. Jac. 116. does not appear. 2 Inſt. 652. S. P.

(a) 2 Inſt. 652.

(b) Cro. Jac. 42. S. C. adjudged.

* Fol. 641.

Moor 758. Pl. 1048. S. C. but S. P. does not appear.

(c) Yelv. 87. S. P. cited to be adjudged. 2 Inſt. 621. S. P. 652. S. P. S. C.

(d) 2 Inſt. 621, 652. S. C. 2 Brownl. 30.

(e) 2 Rol. Rep. 191. S. C. cited to be adjudged.

17. If an Inn-keeper pays Tithe-Hay of certain Land, and the reſt of the Year after puts into the ſame Lands the Horſes of his Gueſts which come to Market there in the ſame Town, no Tithes ſhall be paid for the Herbage of theſe Horſes, for this is but the After-paſture of the Land, of which he had before paid Tithes. Trin. 16 Ja. B. R. between Richardſon and Cable, per Curiam, and a Prohibition granted.

18. 2 H. 4. Rotulo Parliamenti, Numero 93. not for the Agiſtment in ſuch After-paſture.

19. No Tithes are due by the Law of a (f) Fulling-Mill, for no Tithes in Kind can be taken thereof, for only Moneys are paid for the Labour, (g) and ſo it is but a perſonal Tithe. Hill. 16 Ja. B. R. between Johnſon and , reſolved, and a Prohibition granted. This was a Berkſhire Caſe: But Mich. 11 Car. B. R. between (h) Johnſon and Dauridge, per Curiam reſolved, That Tithes by the Law are due thereof, and a Prohibition denied accordingly.

(f) So of a Copper-Mill. Lit. Rep. 314. adjudged.

(g) Jake's Caſe, 3 Bulſt. 212. 1 Rol. Rep. 405. 2 Inſt. 621.

(h) Cro. Jac. 523. S. C. adjudged. 2 Rol. Rep. 84. S. C. adjudged; where the Suit being in the Spiritual Court, for the Tithe of a Griſt-Mill. and Fulling-Mill, and a Prohibition awarded as to the Griſt-Mill, a Conſultation was after granted; but as to the Fulling-Mill, the Prohibition ſtood: And it was agreed per Curiam, that Tithes ſhould not be paid of Fulling-Mills, Tin-Mills, Plate-Mills Rag-Mills, Paper-Mills, &c. unleſs where there is a ſpecial Cuſtom to pay Tithes for them. And it was ſaid, that Artic' Cler', viz. the Statute of 9 E. 2. c. 5. muſt not be intended of ſuch Mills, but of Corn-Mills. But vid. 2 Inſt. 621. the Expoſition of this Act, and March 15. a Diverſity taken between ancient Mills and Mills newly erected. 2 Inſt. 622. my Lord Coke ſays, the Caſe of Tithes of Mills was never judicially determined as he knew. Et vid. 1 Rol. Abr. 652. Pl. 4. N. Dyer 170. b. margine. 1 Rol. Abr. 652.

20. If a Man pays Tithes in Kind to the Parſon for his (i) Lambs, Calves, and other Things, going and ariſing upon his Paſtures, Waſtes, Lands, Meadows, &c. after in the ſame Year he ſhall not pay Tithes of the Agiſtments in the ſame Paſtures, Waſtes, &c. 2 H. 4 Rotulo Parliamenti, Numero 93. this is an expreſs Petition of the Commons.

(i) In the Original it is agneles veles.

(a) (R) *Vid. poſtea*, Title A. To what Thing the *Modus* ſhall extend.

(a) This is printed here as in the Original; tho' it ſeems this ſhould not have been ſet as any diſtinct Head, being deſigned only, I ſuppoſe, to refer the following Caſe in its proper Title under which it ſhould have been put.

1. If there had been Two ancient Corn-Mills de Tempore, &c. for which 6 s. 8 d. hath been paid for the Tithes de Tempore, &c. and after by Continuance of Time the Mill-Stream changes its Courſe, and runs into a Place a little Diſtance from the ancient Stream, and thereupon the Owner of the Mill pulls down one of the ancient Mills, and rebuilds it in the new Place where the Stream runs, this ſhall be diſcharged of any Tithes by Force of the ancient Modus, for this comes by the Act of God, and not by the Act of the Party. Mich. 11 Car. B.R. between (b) Johnſon and Dunridge, per Curiam reſolved, and a Prohibition granted accordingly. But the Court ſaid, if the Stream be altered by the Act of the Owner himſelf, Tithes ought to be paid thereof as for a new Mill.

(b) 1 Rol. Abr. 652. F. 1, 2. S. C.

2. (c) Not of ſuch (d) Things which are not yearly renewing.

3. If a Man pays Tithes for the Fruit of Trees, and after cuts down the ſame Trees, and makes them into Billets or Faggots, and ſells them, he ſhall not pay Tithes for the Billets or Faggots, (e) becauſe this is not a new Encreaſe. Co. Magna Charta 652, 621.

(c) This and the following Placita are printed as in the Original, though it ſeems a Miſtake there, and that they ſhould have been continued under the preceding Title.

(d) Not of the Roots of a Coppice of Underwood, becauſe not creſcentia & renovantia, as Tithes ought to be. March 58, 65.

(e) If a Man pays Tithes for his Corn, and after grinds the ſame Corn at a Mill in the ſame Pariſh, no Tithe Meal ſhall be paid thereof. 2 Inſt. 652.

4. If a Man keeps an Horſe within the Pariſh only for his Saddle to ride, no Tithes ſhall be paid for this Horſe, becauſe this is a barren Animal, not renewing, but only for his Labour. Tr. 15 Ja. B. R. between (f) Lamkin Parſon of Thimblethorp and Wild, where the Caſe was, That a Man leaſes Land to another, reſerving the going of a Nag to ride, and after the Leſſor was ſued in the Spiritual Court for the Tithes of the Nag, and a Prohibition granted by Mountague, Croke, and Dodderidge, becauſe this is a ſteril Animal, and uſed only for to ride; and, as it was urged at the Bar, the Leſſee paid him Tithes for all the Herbage; but the Court took no (g) Advantage of this: But * Houghton ſeemed econ. for it ſeemed to him, that no barren Cattle ſhould be diſcharged of Tithes præter ſuch which were uſed for Husbandry; but this was not uſed about Husbandry, ergo.

(f) Hampton and Wild S. C. Cro. Jac. 430. adjudged; but per Curiam if the Horſe had been kept to ſell, whereby Profit had accrued, there he ſhould

* Fol. 642.

have paid Tithe. Et vide 1 Bulſt. 171. 1 Rol. Abr. 647. Pl. 14. 650. Pl. 14.

(g) So is the Original; but perhaps it ſhould be Notice.

5. If the Soil of an Orchard be ſowed with any Kind for Grain, the Parſon ſhall have Tithes of the Fruit-Trees and of the Grain, becauſe they are of ſeveral and diſtinct Kinds. Co. Magna Charta 652.

6. No Tithes ſhall be paid of Chickens, becauſe he pays Tithes of Eggs. Hill. 15 Ja. B. R. reſolved, and a Prohibition granted accordingly.

7. If

7. If a Man pays Tithe-Lamb at Mark Tide, and at Midsummer he shears the Residue of the Lambs, scilicet, the 9 Parts, he ought to pay Tithe-Wool of them, though there is but two Months between the Time of the Payment of the Tithes of Lambs which were not shorn paid with their Fleeces, and the Shearing of the Residue, for this is a new Increase. P. 16 Ja. B. between Nicholls and Hooper, per Curiam, and a Prohibition denied accordingly.

8. A Man shall not pay any Tithes of the Herbage of (h) Sheep, (i) because he pays Tithes of the Wool, for otherways he shall pay Tithes twice of one Encrease. Trin. 12. Ja. B R. between (k) Marskal and Price, dubitatur.

(h) Poph. 197. Diversity taken by Whitlock, inter animalia inutilia, of which the Parson shall have the 10th Part of the Bargain for depasturing, as Horses, Oxen, &c. & animalia utilia, of which he shall have Tithes in Specie, as Cows, Sheep, &c. 2 Bulst. 240. (i) So if after the Corn is reaped, a Man takes in Sheep pro meliorazione Agriculturæ infra Terras arabiles, & non aliter, he shall not pay Tithe for them, because thereby the Ground is made more profitable, and will yield more. 1 Mod. 216. (k) 2 Bulst. 238. S. C. dubitatur, 1 Rol. Rep. 38, 62. S. C. dubitatur.

9. If the Parson hath Tithe of Corn one Year, and the Land is left unsown the next Year, to the Intent that it may be plow'd and made ready to be sow'd the third Year, no Tithes shall be paid for this second Year, for by the lying thereof fresh the Land is bettered, and the Parson will have the better Tithes the third Year. P. 7. Ja. B. Smith's Case, per Curiam.

10. If Sallows, *&c.* grow *sparsim* among Oaks, *de stipitibus prius succisis crescentes*, and the Owner fells the whole Wood, and causes them to be promiscuously cut into Faggots, and bound up in Faggots together, and the most Part of every Faggot is Oak, and the rest of little Value, so as the Severance of the Sallows, *&c.* from the Oak will not quit the Charge, Tithes shall not be paid for them. *Pasch.* 26 *Eliz.* between *Daws* and *Molins*, 2 *Leon.* 79, 80. *per Curiam.* adjudged.

11. But if the most Part of the Wood be Sallows, *&c.* and (l) here and there grows an Oak, and the Owner cuts down all the Wood, and (m) binds them into Faggots promiscuously, Tithes shall be paid of them. *Pasch.* 26 *El.* 2 *Leon.* 80. *per Curiam*

(l) Where the Boughs of such Oaks growing sparsim shall only be privileged, but the other Wood shall pay Tithe, 1 Sid. 300. (m) Goulf. 127.

12. If Wood be usually cut for Fire-Wood, though permited to grow for 25 Years or more, it shall pay Tithe. *Trin.* 18 *Car.* 2. between (n) *Hawes* and *Cornwall*, 1 *Levinz* 189. adjudged.

(n) 1 Sid. 300. S. C. adjudged; and said, that the Payment of Tithes shall not by this Means be avoided, so long as the Wood cut is intended for Firing.

13. Pollards of 50 Years Growth shall pay Tithes when fell'd. *Trin.* 18 *Car.* 2. *Levinz.* 189. *per Wyndham.*

14. By 2 *&* 3 *Edw.* 6. *cap.* 13. it is enacted, That all such barren Heath or waste Ground, other than such as is discharged by Act of Parliament, (o) which before that Time had lain barren, and paid no Tithes by Reason of the same Barrenness, and then was or hereafter should be improved and converted into Arable or Meadow, should from thenceforth, (p) after the End of 7 Years next after such Improvement, pay Tithe for the Corn and Hay growing thereupon.

(o) So that it must be such Ground as is meerly barren, for if Sheep have been kept there, or it hath yielded any Profit, of which Tithes have been paid, it is not within this Clause. Lit. Rep. 311. per Richardson: But by 2 Inst. 655. though it yield some Fruit, yet if it be barren quoad Agriculturam, which this Clause meant to advance, 'tis within the Act, viz. though it paid Tithe-Wool and Lamb before. —It must be such Ground as suapte Natura is so, not such as with great Charge is got from the Sea, but otherways in its Nature is fruitful. Buck and Wit, 1 Rol. Rep. 354. adjudged. 3 Bulst. 165. adjudged. But for this, vide 2 Inst. 655, 656. Dyer 170. b. N. Bendl. 80. Pl. 122. Moor 430. Pl. 603. 909. Pl. 1279. Cro. Eliz. 475. 1 Rol. Rep. 39. (p) By which 'tis implied, that Tithes shall not be paid before. 2 Inst. 656. Dyer 170. b. 2 Bulst. 257.

15. Provided

15. Provided that if any ſuch (q) barren or waſte Ground had before that Time been charged with the Payment of any Tithes, and the ſame ſhould thereafter be improved or converted into Arable or Meadow, then the Owner thereof ſhould, during the 7 Years next following ſuch Improvement, pay ſuch Kind of Tithes as were paid for the ſame before the ſaid Improvement.

(q) For the Expoſition of theſe Words, and what Ground is intended thereby, vid. N. Bendl. 80. Pl. 122.

(S) For what Things Tithes ſhall be paid (a) by Cuſtom where they ought not *de Jure.*

(a) That Cuſtom may make that titheable which in its Nature is not ſo. March 65. vide. —Where Tithes are payable by Cuſtom, they ſhall be paid,

1. (b) **By Cuſtom Tithes ought to be paid for the Rent reſerved upon Leaſes of Houſes, though not** de Jure, **for this may commence upon a lawful Conſideration.** Co. 11. (c) **Dr.** Grant 16. (**But** quære **thereof, for the Reaſon of the Book is repugnant in it ſelf.**) Vid. M. 12 Ja. B. Hobart's Reports 16. (d) Leyfield's **Caſe, a Prohibition granted.**

though the Lands are not rented, or lie freſh. Hard. 184. Et vid. March 56. (b) Lat. 210 a. like Preſcription. (c) Hob. 11. S. C. cited. (d) Hob. Fol. 10. S. C. A Prohibition granted; and the Court directed, That they ſhould declare upon the Prohibition, and then proceed to Judgment: But in the Margin of the Book there is this Nota, viz. That a Modus decimandi can hardly ſtand to riſe and fall according to the Rent by Preſcription.

2. **But otherways it is of new Houſes, of which no Cuſtom can be.** M. 12 Ja. B. **Dr.** Lyfield's **Caſe,** per Curiam.

3. **Whether a Parſon can preſcribe to have Tithes of Groſs Trees, againſt the Common Law, and the Statute** de Silva cædua, quære, 9 H. 6. 56.

4. **By a Cuſtom, Tithes may be paid of** (e) **Fiſh taken in** Iſland **by Merchants of a Town in England, and brought into the Town here, to the Parſon of the Town.** My Reports, 14 Ja. (f) Goſlin and Harding, **adjudged.**

(e) Where Tithes ſhall be paid for Fiſh by Cuſtom. Palm. 527. Cro. Car. 264, 339. Noy 108. Hetl. 13, 14. 1 Vent. 5. 1 Levinz 179. (f) 1 Rol. Rep. 419. S. C.

5. **By a Cuſtom, Tithes ſhall be paid of Pigeons that ſhall be ſpent in my Houſe, though not of common Right.** Mich. 14 Ja. B. Watley and Hanberry, **agreed** per Curiam.

6. **So by a Cuſtom Tithes ſhall be paid of Wood conſumed in an Houſe.** Mich. 14 Ja. B. Watley **and** Hanberry, **agreed.**

7. **So by a Cuſtom, Tithes ſhall be paid of a Lime-kiln, though none are to be paid** de Jure **without a Cuſtom.** Mich. 13 Ja. B. (g) **between** Thomas **and** Perry, per Curiam.

(g) Hetl. 14. S. C. cited.

8. **By a Cuſtom, Tithes ſhall be paid of white Salt.** Tr. 16 Ja. B. R. **between** Jones **and** Gower, **admitted; but a Prohibition granted upon a** Modus.

Fol. 643.

(T) Of what Things.

1. If a Man leaſes Paſture-Land, rendring a Rent, the Leſſee ſhall not be charged for the Tithes of the Rent, but he ought to have Tithes in Kind of the Land; and if they be but barren Cattle, yet he ought to ſue for Tithes in Kind of them, if any be due; and ſo it was reſolved, P. 14 Ja. in B. between Parſon Ellis of Devon and Drake; though it was ſaid, that by the Spiritual Law he had the Election, for this croſſes the Common Law.

(V)(a) What ſhall be ſaid *Minutæ Decimæ.*

(a) 2 Inſt. 642.

1. Tithes of (b) Saffron are Minutæ Decimæ. P. 38 El. B. R. between (c) Bedingfield and Freake. They are great Tithe. M. Ja. B. R. per Curiam.

(b) The Tithes of all theſe new Things, viz. Saffron, Hops, Wood, &c. if it doth not appear by material Circumſtances to the contrary, ſhall be taken to be Minutæ. Hut. 78. Et vid. 1 Sid. 447. (c) Cro. Eliz the laſt, 467. S. C. adjudged. Moor 909. Pl. 1277. S. C. adjudged. Ow. 74. S. C. adjudged, Goulſ. 149, 150. S. C. adjudged. Cro. Car. 28. S. C. cited, Hut. 78. S. C. cited. Et vid. Palm. 220, 222.

2. If a Vicar be endowed de Minutis Decimis, and he hath uſed by Force of this Endowment for a long Time to have Wood which is but of the annual Value of 6 s. 8 d. by Reaſon of the ſmall Value of the Wood and Uſage, the Wood ſhall paſs by the Words Minutæ Decimæ. Mich. 10 Jac. B. R. between Reynolls and Green, per Curiam adjudged upon Evidence at the Bar, though Wood in its Nature be not Minutæ Decimæ.

(d) By the Statute of 11 & 12 Will. cap. 16. 5 s. per Acre ſhall be paid for the Tithes of Flax and Hemp before they are carried off the Ground; which Act is continued by the Statute 6° Annæ.

3. Tithes of (d) Flax are Minutæ Decimæ. Mich. 14 Car. B. R. in Noah Webb's Caſe, per Curiam.

4. Tithes of Woad, growing in Nature of an Herb, are *Minutæ Decimæ. Hill* 1 *Car.* between (e) Sir *Rich. Udal* and *Tindal* Vicar of *Alton*, *Cro. Car.* 28. adjudged upon a ſpecial Verdict.

(e) Hut. 77, 78. S. C. adjudged; but agreed by the Court, That it might have been ſo found, that it ſhould have been Majores Decimæ, and predial, as if it had been found, that all the Profits of the Parſonage conſiſted of ſuch Tithes; for Things which of their own Nature are Minutæ, become Majores when the greateſt Part of the Profits of, &c. conſiſt therein, as in ſome Countries the greateſt Part of the Land within the Pariſh is Hemp, Lime, or Hops, and there they are great Tithe; and ſo it may be of Wool and Lamb.

5. If by the Cuſtom of a Pariſh the Parſon hath had all the great Tithes, and the Vicar all the ſmall, and within the Pariſh there are 650 Acres of Arable Land, and 750 of Paſture, and 26 Acres thereof, lying in ſeveral Parcels in the open Field, during the 8 Years laſt paſt were ſown with Flax by ſeveral Perſons, but before that Time no Flax had been ſown in the Pariſh, the Tithes thereof ſhall be taken as ſmall, and belongs to the Vicar. *Trin.* 4 *Will. & Mar.* between *Wharton* and *Liſle*, 3 *Levinz* 365. adjudged by *Dolben*, *Gregory*, and *Eyre*, *Con.* the Opinion of *Holt* Chief Juſtice; and he held, the Tithes of Flax, Hemp, *&c.* growing in a Garden, Backſide, Orchard, *&c.* to be *Minutæ*; otherways when growing in the open Field, be the Quantity

more or leſs. But the other Three Juſtices ſaid, Tobacco, Hops, *&c.* in their Nature are *Minutæ Decimæ*; and there was not any ſuch Quantity in this Caſe as ſhould alter their Nature, admit it alterable by the Quantity, in which they did not agree.

(X) Incidents.

What Incidents belong *de Jure* to Tithes.

(a) As to (b) the (c) Setting (d) out of Tithes.

1. (e) If a Pariſhioner ſet out his Tithes, and ſever the tenth Part from the nine Parts juſtly and truly, though he does not give a perſonal Notice to the Parſon, or general Notice in the Church, of the Time of ſetting out the Tithes, ſo that the Parſon may be preſent at the ſetting out the Tithes, and ſee it be juſtly done, (f) yet this is a good ſetting out of the Tithes. Mich. 13 Car. B. R. between Chaſe and Ware, per Curiam, in a Writ of Error upon a Judgment in an Action upon the Caſe againſt the Parſon, for leaving his Tithes of Hay upon the Land of the Pariſhioner, after Notice of the Setting out, by which the Pariſhioner loſt his Graſs there: But it was not alledged, that the Parſon had Notice of the Time of Setting out of Tithes, and yet the Court affirmed the Judgment againſt the Parſon. Intratur, Trin. 13 Car. Rot. 564.

(a) At what Place payable Godb. 331.

(b) If the Pariſhioner ſets out his Tithes, and the Parſon will not take them, he is excuſed. Cro. Eliz. 206. — So though taken away by a Stranger. 4 Leon. 7. — If not carried away in a reaſonable Time, the Pariſhioner may bring his Action, or take them Damage Feſant. 3 Bulſt. 336. Cro. Car. 63. Lat. 8. 1 Part 206. Pl. 36.

(c) That by the Setting out they become a Chattel, and the Parſon can ſue him that takes them away at Common Law only. Moor 912. Pl. 1217. 1 Leon. 39. 1 Rol. Rep. 56. 2 Rol. Rep. 440. 13 Co. 23. Lat. 8. Cro. El. 607.

(d) That they may be ſet out by any Perſon that has the Poſſeſſion of the Land, as a Diſſeiſor, &c. 1 Jon. 89, 90. — But if a meer Stranger ſets them out, this ſettles no Property in the Parſon. Lat. 1.

(e) Styl. 342. S. P. appears.

(f) Noy 12. it is ſaid by Hut. That by the Civil Law the Pariſhioner ought to give Notice to the Parſon when the Tithes are ſet forth; but that it had been adjudged that the Common Law did not ſo oblige a Man. 2 Vent. 48.

2. When the Tithes of Graſs is ſevered from the nine Parts, the Parſon de Jure may make it into Hay upon the Land where it grows, as well as the Pariſhioner himſelf. Hill. 14 Ja. B. R. (g) Newberry and Reynolls Parſon of Collomton in Devon, per Curiam, and a Prohibition denied accordingly, where the Parſon had alledged a Cuſtom ſo to do, and the Court held it idle.

(g) 1 Rol. Rep. 420. S. C. & S. P per Curiam; and by Warburton, a Cuſtom to the contrary would be unreaſonable.

3. So in this Caſe, the Parſon may go over the Land of the Pariſhioner in the Way to come at the Place to make it into Hay; for this is incident to the Tithe. Mich. 14 Jac. B My Reports, (h) Newberry and Reynolls.

(h) 1 Rol. Rep. 420. S. C.

4. By the 2d and 3d of *Edw 6. cap.* 13. it is enacted, That at all Times when predial Tithes, are due at the tithing thereof, it ſhall be lawfull for every Perſon to whom they ought to be paid, his Deputy or Servant, to view and ſee their Tithes juſtly and truly ſet forth and ſevered from the nine Parts, *&c.*

(Y) Tithes

Fol. 644.

(Y) Tithes in Kind.

(a) How they ought to be paid.

(a) Tithes ought to be paid ſo ſoon as they may be fit for the Parſon to receive them, as Calves at ſuch an Age, and other Things as the Matter will bear. Raym. 277.

1. (b) A Man is not bound to make into Hay the Tithe of Graſs which he cuts, but he may ſet out the Tithe thereof when it is in Graſs-Cocks, for then he may well enough ſever the Tithe from the nine Parts. P. 17 Ja. B. between (c) Hide and Ellis, per Curiam. Hobart's Reports, Caſe 328. the ſame Caſe Contra, Hill. 14 Ja. B. R. between Barham and Gooſe, per Curiam. P. 15 Ja. B. R. in the ſame Caſe per Curiam, and a Prohibition denied. Tr. 15 Ja. B. R. between Poppinger and Johnſon, per Curiam, and a Prohibition denied. P. 13 Jac. B. R. per Curiam, and a Prohibition denied. P. 2 Ja. B. R. cited. Hobart's Reports, Caſe 328. to be adjudged between Hall and Simonds.

(b) 1 Rol. Rep. 173. S. P. per Curiam con.

(c) Hob. Fol. 250. S. C.

2. A Man is not bound to tedder the Tithe of Graſs before he puts it into Graſs-Cocks, and ſets out the tenth Part, for he may put it into Graſs-Cocks out of the Swarth, and then ſet out the tenth Part. Contra, Hill. 14 Ja. B. R. Barham and Gooſe, per Curiam, and a Prohibition denied accordingly; and ſo P. 15 Jac. B. R. per Curiam, in the ſame Caſe. Trin. 15 Ja. B. R. between (d) Poppinger and Johnſon, per Curiam, and a Prohibition denied accordingly.

(p) 1 Rol. Abr. 647. B. 4. S. C.

3. A Man may ſet out the tenth Part of the Hops for Tithe before they are dried. Hill. 14 Ja. B. R. in (e) Barham and Gooſe's Caſe, put per Serjeant Hitcham, and agreed per Mountacute.

(e) 1 Rol. Abr. 947. B. 1, 2. S. C.

4. The Pariſhioner ought of common Right to cut down the Corn, and prepare it for the Parſon, and to ſet out the Tithe from the nine Parts. M. 3 Ja. B. R. between Perry and Chauncey adjudged.

5. The Pariſhioner of common Right ought to make the (f) Corn into Sheafs. P. 13 Ja. B. R. per Curiam.

(f) In the Original it is le blees.

6. The Pariſhioner is not bound to gather and ſet up (g) the Corn into Hillocks or Heaps; but it is a good Manner of Tithing to throw the Shocks out. H. 6 Ja. B. R. Placito 13. per Curiam.

(g) In the Original it is le blees.

7. If the Tithes within a Pariſh belong to Two Penſionary Prieſts, *viz.* one Moiety to one, and the other Moiety to the other, the Pariſhioner is not bound to ſet them out in Moieties, but it is ſufficient for him to ſet out the entire Tenth. between *Stileman* and *Cremer*, *Lat.* 24. 228. adjudged; though it appears by the Caſe, that the Pariſhioners had uſed for 40 Years to ſet out the ſeveral Portions.

8. The tenth Part of the Milk of every Meal ſhall not be paid for the Tithe thereof, but every tenth Meal entire, by Reaſon of the Trouble which would otherways accrue in collecting ſo ſmall Parcels. *Paſch.* 13 *Car.* 2. between *Dod* and *Ingleton*, *Raym.* 277. decreed accordingly; and ſaid by *Raym.* That Tithe-Milk ought to be delivered by the Pariſhioner at the Parſonage-Houſe: But by the Chief Baron and Two others it was decreed, That it ſhould be delivered in the Church-Porch, becauſe the neighbouring Pariſhes did ſo.

(Z) For what Thing for a collateral Reſpect.

1. If a Man buys Woods titheable, and burns them in his Houſe, he ſhall not pay Tithes for them, as was reſolved, P. 14 Ja. in Banco, between Parſon Ellis and Drake.

2. (a) No Tithes ſhall be paid of Wood cut and (b) employed (c) for Incloſure (d) in his Husbandry. Tr. 38 El. B. R. between Parſon Ram and Patterſon, admitted, Tr. 10 Jac. B. R. between Browne and Nixon, per Curiam.

(a) Cro. Car. 115. S. P. per Curiam, where there is a Cuſtom alledged to be diſcharged, &c. But for this vid. Moor 683. Pl. 941. (b) Where the greateſt Part is uſed in Hedging, no Tithes ſhall be paid for the reſt, which was cut down for that Purpoſe. Cro. El. 499. (c) Moor 917. Pl. 1304. (d) Otherwiſe if employed in the Incloſure of another's Corn, though the Parſon hath the Tithe thereof. 1 Saund. 142, 143. adjudged, that a Preſcription to be diſcharged in ſuch a Caſe is naught.

3. For Broom or other Fewel expended in the Houſe of the Pariſhioner (e) no Tithes are due. P. 40 El. B. R. between (f) Auſtin and Lucas, adjudged per Curiam.

(e) This muſt not be intended de Jure, but only by Cuſtom. Moxton and Farmer, Cro. Car. 113. adjudged. Hetl. 89, 110. 117. S. C. Lit. Rep. 152, 153. adjornatur. Et vid. 1 Saund. 142, 143. Hetl. 93, 100. Goulſ 161. March 79. 1 Rol. Rep. 31. —It muſt be ſhew'd that he occupies Lands, and that the Houſe is for the Maintenance of Husbandry, by reaſon of which the Parſon hath Uberiores Decimas. 1 Vent. 75. 1 Sid. 447. (f) Moor 909. Pl. 1279. S. C. adjudged. Cro. El. 609. S. C. adjudged.

4. (g) No Tithes ſhall be paid de Jure for Pigeons which are ſpent in my Houſe, for this is for the Preſervation of thoſe which labour in other Things of which the Parſon hath Tithes. M. 14 Ja. B. between Watley and Hanberrye, reſolved, and a Prohibition granted.

(g) Lit. Rep. 40. S. P. adjudged. Et vid. Lit. Rep. 311. Hetl. 147. 1 Rol. Abr. 636. Pl. 2.

5. (h) But he ſhall pay Tithes for ſuch Pigeons as he ſells, as it was agreed in the Caſe of Whatley.

6. If a Man keeps a Family, and hath Pigeon Holes about his Houſe, and there keeps any Pigeons, and the young Pigeons there encreaſe, and he kills and ſpends them in his Houſe, he ſhall not pay any Tithes for them. * Hill. 13 Car. B. a Prohibition granted, and for a Conſultation pleaded by the Parſon that he ſold them, between Vincent and Tutt.

(h) Lit. Rep. 311. S. P. per Curiam.

* Fol. 645.

7. If a Man cuts down Graſs, and before he makes it into Hay, being only put into Swathes, he carries it away, and gives it to his Plough-Cattle for their neceſſary Suſtenance, not having ſufficient for their Suſtenance otherways, no Tithes ſhall be paid thereof. Mich. 9 Car. B. R. between Crawley and Wells, per Curiam, and a Prohibition granted, this being an Hertfordſhire Caſe.

8. If a Man cuts down Wood, and burns it to make Brick for the Reparation of his Houſe within the Pariſh, for the Habitation of himſelf and his Family, no Tithes ſhall be paid thereof, inaſmuch as the Parſon hath the Benefit of the Labour of his Family. Tr. 10 Car. B. R. between Nixon and Browne, per Curiam.

9. So if a Man cuts Wood, and burns it to make Brick for the Enlargement of his Houſe within the Pariſh, for the neceſſary Habitation of his Family, no Tithes ſhall be paid for it. Tr. 10 Car. B. R. between Nixon and Browne, per Curiam, agreed.

10. **But if a Man cuts Wood, and burns it to make Bricks for the Enlargement of his Houſe within the Pariſh, more than is neceſſary for his Family, as for his Pleaſure and Delight, he ſhall pay Tithes for it.** Trin. 10 Car. B. R. between Nixon and Browne, per Curiam **adjudged, and a Conſultation granted accordingly, where the Plaintiff in a Prohibition had affirmed, that he burnt it for the Reparation and the Enlargement of his Houſe generally, without ſaying that it was for the neceſſary Habitation of his Family, for they ſaid that by this Surmiſe he might make a Caſtle, and yet ſhould pay no Tithes.**

Nichol's Caſe S. P. Cro. Eliz. 660. cited to be adjudged. Moor 910. Pl. 1280. cited to be adjudged. Green and Hun, Cro. El. 702. S.P. adjudged.

11. (i) **For the ordinary Rakings not voluntarily ſcatter'd no Tithes ſhall be paid, becaaſe for thoſe no Tithes were due by the Levitical Law, and becauſe they are but a Scattering of the Grain, of which he paid Tithes before.** Trin 3 Ja. B. R. P. 14 Ja. B. R. **between** (k) Pit and Harris, a **Prohibition granted.** P. 7 Ja. B. per Curiam. Hill 8 Car. B. R. **between** Saunders and Paramour, per Curiam, a **Prohibition granted.** My Reports, 11 Ja. 14 Ja. between Mich. 14 Ja B. R. **between** (l) Joyſe and Parker, **agreed** Curia. Hill. 14 Ja. Peck and Harris, a **Prohibition being granted for this.**

Et vid. Moor 278. Cro. Eliz. 475. Savil 100. Lit. Rep. 31. 3 Bulſt. 243. Noy. 15. 1 Mod. 121.
(k) 1 Rol. Rep 379. S. C. adjudged. (l) 3 Bulſt. 243. S. C. & S.P. per Houghton.

12. **But for Rakings voluntarily ſcatter'd, and upon a colluſion, Tithes ſhall be paid.** My Reports, 11 Ja. Mich. 14 B. R. between Joyſe and Parker, agreed per Croke, Houghton, and Dodderidge. H. 14 Ja. B. R. Peck and Harris, per Curiam **adjudged.** Mich. 3 Ja. B. R. per Popham. P. 7 Ja. B per Curiam.

(m) Lit. Rep. 31 S P. adjudged.

13. (m) **Where the Prohibition is of Tithes of Rakings, the Suggeſtion ought to be, that they were** (n) minus voluntarié ſparſæ, **otherwiſe it is not good, for it is not ſufficient to ſay that they were** lapſæ & diſſipatæ in Collectione. Hill. 14 Ja. B. R. (o) Peck and Harris **adjudged,** ſcilicet, **a Conſultation granted.**

(n) So if there be a Preſcription to be diſcharged of Locks of Wool, it ought to be ſhew'd the Locks are caſually loſt. Moor 911. Pl. 1283. Et vid. 2 Inſt. 652. (o) 1 Rol. Rep. 379. S. C. and a Prohibition granted; but it appears not thereby, that a Conſultation was after granted.

(p) Lat. 254.

14. (p) **If a Man ſhears his Sheep about their Necks to preſerve them from Vermin, and not for the Benefit of the Wool, the Parſon ſhall not have Tithe for this.**

15. **But otherways if he ſhear them largely by Covin for the Benefit of the Wool.** Mich. 14 Ja. B. R. **between** (q) Joyſe and Parker, per Curiam.

(q) Cro. Jac. 575.

16. **So if he ſhear them about their Necks without Fraud but two Weeks before** Mich. **and two Weeks after** Mich. **to preſerve them and their Fleeces from the Brambles, no Tithes ſhall be paid for them, for it appears that he does not ſhear them for the Benefit of the Wool, this being done at this Time before the Fleeces are encreaſed after the Shearing of their whole Bodies.** Mich. 14 Ja. **between** (r) Joyſe and Parker, **agreed** per Curiam, præter Mountague, **who doubted.**

(r) 3 Bulſt. 242. S. C. and a Prohibition granted, becauſe it appeared by the Suggeſtion, that for this they had uſed to wind up the other Fleeces at their own Charge. Cro. Jac. 575. S. C.

17. If a Pariſhioner cuts his dirty Locks from his Sheep for their better Preſervation from the Vermin before the Time of Shearing, and does this without Fraud, no Tithes ſhall be paid of theſe. Paſ 14 Car. B. R. between Dent and Salvin, per Curiam, and a Prohibition granted accordingly. Mich. 14 Car. B. R. between Williams and Wilcox, a Prohibition granted; (s) but there was a Conſideration ſurmiſed, ſcilicet, that he wound up the tenth Fleece for the Parſon. Fol. 646.

(s) And vid. Cro. Eliz. 363.

18. If a Man kills Sheep, yet (t) he ſhall pay Tithe of the Wool that comes off them, but not for the Skins. P. 14 Car. B. R. between Dent and Salvin, per Curiam.

(t) For this, vid. Lit. Rep. 31.

19. (u) No Tithe ſhall be paid of the Hay that grows upon the Headlands where the Horſes and Plough turn when the Land is ploughed, if there be alledged a Cuſtom not to pay it, and it be alſo averred that the Headland is but ſufficient to turn the Plough. Hill. 10 Car. B. R. between (w) Mead and Thurland, per Curiam, a Prohibition granted. P. 13 Car. between Bride and White, a Prohibition granted per Curiam: with the ſaid Averment, that the Headland was not greater than what was ſufficient to turn the Plough upon in ploughing the Land.

(u) For this, vid. 2 Leon. 70. Lit Rep. 13. Lan. 16.

(w) Cro. Car. 393. S. C. 1 Rol. 650. Pl. 10 S. C.

20. No Tithes ſhall be paid for the Herbage of Meers, Bawkes, or Fern, *&c.* 2 *Inſt.* 652.

(A) Wages.

1. Servants of the Plough ſhall not pay any Tithe of their Wages; as was reſolved, P. 14 Ja. in Banco, between Parſon Ellis and Drake in Devon, and a Prohibition granted accordingly, although the Libel was but for the Tithe of a third Part of their Wages, leaving the reſt free; for it was ſaid, that by the ſame Reaſon that the Beaſts of the Plough ſhall be free of Tithes, the Servants who follow the Plough ſhall be alſo.

2. (a) No Tithes ſhall be paid for the Feeding which is eaten by the Oxen of the Plough, and the Cattle of the Pail. Mich. 9 Ja. B. between (b) Backſter and Hope, per Curiam.

(a) Maroh 56. S. P. per Barkley. Et vid. 1 Rol. Rep. 38. 2 Rol. Rep 191.

3. No Tithes ſhall be paid for Horſes of the Plough, for the Parſon hath the Benefit of their Labour in his Tithes of the Grain. Trin. 15 Ja. B. between Bell and Tarde, a Prohibition granted.

(b) 2 Brownl. 30. S. C.

4. (c) Tithes are not due for young Cattle which a Man rears for his Plough, for they are for the Manuring of the Land, of which the Parſon ſhall have the Tithe. Mich. 14 Ja. B. Watley and Hanberry reſolved, and a Prohibition granted. M. 14 Ja. B. R. between (d) Joyce and Parker reſolved, and a Prohibition granted. Mich. 14 Ja. B. R. between Doctor Beſte and Williams, and Prohibition granted. H. 14 Ja. B. R. between Kneebon and Woodrett, a Conſultation was denied, a Prohibition being granted before. Tr. 12 Ja. B. R. between (e) Maſcal and Price, per Curiam.

(c) For this, vid. Winch. 33. Cro. Eliz. 702. Moor 910. Pl. 1280. —Where us'd in the ſame Pariſh; but if they be-

long to another Pariſh, Tithes are due for them. Hard. 184. (d) Cro. Jac. 576, S. C. adjudged. (e) 1 Rol. Rep. 38, 63. S. C. & S. P. per Curiam admitted. 2 Bulſt. 239. S. C. & S. P. per Coke, unleſs averred to have been fatted and ſold away.

5. No Tithes are due for young Cattle that a Man rears for his Dairy. Mich. 14 Ja. B. R. a Prohibition granted between Joyce and Parker. H. 14 Ja. B. R. Kneebon and Woodrett, a Conſultation was denied, a Prohibition being granted before.

6. If

6. If a Man, according to the Cuſtom of the Country, ſows Land to feed his Horſes for Tillage, and hath uſed to ſuffer his Horſes to be fed upon the Land without any ſowing thereof, the Parſon ſhall not have any Tithes thereof, for this is no more than Paſture for the Horſes. M. 3 Ja. B. R. per Towſe ſaid, that it was one Same's Caſe of Eſſex, adjudged.

7. And in theſe Caſes in the Prohibition, he need not preſcribe to be diſcharged of Tithes for them, becauſe they are diſcharged by the Law. H. 14 Ja. B. R. Kneebon and Woodrett, per Mountague and Dodderidge; but Houghton ſeemed econtra, becauſe their Labour * is a Manner of a Modus for their Tithes: But Clinch and Clerk ſaid, That of late Time they have not uſed to preſcribe; but anciently the Uſe was to preſcribe.

* Fol. 647.

8. If a Man buys Cattle and feeds them, and ſells them, he ſhall pay Tithes of them. Tr. 38 El. B. R. between (f) Sherington and Fleetwood, per Curiam.

(f) Cro. Eliz. 476. S. C. & S. P. per totam Curiam. Goulſ. 147. S. C. & S. P. per Curiam.

9. But if a Man buys Cattle, and feeds them, and ſpends them in his Houſe, he ſhall not pay any Tithe for them. Trin. 38 El. B. R. between (g) Sherington and Fleetwood, per Curiam.

(g) Cro. Eliz. 479 S. C. & S. P. per totam curiam, though dry Cattle. Goulſ. 147. S. C. & S. P. per Curiam.

10. If a Man feeds Sheep in his Land, and after kills and eats them in his Houſe within the Pariſh, he ſhall not pay Tithes for them. Mich. 7 Car. B. R. between (h) Facey and Lange, per Curiam, upon a Demurrer.

(h) Cro Car. 237. S. C. adjudged. 1 Jon. 254. S. C. but S. P. does not appear. Et vid. Lit. Rep. 13.

11. If a Man gathers green Peaſe to eat in his Houſe, no Tithes ſhall be paid of them, and this by the Law of the Land. P. 12 Ja. B. R. per Curiam.

12. But otherwiſe it is if he gather them to ſell or feed Hogs. P. 12 Ja. B. R.

13. If a Man buys barren Cattle, as Oxen or Steers, and after ſells them, he ſhall pay Tithes for their Paſture, becauſe they can render no other Tithe; but otherwiſe it is of barren Sheep, ſcilicet, Wethers, becauſe they will render Tithe of their Wool. Mich. 7 Car. B. R. between (i) Fancy and Lange, per Curiam.

(i) Cro. Car. 237. S. C. but S. P. does not appear. 1 Jon. 254. S. C. but S. P. does not appear.

14. If a Man keeps Horſes that are barren Cattle to ſell, and ſells them accordingly, he ſhall pay Tithe for them. Tr. 15 Ja. B. R. between Lampkin and Wilde, per Curiam;

15. If a Man buys young Cattle, and rears and ſells them, he ſhall pay Tithes for them. Tr. 38 El. B. R. between Sherington and Fleetwood per Curiam.

16. So if a Man buys Cattle, and feeds and ſells them, he ſhall pay Tithes for them. Tr. 38 El. B. R. between Sherington and Fleetwood per Curiam.

17. (k) Tithes ſhall be paid for Beaſts agiſted for Hire. *Trin. 38 Eliz.* between *Sherington* and *Fleetwood*, *Cro. Eliz.* 476. adjudged.

(k) Cro. Eliz. 446. S. P. & F. N. B. 53. being there cited to be con. is denied to be Law: Et vid. 2 Rol. Rep. 191. Cro. Jac. 576.

18. (l) If an Innkeeper depaſtures Travellers Horſes, he ſhall pay Tithe for the Herbage by them eaten. *Hill.* 1655. between *Gilbert* and *Everſly*, *Hard.* 35 adjudged; but the Court was in Doubt how much, but conceived they ought to have Regard to the Value of the Land; which being proved to be 30 *l.* yearly, they inclined to (m) allow 2 *s. per* Pound: But ſaid, they would award a Commiſſion to enquire of the Value of theſe Tithes, unleſs the Parties ſhould agree in the mean Time, which they adviſed.

(l) 1 Rol. Abr. 650. Pl. 14.

(m) Vide 2 Brownl. 32.

19. Tithes of the Herbage of barren Cattle are due *de communi Jure*, according to the Value of the Land, after the Rate of 2 *s. per* Pound, for they cannot be otherways valued or accounted for, becauſe the Profits of the Land for which they are paid are perceived by the Mouths of Beaſts; but by Cuſtom or Preſcription ſuch Tithes may be paid in other Manner. *Paſch.* 13 *Car.* 2. between *Holbeech* and *Whadcock*, *Hard.* 184. ſaid by the Chief Baron.

(B) (a) *Modus Decimandi.*

(a) Quid; as where Lands, &c. or an annual Sum, or other Profit, Time out of Mind have been given to the Parſon, and his Succeſſors, in lieu of Tithes. 13 Co. 40.

In what Caſes a Man may preſcribe *in modo Decimandi*, and how.

1. **Admitting that Tithes of Graſs de Jure ought to be made into Hay by the Pariſhioner, yet it ſeems a Pariſh may preſcribe, without any Conſideration given to the Parſon to pay the Tithes of this in Graſs-Cocks, before any Tedding thereof. Contra, Barham againſt Gooſe, Hill. 14 Ja. B. R. per Curiam, præter Houghton, who ſeemed econtra them, becauſe this Preſcription is in non Decimando for this Part.**

Hob. 40. 1 Jon. 369. Hob. 297. Where Things feræ Naturæ. Noy 148. —By the Endowment Temp. H. 3. it appeared, the Vicar was endowed of the Tithe of Hay; and whether a Modus Decimandi could accrue after, Godb. 180. quære. —There can be no Modus for Hops, becauſe firſt brought into England Temp. Eliz. 1 Vent. 61. But admitting there was before a Modus for ſmall Tithes, it ſeems to be doubted whether it would not extend to Hops. —A Hearth-Penny paid in Satisfaction of the Tithe of all combuſtible Wood. Cro. Eliz. 702. Moor 910. Pl. 1280. Hetl. 94.

2. **So it ſeems a Pariſhioner may make ſuch Preſcription. Contra, H. 14 Ja. B. R.** (b) **Barham and Gooſe, per totam Curiam, becauſe it is in non Decimando for this Part.**

(b) 1 Rol. Abr. 644. Y. 3, 4. S. C.

3. **So a Pariſh may preſcribe without any Conſideration to pay Tithes of Graſs-Cocks after tedder and making thereof** (c) **in Wecks and Wainroaſe, and putting into Graſs-Cocks, then out of the Graſs-Cocks to ſet out the Tithes, and not to make it into perfect Hay.**

(c) So is the Original. Q. of the proper Engliſh.

4. Contra, 15 Ja. B. R. (d) **between** Poppinger **and** Johnſon, **a Prohibition denied: But** nota, **That only** Houghton **moved it as a Doubt to him, to which no Anſwer was given, but the Prohibition denied notwithſtanding.**

(d) 1 Rol. Abr. 644. Y. 2. S. C.

5. **If a Man preſcribes, that if he hath under ten Fleeces of Wool, that he ſhall pay one Penny to the Parſon for each in lieu of Tithes, and that if he hath more,** * **that he ſhall deliver to the Parſon the Tenth Part of his Wool, upon his Conſcience, without Fraud and Covin,** ſine Viſu vel Tactu **of the Parſon, this is not a good** Modus, **becauſe it is unreaſonable.** M. 12 Ja. B. per Curiam, **between** Wilſon **and the Biſhop of** Carliſle. Vide **the ſame Caſe,** Hobart's Reports (e) 149.

* Fol. 648.

(e) Hob. Fol. 107. S. C.

6. If a Man preſcribes to pay to the Parſon for the Tithes of the Tenth Sheep as it falls out, and the tenth Swath, this is not any Modus, becauſe he does not preſcribe to pay other Thing than what was due, but a full Tenth. M. 13. Ja. B. between Barker and Boſwell, per Curiam.

7. A Man may preſcribe to pay the tenth Acre of Wood ſtanding, and ſo to pay the tenth Acre of Graſs ſtanding for the Tithe of Hay. Hobart's Reports, Caſe (f) 328.

(f) Hob. Fol. 250. S. C.

8. A Cuſtom that all Lambs ingender'd, fallen, and bred upon one Tenement or Living within the Pariſh, though belonging to ſeveral Owners, ſhall be caſt and reckon'd together as if but one Man's, and that the Tenth or Tithe-Lamb of them ſo counted together ſhall be paid for Tithe, is (g) unreaſonable and againſt Law, otherways it may ſo happen that a Man may have but one Lamb, and that ſhall be taken for Tithe, and he that has more ſhall pay nothing. *Mich.* 18 *Jac.* between *Barker* and *Cocker*, *Hob.* 329. adjudged.

(g) If a Modus be alledged in this Manner, viz. That the Proprietors and Occupiers of ſuch a Manor, or any Part thereof, ſhould pay a Groat to the Parſon for Herbage-Tithes, this is not good. 1 Vent. 3. adjudged: But it ought to be laid, that the Proprietors of the Manor, for themſelves and their Farmers, had paid 4 d. &c.

9. A Cuſtom to pay a Halfpenny for the Tithes of all Willows by him cut down in ſuch a Pariſh is not good, for by this, if he cuts down all the Willows of (h) other Men, but one Halfpenny ſhall be paid. *Mich.* 28 & 29 *Eliz. Anonymus. Godb.* 60. adjudged.

(h) So a Cuſtom to be diſcharged of the Tithe of Wood cut to incloſe Corn, of which the Parſon hath the Tithe. 1 Saund. 142, 143. adjudged, becauſe not tied up to the Corn of the Owner of the Wood only.

10. A Cuſtom to pay the 20th Fiſh, in Satisfaction of the Tithe of all Fiſh taken in the Sea, is good, for the Tithe thereof being payable only by Cuſtom, it may by that Cuſtom be leſs than a Tenth. *Paſch.* 18 *Car.* 2. betwen (i) *Sheppard* and *Primroſe*, 1 *Levinz* 179. adjudged.

(i) 1 Sid. 278. S. C. and a Quære there made: But vid. Noy 108. where it is adjudged, That the Parſon having the Tithe thereof by Cuſtom, ought to take it according to the Cuſtom.

11. But a Cuſtom to pay the (k) twelfth Sheaf, in Satisfaction of the Tithe of all Sheaf-Corn, is not good, becauſe the Tenth of the Corn, is due *de Jure.* (l) *Paſch.* 18 *Car.* 2. 1 *Levinz* 179. *per Curiam.*

(k) Where a Cuſtom to pay leſs than a Tenth of the Corn was held good, Godb. 120. Et vid. Godb. 234. 1 And. 199. (l) 1 Sid. 278. S. C. & S. P. per Curiam; and ſaid to have been ſo adjudged; but a Quære made if it had been that a Twelfth ſhould be paid after Stitching, &c. Q. what intended by Stitching, &c.

(C) (a) *Modus Decimandi.*

(a) Where the Payment of different Sums is an Evidence that there is no Modus. Goddard and Tiler. Hetl. 100. Lit. Rep. 151.

1. IT is a good Modus Decimandi, that, in Conſideration the Pariſhioner hath Time out of Mind, &c. paid Tithe-Wool of all his Sheep which he hath ſhorn, as well of thoſe as he bought two Days before the Shearing, as of others that he had kept through the whole Year, (b) he hath uſed Time, &c. to be diſcharged of Tithe-Wool of ſuch Sheep that he ſold two Days before the Shearing;

(b) Cuſtom to pay Tithes in Kind for Sheep, if they continue in the Pariſh all the Year, but if ſold before Shearing-time, but an Halfpenny only for every one ſo ſold, is an unreaſonable Cuſtom. March 79. adjudged. —A Cuſtom that all Perſons in the Pariſh that had Sheep on their Ground on Candlemas-day, ſhould be dicharged of Tithes of all Sheep that ſhould be upon their Ground after in that Year, upon Payment of full Tithes for all Sheep that were there upon that Day. 1 Mod. 229. adjudged unreaſonable. —Though Tithe-Wool is due at Clipping, yet a Cuſtom to pay it at Lammas is good. Cro. Eliz. 702. Moor 910. Pl. 1280. —A Cuſtom to pay an Halfpenny for the Wool of Sheep ſold after Shearing, and before Michaelmas, is good. Moor 911. Pl. 1283.

Shearing; for by the Spiritual Law they ſhould have Tithes of him, & de Reſiduo pro Rata which he ſold before Shearing, and therefore, in Conſideration that he here pays Tithes of thoſe which he bought ſo ſmall a Time before the Shearing for the whole Year, which is not due by the Spiritual Law, it is therefore good. M. 14 Ja. B. adjudged.

2. It is a good Modus for the Tithes of Calves to pay a (c) Calf for the Tithe if he have ſeven in one Year, and if he have under ſeven, to pay an Halfpenny for every Calf for the Tithe, and if he ſells any Calf, that he ſhall pay the Tenth of that for which he ſells it. M. 14 Ja. B. R. between Lee and Collins reſolved, and a Prohibition granted.

(c) Cuſtom to pay an Halfpenny for every Lamb under ſeven, and if there be but ſeven, that the Parſon ſhall have the Seventh Lamb, paying 3d. and if 8. that he ſhall have one Lamb, paying 2d. and if the Common

3. It is a good Modus for Tithe of Eggs, to pay in Lent 30 Eggs for all Tithe of Eggs. M. 14. Ja. B. R. between Lee and Collins, a Prohibition granted thereupon.

4. It is not a good Modus to pay every tenth Pound of Wool for the Tithes of Wool, if he doth not ſhew that he hath paid ſomething, if his Wool does not amount to 10 l. for otherways it is in non Decimando, if it be under 10. l. M. 7 Ja. B. between Delman and Barton, per Curiam, for the tenth Part of this is due.

10 that he ſhall have the Tenth, without paying any Thing. Cro. Car. 403. and ſaid, Law was ſo.

(D) *Modus Decimandi.*

(a) What ſhall be a good *Modus Decimandi.*

1. IT is a good Modus Decimandi, if in Conſideration that he hath uſed, &c. to make the Tithes of the firſt Moath into Hay for the Parſon at his Labour and Coſt, he hath been diſcharged of Tithes of the After-moath. Tr. 36 El. B. R. Johnſon and Keblethwayte, 37 El. (b) Johnſon and Awberry, in theſe two Caſes it was ſo reſolved, and a Prohibition granted. Paſ. 41 El. B. R. P. 11 Car. Banco Regis, (c) Langford's Caſe reſolved, and a Prohibition granted.

(a) 2 Bulſt. 238. 1 Rol. Rep. 38, 62. Palm. 525.
(b) Cro. Eliz. 660. S. C. adjudged, the Cuſtom being laid only to make into Graſs-Cocks, and

ſet out the Tenth. Moor 910. Pl. 1280. S. C. adjudged. Et vid. 2 Bulſt. 238, 239. 1 Rol. Rep. 39.
(c) Cro. Car. 404. S. C.

2. (d) It is a good Modus Decimandi, that, in Conſideration of the cutting of the Graſs, and ſpreading and putting it into (e) Wenrews, ſcilicet, tedding, and after making the Tithes of the Parſon of the firſt Moath into Graſs-Cocks at his own * Coſts and Charges, he hath been diſcharged of Tithes of the After-graſs. Mich. 42, 43 Eliz. Johnſon and Poppinger; 1 Jac. Eeles and Vachin; 3 Jac. Eeles and Sanders; Hill. 8 Jac. Eeles and Winterbolt: In all theſe Caſes Prohibitions were granted in B. R. And Mich. 14 Jac. Johnſon moved for a Conſultation upon the ſaid Prohibition granted in the 43 El. againſt Poppinger, but it was denied. Paſch. 41 El. B. R. between (f) Aubrey and Johnſon. Paſch. 11 Car. B. R. (f) Langford's Caſe, a Prohibition granted upon ſuch Surmiſe for the After-moath. Paſch. 14 Car. B. R. between Manning and Clapham, a Prohibition granted for the Fatting of Sheep upon the After-paſture,

(d) Hob 250. S. P. adjudged Hall
* Fol. 649.
and Fetti-place S. P. Cro. Jac. 42. Moor 768. Pl. 1048. a. Diverſity taken when the Preſcription to make it into great, and where into ſmall; but it ſeems

to be ill reported. Et vid. Cro. Jac. 116. Yelv. 86. (e) So is the Original. Q. the proper Engliſh. (f) Cro. Eliz. 660. S. C. adjudged, Moor 910. Pl. 1280. S. C. adjudged, the Cuſtom being laid to make it into Hay. Cro. Jac. 42. S. C. cited. (g) Cro. Car. 404. S. C. adjudged.

3. It

(h) Green and Auſtin S P Yelv. 86. where ſuch a Payment of Tithe-Hay to the Parſon was alledged in Diſcharge of the Vicar's Demand of Tithe Herbage, and Agiſtment of Cattle upon the Ground after Harveſt, and adjudged a good Modus. becauſe of common Right the Tithes belong to the Parſon, and the Vicaridge is derived out of the Parſonage. Cro. Jac. 116. Et vid. March 11. Winch 44, 45. —That a Modus to the Rector is a good Diſcharge againſt the Vicar. 1 Mod. 216. yet vid. 3 Bulſt. 220, 221. 1 Vent. 61. —Payment to the Vicar in Satisfaction of all Tithes due to the Parſon. Winch 2, 45. Et vid. Moor 761. Pl. 1055. 780. Pl. 1081. 907. Pl. 1267. —A Payment to the Chaplain of the Chapel of Eaſe, in Satisfaction of Tithes demanded by the Vicar of the Pariſh. Lit. Rep. 61.

3. (h) **It is a good** Modus Decimandi, **that, in Conſideration of the making the Tithe-Graſs of the Parſon of certain Land into perfect Hay at his Coſts, he hath been diſcharged of Tithe of the Paſture of the ſaid Land for the whole Year after.** Paſch. 16 Ja. B. **between** Nichols **and** Hooper, **reſolved, and a Prohibition granted.**

(i) For this vid. 2 Brownl. 33.

(k) And where the Pariſhioner by Cuſtom doth any Thing which by Law he is not compellable to do, which comes to the Benefit of the Parſon, this by Cuſtom may be a good Satisfaction or Modus for the Tithe in lieu whereof it is done. March 65.

4. (i) **It is a good** Modus Decimandi, **that, in Conſideration that they who ſow the Land ought to reap it, and bind and ſever the tenth Part from the nine, and ſet it up in Hillocks or Heaps, that the Parſon ſhall not have any Tithe of this Land the next Year following, the Land lying ley, and not tilled nor converted into Meadow,** (k) **for of common Right the Pariſhioner is not bound to gather and ſet up the Tithe in Hillocks,** &c. **but it is a good Manner of Tithing to throw the Shocks out.** Hill. 6 Jac. B. Pl. 13. per Curiam.

(l) For this vid. 2 Brownl. 32.

(m) Cro. Jac. 575, 576. S. C. but S. P. does not appear. 3 Bulſt. 242. S. C. but S. P. does not appear.

5. (l) **It is a good** Modus, **that, in Conſideration that he hath Time,** &c. **wound up the tenth Fleece of his Wool at his Shearing for the Parſon at his Coſt and Charges, and paid it to the Parſon, he hath been diſcharged of Tithes of the Necks of his Sheep when he ſhore them about their Neck for their better Preſervation, two Weeks before** Michaelmas, **and two Weeks after** Michaelmas. Mich. 14 Jac. B. R. **between** (m) Joyſe **and** Parker, **Parſon of** Northmolton **in** Devon, **reſolved, and a Prohibition granted, becauſe the Parſon ſued for the Tithe of this Necking; for it appears, that the Shearing at this Time of the Year cannot be for the Benefit of the Wool.**

(n) Auſten and Piggot S. P. Moor 911. Pl. 1284. appears Cro. El. 736. appears. Et vid. Cro. Eliz 587, 599. Moor 484. 13 Co. 14, 15. 2 Inſt. 490.

(o) In the Original it is miſprinted, for there it is Suceſſors.

(p) Cro. Jac. 501. S. C. adjudged.

6. (n) **It is a good** Modus, **that, in Conſideration that the Parſon and his** (o) **Predeceſſors Time out of Memory,** &c. **have been ſeiſed in Fee of certain Meadow within the Vill of** D. **and taken the Profits thereof, in full Satisfaction and Diſcharge of all Tithes of Hay within the ſame Town Time out of Memory,** &c. **for it ſhall be intended that this Meadow was given at the Beginning in full Satisfaction of all the Hay within the ſame Town.** Mich. 16 Jac. B. R. **between** (p) Moor **and** Bullock, **adjudged upon a Prohibition, this Matter being moved in Arreſt of Judgment.**

7. **It is not a good** Modus Decimandi, **that he hath paid the Tenth of the Wool of all Sheep that he had before** Lady-day, **and ſheer'd or ſold, or put in any other Pariſh, or hath paid the Value of the Tenth thereof, to be in full Satisfaction as well of all the Wool of ſuch Sheep, as of all other Sheep brought within the Pariſh after** Lady-Day, **for it is not reaſonable that the Tithes he hath paid ſhould be a Diſcharge for all the other Pariſhioners; but this was intended to be a Diſcharge of all the Sheep of the Party himſelf brought within the Pariſh after** Lady-day; **but this was not ſo expreſſed, and this had been a good Cuſtom.** Mich. 9 Car. B. R. **between** Market **and** Knight, **adjudged upon Demurrer, and ſo ruled in another Caſe the ſame Term upon a Trial at Bar.**

8. (q) It is not a good Modus, that he ought to be diſcharged of Tithes, in Conſideration that he hath uſed Time out of Memory &c. to employ the whole Profits of the Land in the Reparation of the Body of the Church, and to find all Neceſſaries for the Church, for this is not a Recompence to the Parſon. Paſch. 37 Eliz. B. between Longley and Meredine, adjudged.

(q) Cro. Eliz. 276. like Point, where the Surmiſe was, that the Owners of the Land Time out of ; and adjudged, that this was no Cauſe of Diſcharge, for the Parſon was not chargeable with it, nor had any Benefit thereby: Otherways if ſhewed that the Parſon had a Seat in the Body of the Church.

Mind had found Straw for the Body of the Church, in Diſcharge of all Tithes of Hay

9. But it is a good Modus to be diſcharged, becauſe he hath uſed, &c. to employ the Profits for the Reparation of the Chancel, for the Parſon hath a Benefit by this. Paſch. 37 Eliz. B. ſaid to be adjudged in B. R.

Fol. 650.

10. It is not a good Modus, that in Conſideration that the Pariſhioner having Arable Land hath ploughed it; and hath had Head-lands, green Slips, or Doles, Parcel or Appurtenant to their Husbandry-Houſes or Lands, that in Conſideration the Pariſhioner would (r) plough and ſow his Land with ſome Kind of Grain, and mow it, and (s) make it up into Shocks, (t) Pooks, and ſever it from the ninth Part, and prepare it for Carriage for the Parſon, the Pariſhioner hath uſed to be diſcharged of the Payment of any Tithe ſowed, growing upon the Headlands, &c. of ſuch arable Land, and then ſowed, applied, and converted for the Nutriment of his Cattle of Husbandry employed in the Tillage of the ſaid arable Land, this is not a good Modus, becauſe of common Right the Pariſhioner ought to cut and prepare the Grain and ſet out the Tithe. Mich. 3 Ja. B. R. between (u) Perry and Chauncey, adjudged upon Demurrer, and a Conſultation granted. But Hill. 10 Car. B. R. between (w) Mead and Thurland, a Prohibition granted per Curiam, where the Suit was for Tithes of Hay growing upan ſuch Headlands, where by Cuſtom not uſed to be paid.

(r) This in the Original ſeems to me to be miſprinted, for there 'tis abera.

(s) A Cuſtom to be diſcharged of the Tithes of the odd Sheaves, in Conſideration that they have uſed to bind the Corn into Sheaves, and ſet out the Tithe. Lat.

226. adjudged good, but darkly reported. (t) So is the Original. Q. the proper Engliſh thereof.
(u) Noy 15. S. C. adjudged. (w) Cro. Car. 393. S. C. adjudged. 1 Rol. Abr. 646. Pl. 19. S. C.

11. (x) It is not a good Modus, that in Conſideration that the Pariſhioner having Barley, the greateſt Part whereof he hath cut down and tied into Sheafs, and ſet in Cocks, of which the Parſon had the tenth Cock, that he hath uſed to leave a ſmall Parcel of the Barley to ſtand, to the Intent to cut it down afeer for Bands for the Rakings involuntarily ſcatter'd, and to be diſcharged of the Tithes of this ſmall Parcel of Barley when he cuts it. Hill. 8 Car. B. R. between Saunders and Paramour, per Curiam, a Prohibition denied.

(x) Moor 278. Pl. 433. like Point adjudged, becauſe the tenth Sheaf or Cock is no Satisfaction for more than the Grain of

which this is the Tithe. Et vid. Cro. El. 363. 2 Bulſt 238, 239. 1 Rol. Rep. 36, 173.

12. If a Pariſhioner preſcribes, that whereas the greateſt Part of the Land within the Pariſh, and within the Pariſhes next adjoining thereto, is arable Land, ſo that for want of Graſs they ought to provide other Suſtainance for their Plough-Cattle, and becauſe he hath uſed to cut and tie into Sheafs the Grain ſowed there, and to put them into Shocks, of which the Parſon had the tenth Shock, by which the Parſon hath the Benefit of the Labour of the Plough-Cattle, and in Conſideration thereof the Pariſhioner hath Time out of Memory, &c. uſed to be diſcharged of the Tithes of green Tares before they come to Perfection, cut in ſmall Parcels in the Time of Harveſt, or before, and given to his Plough-Cattle for their Suſtainance, this is not a good Modus,

 becauſe

because if he cuts them down, he ſhall pay Tithes for them, as well as if they had come to their Perfection. Hill. 8 Car. B. R. between Saunders and Paramour, and per Curiam, a Prohibition denied, but after, ſcilicet, Hill. 10 Car. B R. between (y) Mead and Thurland, a Prohibition granted per Curiam in ſuch Caſe, this being alledged by Way of Cuſtom.

(y) Cro. Car. 393. S. C. adjudged and a Prohibition granted accordingly. 1 Jon. 357. adjudged, and a Prohibition granted, founded upon the Cuſtom of the Pariſh, that no Tithes were payable in this Caſe.

13. It is not a good Modus, that in Conſideration that he hath expended his Hay for his Husbandry Cattle, to be diſcharged of Tithes of Hay. M. 3 Ja. B. R. and there cited. (z) Sir Warner's Caſe, adjudged.

(z) Cro. Jac. 47. S. C. adjudged. Moor 683. Pl. 941. S. C. adjudged.

14. It is a good Modus for an Inn-keeper, that in Conſideration that he and all, &c. have paid Tithe-Hay and Grain growing upon the Land belonging to the ſaid Inn, and have paid Tithes of all their own Cattle feeding upon the Land, that they have been Time, &c. diſcharged of the Tithes of the Horſes of their Gueſts agiſted in the ſaid Land when they travel (a) by the ſaid Inn, for ſome have ſaid, that this was but a perſonal Tithe, and others have ſaid, that (b) no Tithes ſhould be paid for ſuch Agiſtment by the Common Law, without any Modus, between Gabell and Richardſon reſolved, and a Prohibition granted.

(a) In the Original it is permie le dit Inn.

(b) But vid. Hard. 35. con.

15. It is a good Modus to be diſcharged of the tenth Swarm of Bees for Tithe, in Conſideration of the Payment of the Tenth of the Wax and Honey to maintain them in Winter, and find Caps for them, inaſmuch as they are feræ Naturæ of themſelves, and require great Care and Labour to keep them when they ſwarm. Dubitatur, Hill. 10 Car. B. R. (c) Langford's Caſe. Paſch. 11 Car. in this Caſe moved again, and then a Prohibition granted. But ſome of the Judges ſaid the Modus was not good, ſcilicet, but only the Duty which the Law gave: But they held, That no Tithes were due of the Tenth Swarm, becauſe they are feræ Naturæ.

* Fol. 651.

(c) Cro. Car. 404. S. C. adjudged.

16. It is not a good Modus to preſcribe to pay one Tithe for another.

17. As it is not a good Modus to preſcribe to pay for every Mich-Cow 2 d. and for every Calf 1 d. in Satisfaction of all Tithes of all Manner of Cattle, for this ſhall not diſcharge any Cattle, for this is but one Tithe for another. Mich. 3 Jac. B. R. is cited by Coke to be ſo adjudged. between (d) Sherrington and Fleetwood, which Caſe was Trin 31 Eliz. B. R.

(d) Cro. Eliz. 475. S. C. adjudged: But per Curiam a Modus to pay 1 d. for all Cows and Cattle agiſted is good. Goulſ. 147. S. C. adjudged. 2 Bulſt. 238. S. C. cited. Et vid. Cro. Eliz. 206.

18. So if a Man preſcribes to pay one Heifer for all Tithes, this ſhall not diſcharge the Tithes of other Cattle, but he ſhall pay them in Kind. Trin. (e) 38 Eliz. B. R. per Curiam.

(e) Moor 454. Pl. 623. ſeems to be 2 Bulſt. 238. S. C. by the Time in which ſeveral Caſes are cited upon the ſame Reaſon. Et vid. 1 Rol. Rep. 38. Cro. Eliz. 446, 786. Moor 911. Pl. 1282.

19. It is a good Modus, in Conſideration of the Payment of the tenth Cheeſe made from the firſt of May until the laſt of Auguſt, that he hath been diſcharged of the Tithe of Milk, (f) for this is not a Tithe in Kind of Parcel in Diſcharge of the Whole, for no Tithe in Kind is due of Cheeſe, but only of Milk, and ſo a good Conſideration. Paſch. 40 Eliz. B. R. between (g) Auſten and Lucas, adjudged.

(f) But a Cuſtom to pay the tenth Quart of Milk from May, &c. is not good.

Cro. El. 609. Moor 909. —Otherways if to pay the tenth Quart of Milk from May, &c. at the Parſonage-Houſe or other Place. Cro. El. 609. per Poph. Raym. 278. adjudged, becauſe the Cheeſe comes of Labour, and is not of it ſelf due. Moor 909. Pl. 1279. S. C. adjudged.

(g) Cro. El. 609. S. C.

20. A Preſcription to pay 5 *s.* to the Clerk in Lieu of the Tithes of certain Land is not good, becauſe laid in a Perſon that is dative and removeable. *Mich.* 29 *Eliz.* between (h) *Savell* and *Wood*, *Cro. Eliz.* 71. adjudged; but *per Curiam*, perhaps it might have been good, if laid that the Parſonage was impropriate, and that the 5 *s.* had been paid to the Clerk, which the Impropriator was bound to find, for this is *quaſi* a Payment to the Parſon himſelf: But *vide* the Book, for 'tis very obſcurely reported.

(h) Moor 908. Pl. 1274. S. C. where it is ſaid, the Clerk would have preſcribed to have had 5 s. of

the Parſon yearly for the Tithe of a certain Place within the Pariſh, but could not, becauſe dative and removeable,

(E) To what (a) Thing the *Modus* ſhall extend.

(a) Where the Parſon ſhall not reckon the Calves which a Pariſhioner hath in ſeveral Years together, ſo as to avoid the Modus. Lat. 254.

1. (b) If a Man preſcribes to pay to the Parſon a certain Thing as a Modus Decimandi for all the Demeſnes of his Manor of D. and after erects a Wind-mill upon Part of the ſaid Demeſnes, he ſhall not pay any Tithes for this Mill, but the Modus Grain for the Demeſnes ſhall go in Diſcharge of this alſo which is built upon the Land diſcharged. Trin. 39 Eliz B. R. between Ruſſel and Moore, per Curiam, and a Prohibition granted.

(b) 490. like Point. Et vid. 11 Co. 16.

2. If a Man preſcribes in Modo Decimandi for Hay and Graſs in 40 Acres of Land, and the Tenant converts it into a Hoppard, or into Tillage, (bb) the Modus is gone, for when the Modus is ſpecial (c) for Hay and Graſs only, by Converſion of this to other Uſes, the Modus is gone. H. 6 Ja. B. between (d) Sharp and Coult, per Curiam.

(bb) Viz. ſo long as it continues in Tillage; but when laid

for Hay, &c. it ſhall revive. Godb. 194. (c) So where the Preſcription is to be diſcharged from Payment of Tithes for a Meadow. Winch 45. Hut. 58. (d) Noy 148. ſeems to be S. C. cited.

3. If a Man preſcribes to pay 6 s. 8 d. for all Manner of Tithes of (e) a Park, and after the Park is diſparked, and converted into Tillage and Paſture Land, the Modus is gone by the Alteration aforeſaid. (f) Spurdam's Caſe, adjudged; cited by Coke, Hill. 6 Jac. and there agreed per Curiam.

(e) Otherways where paid for the Tithes of all Things renovant within a

Park. Cro. El. 467. Pl. 25. Moor 909. Ow. 74. (f) Noy 148. ſeems to be the S. C. cited by the Name of Shipden's Caſe.

4. If

4. If a Man preſcribes to pay 6 s. 8 d. for all Manner of Tithes ariſing from ſo many Acres of Land which contain the Park, though the Park be diſparked, and the Land converted into Tillage, &c. yet the Modus ſhall continue, (g) becauſe the Preſcription is in the Soil, and not in the Park.

Spurdam's Caſe, adjudged; cited per Coke, Hill. 6 Ja. B. and there agreed per Curiam.

(g) The Difference is where the Preſcription runs to the Land, and where to the Park. Godb. 238. Et vid. 1 Rol. Rep. 147. 2 Bulſt. 240. 2 Rol. Rep. 162.

5. If a Man preſcribes to pay yearly 2 s. for every Acre of 140 Acres, which were once a Park, and alſo the Shoulder of every third Deer that ſhould be kill'd within the Park, in Diſcharge and Satisfaction of all Tithes, and after the Park is diſparked, by which the Tithe * of the Deer is gone, which is Part of the Conſideration, (h) yet it ſeems the 2 s. for every Acre ſhall diſcharge the Land. Dubitatur, Hill. 12 Jac. B. between Hooper and Andrews; quod vide. My Reports, 12 Jac. and Hobart's Reports (i) 54. Et vid. Mich. 5 Jac. B. between Shaw and Sharp.

* Fol. 652.

(h) Otherways if all had been caſual and failed. Hob 40. Moor 909. Cro. Eliz. 467. Pl. 25. Ow. 74.

(i) Cowper and Andrews, Hob. Fol. 39, 40, &c. S. C. with a long Argument thereupon. Moor 863. Pl. 1186. S. C. and the Court divided. Godb. 237, 238. S. C. and the Court divided. 1 Rol. Rep. 120. S. C. and the Court divided. Winch. 46. S. C. cited. Moor 909. Hut. 58. S. C. cited; and ſaid, that it was never adjudged.

6. If a Man preſcribes to pay a Buck and Doe yearly out of a Park, in Diſcharge of all Tithes of the Park, if the Park is diſparked, the *Modus* is gone. *Mich.* 10 *Jac.* between (k) *Pool* and *Reynol*, *Hut.* 57, 58. agreed *per Curiam*.

(k) Winch 1. 44. S. C. but S. P. cannot ſo clearly be collected.

7. But if a Man preſcribes to have paid a Buck and a Doe yearly for the Tithes of a Park till the Tenth of *Eliz.* when it was diſparked, and after the Diſparking in lieu of all Tithes of the Land, this is a good *Modus* continuing, for not being laid to be paid out of the Park, it is intended annexed to the Land by the Name of the Park. *Mich.* 10 *Jac.* between (l) *Pool* and *Reynolds*, *Hut.* 57, 58. adjudged.

(l) Winch 1. 44. S. C. but not ſo clearly ſtated. Et vid Noy 148. Ow. 35. 1 Brown. 31.

(F) To what (a) Thing it ſhall extend.

(a) Where the Garden-Penny ſhall not extend to the new Enlargements of the Garden Het. 94. Lit. Rep. 151. —Nor to a new Garden. Lit. Rep. 148.

1. If a Man be diſcharged of two ancient Griſt Water-Mills for one Modus, ſcilicet, for 6 s. 8 d. yearly paid to the Parſon, and after, by Continuance of Time, by the Act of God, the Watercourſe which uſed to run to the Mills is diverted, and runs in another Place a little diſtant from the ancient Mills, and thereupon the Owner of the Mills pulls down one of the ancient Mills, and rebuilds it upon the Stream in the new Courſe, he ſhall be diſcharged of Tithes of this new Mill for the ſaid 6 s. 8 d. for this is altered by the Act of God. Mich. 11 Car. B. R. between (b) Johnſon and Dandridge, per Curiam, reſolved, and a Prohibition granted accordingly.

(b) 1 Rol. Abr. 641. R. 1. S. C.

2. But in the ſaid Caſe, if the ancient Watercourſe be changed (c) by the Act of the Party himſelf, who is the Owner of the Mill, he ſhall pay Tithes thereof as for a new Mill, and the ſaid ancient Modus ſhall not diſcharge it. Mich. 11 Car. B. R. in the ſaid Caſe of Johnſon and Dandridge, per Curiam reſolved.

(c) Vide 4 Co. 87.

3. If for two ancient Meſſuages, and two ancient Water-Grain Mills, Time out of Memory, &c. there hath uſed to be paid to the Parſon 20s. per Annum, in lieu of all Tithes iſſuing out of the ſaid Meſſuages and Mills, and after the Owner of the Meſſuages and Mills erects two new Grain-Mills within the ſaid Meſſuages, it ſeems (c) the Modus will not diſcharge theſe new Mills from the Payment of Tithes, becauſe the Tithes of a Mill is not merely predial, but mix'd with the Perſonalty, and is more of the Perſonalty than of the Predialty. Mich. 13 Car. B. R. between Goodwin and Smith, concerning Torrington Mills in the County of Devon, upon a Demurrer. Juſtice Berkly & Curia ſeemed to incline, that the Modus ſhould not extend to theſe new Mills; but they did not reſolve it, becauſe the Iſſue was taken upon the Modus, as to the two Meſſuages and ancient Mills; and at the Niſi Prius the Plaintiff in the Prohibition was nonſuit, (cc) by which he was nonſuit as to the Demurrer alſo, and for this Cauſe a Conſultation was granted for the Whole.

(c) 3 Buſt. 212. 1 Browul. 32.

(cc) 2 Rol. Abr. 134. Pl. 4. S. C.

4. If a Man be ſeiſed of 8 Acres of Paſture, and of Meadow, for the Tithes of which there has been paid Time out of Memory, &c. 5 s. 6 d. and after the Owner thereof erects thereupon a Corn-Mill, he ſhall pay no Tithe for the Corn-Mill, (d) becauſe the Land was diſcharged per Modum Decimandi. Co. Magna Charta 490.

(d) But where the Parſon libelled for Tithes of a Mill erected upon Land diſcharged of Tithes by the Statute of Monaſteries, 31 H. 8. Cro. Jac. 429. a Prohibition was denied per totam Curiam, for de molendino de novo erect' non jacet Proh' per Stat' Artic' Cler' c. 5. Vide 1 Rol. Abr. 641. Pl. 19. and the Notes thereupon.

(G) To what Thing it ſhall extend for a collateral Reſpect.

Fraud.

1. If a Man preſcribes to pay an Halfpenny for every Lamb which he ſhall ſell before the firſt Day of May, without other Tithe of them, and after, by Fraud to deceive the Parſon, he ſells the Lambs (a) but a Day before May, this is not diſcharged by the Cuſtom of Tithing. Mich. 17 Jac. B. per Curiam.

(a) Where a Man keeps his Sheep in one Pariſh till Shearing-time, and then ſells them into another, the Vendee ſhall pay Tithe-Wool to the Pariſh where they were depaſtured the greater Part of the Time of the growing of the Wool. Lan. 16, 17. Mid. Poph. 197.

(H) Who ſhall preſcribe *in Non decimando.*

Fol. 653.

1. A Layman cannot preſcribe in Non decimando without ſpecial Matter, though he be capable of a Diſcharge of Tithes in Favour of the Church, becauſe it ſhall not loſe its Right without an actual Recompence. Co. 2. (a) the Biſhop of Wincheſter 44. reſolved.

(a) Moor 425. Pl. 598. S. C. & S. P.

2. (a) A Spiritual Perſon may preſcribe generally in Non decimando, becauſe he is more favoured than a Layman, for this is always in a Spiritual Perſon, and ſo not taken from the Church, for ſuch Spiritual Perſon was capable of a Grant of Tithes at the Common Law in Perpetuity. Co. 2. the Biſhop of Winchester 44. reſolved.

(b) Nash and Molins S. P. 1 Leon. 240. adjudged. Cro. El. 206. adjudged. Et vid. Hob. 309 1 Rol. Rep. 264.

3. (c) As a (d) Biſhop may preſcribe in Non decimando, as to be diſcharged of Tithes for himſelf, his Farmers and Tenants at Will, for certain Land in the Parish of another. Co. 2. (e) the Biſhop of Winchester 44. adjudged: And Mich. 15 Ja. B. R. ſame Caſe came in Queſtion, and adjudged, and a Prohibition granted accordingly. Mich. 42, 43 Eliz. B. R. between Crowcher and Frier adjudged. M. 13 Ja. B. R. in the Biſhop of Hereford's Caſe, reſolved and a Prohibition granted accordingly.

(c) The Biſhop of Lincoln and Cooper S. P. Cro. El. 216. adjudged: 1 Leon. 248.

adjudged. And though it appeared, that in the Time of Ed. 6. the Manor was granted to the Duke of Somerſet in Fee, and after regranted to the Biſhop, yet it was held the Preſcription was not deſtroyed. —But if the King has Lands diſcharged of Tithes by Preſcription, and he aliens them, the Preſcription is deſtroyed, though the Lands come to the King's Hands again by Eſcheat or otherways. Hard. 314. (d) That a Dean and Chapter may, vid. Winch 65. (e) Wright and Wright S. C. Cro. El. 475. adjudged. Moor 425. Pl. 598. adjudged. Moor 531. S. C. cited.

4. When certain Land is ſo diſcharged by Preſcription in Non decimando in the Hands of a Spiritual Perſon, if he leaſes it for Years to a Layman, he may now preſcribe in Non decimando alſo, (f) becauſe the Land is diſcharged in Facto. Co. 2. (g) the Biſhop of Winchester 45. adjudged: And Mich. 15 Ja. B. R. in the ſame Caſe it was ſo adjudged alſo, and a Prohibition granted.

(f) Hob. 42. (g) Wright and Wright S. C. Cro. Eliz. 475, 511, 512. adjudged. Moor 525. Pl. 598. adjudged. Et vid. Moor 219.

5. A Parſon of a Pariſh having Land in another Pariſh, Parcel of his Glebe, may preſcribe in Non decimando, for him, his Farmers, and Tenants. Mich. 13 Car. B. R. between Dr. Word and Taylor, per Curiam.

6. The Church-wardens of a Pariſh, admitting they may have Land by Preſcription, cannot preſcribe generally in Non decimando for this Land which they have for the Reparation of the Church for the Pariſhioners, for they are not Spiritual Perſons. P. 37 El. B. in Longeley and Meredine, adjudged.

7. Copyholders of Inheritance that hold of a Biſhop as of his Manor, may preſcribe, That the Biſhop and his Predeceſſors, ſeiſed of the ſaid Manor for themſelves, their Tenants for Life, Years, and Tenants by Copy of Court-Roll, of the ſaid Manor, Time out of Memory, &c. have been diſcharged of the Payment of Tithes for their Lands, Parcel of the ſaid Manor, for this is a good Preſcription, and the Copyholders ſhall be diſcharged of Tithes thereby, for their Tenements are Part of the Demeſnes of the Manor, and this might commence upon a real Compoſition for the whole Manor. Mich. 42, 43 El. B. R. between (h) Crowcher and Frier, adjudged.

(h) Cro. Eliz. 704, 784, 785. S. C. adjudged. Moor 618. Pl. 844. S. C. adjudged by Three Judges againſt One. Yelv. 2. S. C. adjudged by Three Judges againſt One Noy 132. like Point, and S. C. cited.

8. (i) A Pariſh cannot preſcribe in Non decimando. Hill. 14 Ja. B. R. Barham and Gooſe, per Curiam.

(i) March 26. S. P. per Curiam.

9. A County may preſcribe in Non decimando. Contra, P. 12. Ja. B. R. per Coke.

2

10. So

10. So a Wild may preſcribe in Non decimando, as the Wild of Suſſex. Mich. 13 Ja. B. R. a Trial was at the Bar upon a Prohibition upon ſuch a Preſcription to be diſcharged of Tithes of Wood, between Porter and Tike, and the Preſcription found, and Judgment given accordingly. Hill 14 * Ja. B. R. per Curiam, ſuch a Preſcription is good in Barham and Gooſe's Caſe. Mich 17 Ja. B. in Dr. Andrews and , adjudged upon a Trial at Bar, by which the Preſcription was found.

* Fol. 654.

11. (k) So the Wild of Kent may preſcribe in Non decimando of Wood. Tr. 15 Ja. B. between Bell and Tarde, a Prohibition granted. Mich. 17 Ja. B. R. (l) between adjudged upon a Trial at Bar, in which the Preſcription was found. Mich. 21 Ja. B. R. between Loan and Dixon, a Trial was at the Bar upon a Prohibition, in which the Iſſue was, whether Hilden-Borough Ward was within the Wild of Kent or not, admitting and agreeing that it was diſcharged of Tithes of Wood if it was within the Wild, and found by Verdict that it was within the Wild. Tr. 17 Ja. B. between Fawkener and Andrewes, per Curiam.

(k) 13 Co. 12. S. P. debated.

(l) The Earl of Clanricard and Denton, 2 Rol. Rep. 122 S. C. adjudged; Palm. 37, 38. adjudged; by which Book it appears, the Wild of Kent hath 20 Pariſhes in it. Et vid. Lit. Rep. 153. Hetl. 111.

12. A Man may preſcribe, that by the Cuſtom of the Country where he is ſued for the Tithes of Milk of Ewes, no Tithes Time out of Memory have been paid for Milk of Ewes. Mich. 14 Car. B. R. between Sewel and Bichner, per Curiam, a Prohibition granted upon ſuch a Surmiſe to the Conſiſtory of Winton.

13. A Man may preſcribe that there is a Cuſtom within the Hundred of Oſulſton in the County of Middleſex, and in the County of Surrey, that if any common Baker of Bread inhabiting within any of thoſe Hundreds erects any Water-mill, Wind-mill, or Hand-mill, within any of thoſe two Hundreds, to grind his Grain, to be employed in making of Bread for himſelf in his Trade of a common Baker, for the making of Bread for the Maintenance of his Family, and to ſell to his Cuſtomers inhabiting there, or near the ſaid Hundreds, for their Suſtentation, by the Support of whom the Parſons within the ſaid Hundred have more ample Tithes, videlicet, of thoſe who have Lands or Tenements, and others, as of Handycraft Tradeſmen, Offerings, and ſuch like, no Tithes hath uſed to be paid from the Time, &c. for the Grinding of this Grain ſo employed as is aforeſaid in his Trade, for two Hundreds may preſcribe in Non decimando. (m) P. 15 Car. B. R. between Kidden and Edwards, a Prohibition granted upon this Suggeſtion, where the Baker inhabited in one of the Hundreds, and erected a Mill in the other Hundred.

(m) March 25. ſeems to be S. C.

14. (n) A Country may preſcribe to be quit of Tithes of Wood, or any other Tithe, ſo there be ſufficient Maintainance and Suſtentation of the Incumbent beſides; but a Town cannot ſo preſcribe. 2 *Inſt.* 645.

(n) 13 Co. 13. S. P. 1 Rol Rep. 22. S. P. ſaid by Coke to have been ſo held by Wray Chief Juſtice.

(I) Who

(I) Who ſhall have Advantage of a Preſcription *in Non decimando.*

1. If a Man preſcribes, that ſuch an Abbot and his Predeceſſors Time out of Memory, &c. held certain Land diſcharged of the Payment of Tithe, and that this came after by Diſſolution by the Statute of 27 H. 8. to the Crown, and ſo derives a Title to it from the Crown, the Patentee ſhall not have Advantage of this Preſcription by the Common Law, without the Help of any Statute, becauſe it ſhall be intended that this Diſcharge was by Reaſon of ſome perſonal Privilege given the Abbot and his Predeceſſors, (a) and ſo is gone by the Diſſolution of the Body Politick, and not in reſpect of any real Compoſition. P. 7 Car. in Scaccario, between Clark and Ward, adjudged in the Caſe of the Vicar of Daintre. Mich. 10 Car. B. R. between (b) Siddowne and Holms, per Curiam, upon Demurrer, and gave a peremptory Rule for Judgment accordingly, if Cauſe was not ſhewn the next Term to the contrary. But after Judgment was ſtay'd till M. 11 Car. at which Time it was ſolemnly argued by the Court, and then adjudged by Bramſton, Jones, and Barkely, econtra the Opinion of Croke, that the Preſcription in Non decimando was gone by the Common Law. H. 11 Car. between Cock and Thorpe, ſo adjudged upon a Demurrer without Argument, Econtra the Opinion of Croke. Intratur, P. 11 Car. Rot. 28.

(a) 1 Jon. 3.

(b) Cro. Car. 422. S. C. adjudged. 1 Jon. 368, 373. S. C. adjudged.

Fol. 655.

2. In a Prohibition, if the Plaintiff preſcribes, that King Edw. 6. was ſeiſed de nuper deaforeſtata foreſta de Savernack in Comitatu Wilts, of which 20 Acres of Wood, call'd Wickam-Huſſocks, within the Pariſh of Pewſey, a Tempore, &c. was Parcel, and that King Edw. 6. and all his Progenitors and Predeceſſors, Kings of England, Foreſtam predictam, cum pertinentiis, unde, &c. habuerunt & gaviſi fuerunt exoneratam ac quietatam Immunem & Privilegiatam de & à Solutione omnium & ſingularum Decimarum quarumcunque Rectori Eccleſiæ parochialis de Pewſey predict', ſeu Firmario ſuo pro Tempore exiſtenti Solubilium, infra Foreſtam prædictam, ſeu aliquam inde Parcellam, creſentium, renovantium, provenientium, & contingentium, Rectori Eccleſiæ de Pewſey prædicta, ſeu ejus Firmario, pro Tempore exiſtenti ſolubilium; and that King Edw. 6. by Deed enroll'd, convey'd the ſaid Foreſt to the Duke of Somerſet in Fee, and ſo it was conveyed from him by mean Conveyance to the Plaintiff, the now Earl of Hertford, in Fee, and that the Defendant being Parſon of the ſaid Pariſh, had ſued for Tithes of the ſaid 20 Acres of Wood, to which the Defendant pleaded for a Conſultation, that the ſaid 20 Acres were not Parcel of the ſaid Foreſt, upon which an Iſſue being joined, a Verdict was given for the Plaintiff: And after it was moved in Arreſt of Judgment, that this Preſcription in Non decimando, which was laid in the King and his Progenitors Kings of England, was perſonal, and did not extend to the Alience of the King; and after ſeveral Arguments at the Bar, it was adjudged per totam Curiam, that the Plaintiff could not take Advantage of this Preſcription, without any Argument by them, and a Conſultation granted accordingly, for that the Ground of this Preſcription was either becauſe it was a Foreſt, and could not render Tithes ſo long as it was uſed with wild Cattle, ſcilicet, Deer; or becauſe the King was not within the Council of Lateran, which ordains the Parochial Right, or becauſe the King is Perſona mixta, and ſo might preſcribe in Non decimando as a Spiritual Perſon, in all

which Caſes it could not extend to the Alienee of the King, (c) the ſaid Foreſt being diſafforeſted, and ſo now it may render Tithe in kind; and it ſhall not be intended that any real Compoſition or Conſideration was given for this Diſcharge without ſhewing thereof ſpecially, no more than in Caſe of a Spiritual Perſon or Abbot that makes ſuch Preſcription. P. 11 Car. B. R. between (d) the Earl of Hertford and Leech, adjudged. Intratur, Hill. 8 Car. Rot. 565. Vide my Argument in this Caſe in my Book.

(c) Cro. Car. 20. Hetl 60. Styl. 177.

(d) 1 Jon. 387. S. C. adjudged.

2. In Debt upon the Statute of *Ed.* 6. for not ſetting forth of Tithes, and *Nil debet* pleaded, it was found, that the Abbot of *A.* was ſeiſed in Fee, and that he and his Predeceſſors Time out of Mind had held the ſame diſcharged of Tithes, and he granted the Land to *All-Souls* College in *Oxford*, &c. *Trin.* 18 *Car.* 2. between (e) *Bolls* and *Atkinſon*, 1 *Levin.* 185. adjudged for the Plaintiff *per totam Curiam*; for that this could not be intended of a Diſcharge by real Compoſition, not being pleaded or found ſo by the Jury, but a meer Preſcription, and perſonal to the Abbot, and ran not with the Land.

(e) 1 Sid. 320. S. C. adjudged.

(K) (a) Who ſhall pay Tithes.

(a) Where the Parſon ſhall not pay Tithes to the Vicar, & vice verſa, 2 Rol. Abr. 335. Pl. 2, 3.

1. (b) If a Parſon ſows his Glebe, and after leaſes over the Land, and after the Leſſee ſevers the Embleaments, he ſhall pay Tithes for them (c) to the Parſon. P. 40 El. B. R. in Humfrey's Caſe, per Fenner.

(b) 2 Bulſ. 184. S. P. per Coke Chief Juſtice. Cro. Eliz. 578, 579. S. P. arguendo. Moor 910. Pl. 1281. S. P. Et vid. 2 Rol. Abr. 57. V. 2. and the Notes there. Moor 47, 50. Hetl. 31. Noy 132. Savil 3. Palm. 38. N. Dyer 43. a. and the Notes in the Margin. (c) A Parſon purchaſes Land within his Rectory, and leaſes the Rectory, the Leſſee ſhall have Tithes of the Land purchaſed. 11 Co. 14. a.

2. If a Parſon ſows his Glebe, and after ſells over the Embleaments, reſerving the Land, and the Vendee ſevers the Embleaments, the Parſon ſhall have Tithes of them, notwithſtanding his own Grant. P. 40 El. B. R. Humfrey's Caſe. Dubitatur, H. 11 Ja. B. R. between (d) Moyle and Ewer, Curia, and affirmed in a Writ of Error.

(d) Cro. Jac. 362. S. C. adjudged.

1 Bulſ. 183, 184. S. C. adjudged; but it did not appear that the Land ſowed was Glebe, or that he was Parſon at the Time of the Sale, ſo that he might become ſo afterwards.

3. (e) If a Parſon ſows his Glebe, and dies before Severance, and after a Succeſſor is inducted, and after the Executor or his Vendee ſevers the Embleaments, the Succeſſor ſhall have Tithes of them; for though the Executor repreſents the Perſon of the Teſtator, yet he cannot repreſent him as Parſon, inaſmuch as another is inducted. Contra, P. 40 El. B. R. Humfrey's Caſe.

(e) Harris and Cotton S. P. Hob. 188. dubitatur. 1 Brownl. 69. Fol. 656. the Court inclined accordingly. Et vid. Moor 47. Pl. 140.

4. If a Parſon ſows his Glebe, and after is depoſed before Severance, and another is induced, it ſeems he ſhall have Tithes of his Predeceſſor. (Quære, Whether there be not a Diverſity where he dies before the Annunciation, and where after?)

(f) H. 11 Ja. B. R. per Curiam.

5. By 6 *H.* 4. *cap.* 11. the Farmers or Occupiers of the Lands of Aliens ſhall pay Tithes, though ſeiſed into the King's Hands.

(f) 1 Bulſ. 184. S. P. per Coke Chief Juſtice.

(L) By whom they ſhall be paid.

1. If a Man ſells to me Wood, and I burn it in my Houſe, the Vendor ſhall be charged for the Tithes, and (a) not the Vendee, for no Tithes are due for Wood burnt in my Houſe; and this was reſolved, P. 14 Ja. B. between Parſon Ellis of Devon and Drake, and a Prohibition granted accordingly; although it was ſaid, by the Civil Law the Parſon hath Election to ſue either of them: But this croſſes the Common Law.

(a) That he ſhall not be compelled to ſue the Vendee, who perhaps may not be known to him. Noy 152. Mid. Palm. 38. 2 Rol. Rep. 440.

2. If A. agiſts the Cattle of a Stranger in his Land, the Parſon (b) may ſue the Owner of the Land for the Tithes of the Paſture; for otherwiſe it would be very inconvenient for the Parſon to ſue every Owner of Cattle, and it would be very hard to know, and infinite. Mich. 7 Car. B. R. between (c) Facey and Lange, per Curiam.

(b) In the Caſe of Pery and Wright, Hard. 184. it was held per Curiam, That Tithes for the Agiſtment of Cattle are payable by the Owner of the Cattle, for the Cattle take the Profits and Herbage of the Soil: So in Caſe of Commoners; and the Chief Baron ſaid, the Owner of the Soil might pay them, but clearly the Agiſtor is compellable to pay them. (c) Cro. Car. 237. S. C. but S. P. does not appear. 1 Jon. 254. S. C. and it ſeemed to the Court in Reaſon, that the Suit was well brought againſt the Owner; but howſoever it be, it was adjudged that it belonged to the Court-Chriſtian to determine whether the one or the other ought to be ſued; and therefore as to this Point a Conſultation was granted per Curiam. Hard. 35. S. C. cited.

3. If a Man hath a Nurſery of Trees, and he ſells them, and pulls them up himſelf, he ſhall pay the Tithe; but if he ſells them particulary to another, the Vendee ſhall pay the Tithes. *Mich.* 16 *Car.* 2. between *Grant* and *Hedding & al. Hard.* 380, 381. *per Curiam:* As in caſe of Tithe of Corn, if ſold ſtanding, the Vendee ſhall pay the Tithes; (d) but if ſold after Severance, the Vendor muſt.

(d) 2 Rol. Rep. 78. S. P.

(M) Tithes perſonal.

(a) What ſhall be ſaid perſonal Tithes.

(a) Lit. Rep. 147.

1. A Perſonal Tithe is the tenth Part of the clear Gain quæ debentur ex opere perſonali, his Charges and Expences, according to his Eſtate, Condition, or Degree to be firſt deducted. Co. Magna Charta 621, 657, 649.

2. Tithes of Fiſh taken at Iſland, or of Herrings or Pilchards upon the Sea, are perſonal Tithes. Mich. 14 Ja. B. R. (b) Goſlin and Horden, per Dodderidge. H. 24 Car. B. R. ſaid by Juſtice Jones, that in an Appeal out of Ireland to the Delegates here, in my (c) Lord Deſmond's Caſe, it was agreed by all the Civilians, That Tithes perſonal taken in the Sea out of any Pariſh are due deductis Expenſis, and not Tithes in kind. Co. Magna Charta 621.

(b) 2 Rol. Rep 419. S. C. and Tithes thereof payable by particular Cuſtom.

(c) Cro. Car. 264. ſeems to be the S. C. Mid. 1 Rol. Abr. 636. Pl. 4, 6, 7.

3. Tithes of Fulling-Mills and Paper-Mills are perſonal Tithes. Co. Magna Charta 621.

3. The Tithes of a Corn-Mill are not perſonal, but predial or mix'd, and (d) of this, according to the Cuſtom of the Realm, the Miller ought to pay the tenth Toll-diſh for Tithes. Contra, Co. Magna Charta 621.

(d) But for this, vid. 1 Rol. Abr. 641. Pl. 19. and the Notes there.

(N) In what Caſes they are due.

Of what Things they ſhall be paid.

1. NO perſonal Tithes ſhall be paid out of the clear Gains of the Party. Mich. 14 Ja. B. R. per Dodderidge.

2. As if the Owner of a Ship lends it to Mariners to go to Iſland for Fiſh, for a certain Quantity of Fiſh to be paid to him upon their Return, no Tithes upon their Return ſhall be paid by the Mariners to the Parſon out of thoſe Fiſh which the Owner ſhall have for the Hire of his Ship, becauſe this is a perſonal Tithe, and for that it ought to be paid but of the clear Gain: And ſo in Devon, upon the Hire of a (a) Ship or Boat to take Pilchards or Herrings. Mich. 14 Ja. B. R. per (b) Dodderidge, in Goſlin and Horden's Caſe.

(a) In the Original it is ſeabe. Q. if not miſprinted.

(b) 1 Rol. Rep. 419. S. C. but S. P. does not appear.

3. If a Man purchaſes an Houſe for 300 l. and ſells it again within a ſhort Time after for 500 l. yet no Tithe ſhall be paid of of the Gain * thereof, for this is againſt the Common Law. M. 11 Ja. B. R. between Davies and Tolbin reſolved, and a Prohibition granted.

* Fol. 657.

4. By 2 & 3 *Edw.* 6. *cap.* 13. it is enacted, That every Perſon exerciſing Merchandize, *&c.* Handicraft, or other Art or Faculty, being ſuch Kind of Perſons as within 40 Years had accuſtomably uſed to pay perſonal Tithes, or of Right ought to pay, (other than ſuch as be common Day-Labourers) ſhall yearly, *&c.* pay for his perſonal Tithe the tenth Part of his clear Gains, his Charges, *&c.* deducted; and where Handicraft-men have uſed to pay their Tithes within 40 Years, the (c) ſame Cuſtom of Payment ſhall be obſerved.

(c) So that there may be a Modus Decimandi for perſonal Tithes. 2 Inſ. 657.

(O) Tithes Extraparochial.

(a) Who may have them.

1. ANY Stranger may have a Portion of Tithes in the Pariſh of another Parſon. 13 H. 4. 17. 44 Aſſ. 25.

2. 3 E. 1. Rotulo Clauſorum, Membrana 3. the Abbot de Burgo Petri had by the Charters of divers Kings Decimam Venationis capt' in Foreſtis Regis infra Comitatum North't. 8 E. 1. Rot. Clauſorum, M. 2. accordingly in Foreſta Regis citra Trentam.

3. 13 E. 1. Rotulo Patentium. M. 6. the Dean and Chapter M. S. had the Tithe in Foreſta de Claringdon ex Conceſſione Regis.

(a) By the Canon Law, the Biſhop is to have all Tithes growing in Lands not aſſigned to any Pariſh within his Dioceſe; but this Canon being againſt the Law of the Land, never had Allowance within the Realm. 2 Inſ. 647. 1 Rol. Rep. 454.

4. The

(b) 2 Inſ. 647. S. P. Cowdzy's Caſe. 5 Co. 15. a. S. P. Styl. 137. S.P. per Curiam. 1 Rol. Rep. 454, 457.

4. (b) **The King ſhall have the Tithe in Places which are out of any Pariſh, as in Foreſts, and the like, and may grant them by his Letters-Patents, and the Patentee ſhall have them.** 22 Aſſ. 75. D. Proxys, 4 Co. 2. **the Biſhop of** Wincheſter 44. for he is Perſona mixta.

5. Libro Parliamentorum, Fol. 19. inter Placita in Parliamento de 18 E. 1. **the Prior of** Carliol **and the Biſhop of** Carliol's Caſe, **it is there ſaid, that the Tithes of Land within a Foreſt which is out of any Pariſh, belong to the King, becauſe he** in Foreſta prædict' Villas ædificare, Eccleſias conſtruere, Terras aſſartare, & Eccleſias illas, cum Decimis Terrarum illarum, pro Voluntate ſua cuicunq; voluerit conferre poteſt, eo quod Foreſta illa non eſt infra Limites alicujus Parochiæ.

(P) To whom they belong *de Jure*.

1. **THE Tithes of ſuch Places as are out of any Pariſh belong** de Jure **to the King, as Foreſts, and ſuch like.** 22 Aſſ. 75. per Thorpe.

9. 18 E. 1. Libro Parliamentorum 19. b. **upon a Suit for Tithe between the Parſon and the Grantee of the King**, &c. Willielmus, qui ſequitur pro Domino Rege, dicit, quod Decimæ predictæ ad Dominum Regem pertinent, & ad nullum alium, quia dicit, quod prædictæ Placeæ ſunt infra Bundas Foreſtæ ipſius Domini Regis de Inglewood, & quod ipſe Dominus Rex in Foreſta ſua prædicta, Villas ædificare, Eccleſias conſtruere, Terras aſſartare, & Eccleſias illas, cum Decimis Terrarum illarum, pro Voluntate ſua cuicunque voluerit conferre poteſt, eo quod Foreſta illa non eſt infra Limites alicujus Parochiæ, & petit quod Decimæ illæ Domino Regi remaneant, prout debent Ratione prædicta, &c.

3. By the Statute of 2 & 3 *Edw.* 6. *c.* 13. it is enacted, That every Perſon that ſhall have Beaſts, or other titheable Cattle, going, feeding, or depaſturing, in any Waſte or common Ground, (a) whereof the Pariſh is not certainly known (b) ſhall pay their Tithes for the Increaſe of the ſaid Cattle to the Parſon, *&c.* Owner, Farmer, or Deputy, of the Pariſh where the Owner of the Cattle inhabiteth.

(a) 1 Mod. 216.

(b) Where the King ought to have the Tithes within the Waſtes or Commons in his Foreſts, which are not within any Pariſh, the Tithes of the Increaſe of Cattle are hereby given to the Parſon, &c. of the Pariſh where the Owner of the Cattle dwells. 2 Inſ. 651. —But vide Savil 60, 61. per Curiam, ſaid, That where Tithes have Time out of Mind been paid to any other Perſon, they ſhall be continued accordingly.

(a) Tithes.

(b) Who is capable thereof, and to whom payable.

(a) A Portion due by Law of God; but it belongs to the Law of Man to aſſign hanc vel illam.

1. BY the Common Law, none were capable of (c) taking Tithes but only Spiritual Perſons, or *Perſona mixta*; and regularly, no meer (d) Layman by the Common Law was capable of them, unleſs in Special Caſes. 2 *Co.* 44. a. in the Biſhop of *Wincheſter*'s Caſe. 13 Co. 16. Moor 530.

(b) A Chaplain of a Chapel of Eaſe, who was not Preſentative or Donative, libelled for Tithes of the Inhabitants within the Precincts of the Chapel. Lit. Rep. 72. a Prohibition granted. (c) But a Layman was capable of having Tithes by Way of Retainer. Cro. El. 512. (d) Who was not capable of adminiſtring the Sacrament, and Performance of the Duty of a Miniſter. Moor 484.

2. (e) But the King being *Perſona mixta*, was capable of Tithe by the Common Law. 2 *Co.* 44. a.

(e) Cao. El. 393. S. P. admitted. 599. S. P. per Curiam. Moor 486. S. P. Dav. 4 S. P. per Curiam, arguendo. 1 Jon 387. S. P. agreed per Curiam. And vid. Hard. 315.

3. So was the King's Patentee by his Prerogative. 2 *Co.* 44. a.

4. It is commonly ſaid in (f) our Books, That before the Council of *Lateran*, (g) every (h) one might have given his Tithes to any Eccleſiaſtical Perſon that he would. 2 *Co.* 44. b. in the Biſhop of *Wincheſter's* Caſe.

(f) For this, vid. 2 Inſ. 646. Moor 530. 2 Brownl. 24. Hob. 296.

(g) The King not bound by this Council. Cro. Eliz. 512. 1 Jon. 317. (h) Before the Diviſion of Pariſhes, every Biſhop had the Diſtribution of all the Tithes within his Dioceſe, for which Bede's Eccleſiaſtical Hiſtory is there cited. Dav. 80. 81.

5. (i) A Man may preſcribe, that he, and all thoſe whoſe Eſtate he hath in the Manor of *A.* have Time out of Mind paid to the Parſon of *A.* and his Predeceſſors, 6 *l.* yearly for all Manner of Tithes growing within the Pariſh of *A.* and that by reaſon thereof, he and all they whoſe, *&c.* Lords of the ſaid Manor, have had *decimam Garbam, ſive decimum Cumulum Garbarum*, of all his Tenants within the ſaid Manor. *Mich.* 39 *&* 40 *Eliz.* between (k) *Piggot* and *Hearn*, *Cro. Eliz.* 599. adjudged, that it was good to have the tenth Shock, *&c.* for he has it as a Profit apprender belonging to his Manor, and not as Tithes; and if he had preſcribed to have had *Decimas Garbarum*, it had been ill.

(i) Cro. Eliz. 763. S. P. adjudged; and ſaid, the Lord ſhould have his Remedy for them either at Common Law or in the Spiritual Court.

Et vid. Cro. El. 293. 1 Rol. Rep. 3. (k) Moor 483. Pl. 685. S. C. adjudged. 2 Co. 45. S. C. cited, and ſaid, That it was reſolved that in this ſpecial Caſe the Owner of the Manor being a Lay-perſon, might ſue for Tithes in the Spiritual Court, for it ſhould be intended that at the Beginning the Lord was ſeiſed of the entire Manor before the Tenancies were derived out of it, and then by Compoſition or other lawful Means the Lord had all the Tithes, &c. 1 Saund. 142. S. C. cited.

6. The Prior of *N.* being ſeiſed of the Manor of *N.* and of the Tithes thereof, *ſimul & ſemel*, as of a Portion of Tithes, 25 *H.* 1. granted the Manor and Tithes to *A.* and his Heirs, rendring Rent, and he enter'd, and held it diſcharged of Tithes, and after granted two Hides of Land, Part of the Manor, with the Tithes thereof, to *B.* and *A.* and his Heirs paid the Rent to the Prior till the Diſſolution, and after to the King. *Trin.* 34 *Car.* 2. between *James* and *Trollop*, 2 *Mod.* 320. it was adjudged, That the two Hides ſhould be diſcharged of Tithes, for the Prior might preſcribe for Tithes in Prender, and being well in him, he might grant them to *A.* paying 5 *s.* Rent.

7. By 28 *Hen.* 8. *cap.* 11. the Tithes and other Profits of any Archdeaconry, Deanry, Prebend, Parſonage, *&c.* ariſing during the Vacancy, belong to ſuch Perſon as is next preſented, promoted, *&c.* his Executors, *&c.* towards Payment of his Firſt-Fruits, *&c.*

Diſcharge of Tithes.

(a) By (b) the Common Law.

(a) That the Pope might have diſcharged one from Payment of Tithes. Cro. Eliz. 512. Moor 532. Poph. 156. 1 Jon. 368. —But vid. 2 Inſt. 652. where my Lord Coke ſays, it is his Opinion, That the Pope by his Bull could not diſcharge any Subject of the Payment of Tithes, for it was againſt the Right of the Parſons, &c. of Pariſhes after the Parochial Right of Tithes was eſtabliſhed.

1. A Lay-man by the Common Law might be diſcharged of Tithes by Grant or Compoſition, though not by Preſcription. 2 *Co.* 44. a. in the Biſhop of *Wincheſter*'s Caſe.

2. The Orders (c) of (d) Ciſtercians, Templers, and (e) Hoſpitallers, were diſcharged of Tithes *ſub modo, viz.* (f) *quamdiu propriis Manibus excoluntur.* 2 *Co.* 44. b.

3. The King is not by his Prerogative (g) diſcharged of Tithes for the Ancient (h) Demeſnes of the Crown. *Mich.* 14 *Car.* 2. *Hardr.* 315. ſo held upon Evidence by *Hale* Chief Baron, and the whole Court.

(b) The ſeveral Ways by which Lands might be diſcharged. 2 Rol. Rep. 252. 1 Jon. 3. 368. Poph. 156. Cro. Jac. 608. Hob. 296, 309. (c) Dyer 277. Pl. 60. Moor 532. 2 Rol. Rep. 479. Lat. 89. 1 Jon. 369. Bridg. 33. Cro. Jac. 544. Hob. 297. 1 Jon. 189. 2 Inſ. 652. —Whether the Premonſtrat had any, and what Diſcharge, vid. Dickenſon and Greenhall, 2 Rol. Rep. 479. Poph. 157. 1 Jon. 368. (d) This Order diſcharged of Tithes by the Council of Lateran. Hard. 101. But Q. if not diſcharged before. Et vid. Hard. 381. —But this is ſuch a Privilege as they may by Agreement waive. Hard. 383, 384. (e) Lat. 89, 90. Bridg. 33. Godb. 396. 1 Jon. 184, 185. (f) A Bull made to the Ciſtercians to diſcharge their Lands of Tithes when let to Farm, and all like Bulls to be by them or others purchaſed, by 2 Hen. 4. c. 4. are not to be put in Execution under the Penalty of a Premunire. Et vid. 7 H. 4. cap. 6. 2 Inſ. 652. (g) Moor 915. Pl. 1295. (h) Lands lying within a Foreſt, and in the Hands of the King, do not pay Tithes, though they be within a Pariſh. Styl. 137. —Though the King by reaſon of his Prerogative is privileged from Payment of Tithes, yet his Leſſee is not. Cro. El. 511. ſaid to be adjudged: But vid. 1 Brownl. 31.

Diſcharge.

By Act of Parliament.

(a) But ſuch Privilege as the Abbots, &c. had of being diſcharged of Tithes, was not preſerved by theſe general Words. Sydown and Holme, Cro. Car. 424. adjudged. 1 Jon. 370, 373. adjudged.

1. BY the Statute of 27 *H.* 8. *cap.* 28. it was enacted, That the King ſhould have all Monaſteries, Priories, and other religious Houſes of Monks, *&c.* that had not Lands, *&c.* above 200 *l.* yearly, and all Lands, *&c.* of ſuch Monaſteries, *&c.* (a) in as large and ample Manner as the Abbots, *&c.* then had or ought to have the ſame in Right of their Houſes.

(b) In the Conjunctive; ſo that this Act extends only to ſuch Hoſpitals, &c. as are both Religious and Eccleſiaſtical. 2 Rep. 48. b. 49. a. And Corbet's Caſe, 10 El. Dyer 280. Pl. 11, 12. was denied to be Law, though the Dean and Chapter there was once religious. Co. Lit. 342 a. (c) So that this extends not to Monaſteries, &c given to the Crown by 27 H. 8. Cro. Car. 424, 425.

2. By the Statute of 31 *Hen.* 8. *cap.* 13. reciting, That divers Abbots, *&c.* and other Eccleſiaſtical Governors of Monaſteries, *&c.* Colleges, Hoſpitals, Houſes of Friars, and other Religious (b) and Eccleſiaſtical Houſes and Places, ſince the (c) 4th of *February*, 27 *H.* 8. had granted all their Manors, *&c.* to the King and his Succeſſors, it is enacted, That the King ſhall hold them in as large and ample Manner and Form as the late Abbots, *&c.* held or occupied, or of Right ought to have held or occupied, the ſame, at the Time of the Diſſolution, and that all the ſaid late Monaſteries, *&c.* and all other Monaſteries which hereafter ſhall

happen to be (d) diſſolved, ſuppreſſed, renounced, or by any other Means come to the King, and all Manors, *&c.* belonging to the ſame, when and as ſoon as they ſhall be diſſolved, *&c.* ſhall be veſted, deemed and adjudged, by Authority of this Act, in the very actual and real Seiſin and Poſſeſſion of the King, his Heirs and Succeſſors.

(d) This extends not to ſuch Colleges, Chanteries, &c. as were given the King by 1 Edw. 6. cap. 14. for Beginning with Diſſolution, Suppreſſion, &c. which are inferiour Means, the general Words, viz. any other Means, ſhall not be intended of an Act of Parliament, which is the higheſt Manner of Conveyance. Green and Balſor, or the Archbiſhop of Canterbury's Caſe, 2 Rep. 46. b. However it being enacted by 1 Ed. 6. That they ſhall be in the King by Force of that Act, that would have repealed the Force of this Act, Green and Boſekin. Moor 420. Pl. 579. adjudged. Et vid 1 Jon. 4. Cro. Jac. 608. 1 Jon. 185, 186. 187. Hob. 310.

3. And by the ſame Statute, reciting, That whereas ſeveral Abbots, *&c.* had ſeveral Parſonages, appropriate Tithes, Penſions, and Portions, and alſo were acquitted of or for the Payment of Tithes, it was further enacted, That the King, his Heirs and Succeſſors, and ſuch Perſons which had, or thereafter ſhould have, (e) any Monaſteries, *&c.* or any Manors, *&c* to the ſaid Monaſteries, *&c.* belonging, ſhould hold the ſaid Parſonages, appropriate Tithes, Penſions and Portions, Manors, *&c.* and other Hereditaments, of what Nature or Kind ſoever they be, according to their Eſtates and Titles, (f) diſcharged and acquitted of (g) Payment of Tithes, as freely, and in as large and am-

(e) Theſe general Words extend not to ſuch Monaſteries, &c. as came to the King by the 27 H. 8. for though the Words be general, yet it is after the ſaid late Abbots, &c. therefore ought to be expounded and coupled with the Clauſe precedent, which mentions and extends only to ſuch Abbeys as came to the King after the 4 Febr. 27 H. 8 Sidown and Holme, Cro. Car. 424. adjudged by Three Judges againſt one. 1 Jon. 372, 373. S. C. adjudged by Three Judges againſt One; and that the general Words were reſtrained by the ſubſequent, the ſaid late Abbots, &c. Et vid. 1 Jon. 185. Hob 310. —But whether this Clauſe extends to the Lands of the Houſe of St John of Jeruſalem, diſſolved by 32 H. 8. cap. 24. Whitton and Weſton, dubitatur. Bridg. 32. Lat. 89. Godb. 395, 396. 1 Jon. 182, 183. Cornwallis and Spurling, Cro. Jac. 57. adjudged per totam Curiam that it did not. Moor 913. Pl. 1291. adjudged. Hurry and Boyer, 2 Br. 8, 23, 24. debated and adjourned. Er vid. N. Dyer 177. Margine. (f) That the Plaintiff in a Prohibition may ſhew generally, that the Prior, &c. held diſcharged, &c. at the Time, &c without ſhewing how, &c. 2 Co. 48. b. and ſaid, that ſo was the common Uſe in Prohibitions. Naſh and Molins, Cro. El. 206. adjudged. 1 Leon. 240 adjudged: But vid. Slade and Drake con. Hob. 295. adjudged per totam Curiam, præter Warburton, upon a general Demurrer: And the Opinion of Coke, in his ſecond Rep. denied, and ſaid, there was no authentick Precedent, much leſs Judgment or grave Opinion, to that Purpoſe. 1 Jon. 6, 7. adjudged by Three Judges con. Warburton; but a Writ of Error was brought, and the Book makes a Quære thereof. 1 Rol. Rep. 250. debated upon the Writ of Error. —To a Bill for Tithes, the Defendant by his Anſwer ſet forth, that the Lands whereof the Tithes were demanded were Part of the Priory of , and that the Lands belonging to that Priory were diſcharged by Order, without ſaying more. Hard. 322. held ſufficient, notwithſtanding the Uncertainty. (g) So that this extends to ſuch Caſes where there was an Unity of Poſſeſſion of the Rectory and Lands Time out of Mind. 2 Co. 47. b. Moor 420. Pl. 579. Pridle and Napper, 11 Co. 14. a. & b. 2 Brownl. 25. Et vide Moor 46 Pl 140. 50. Pl. 151. Hob. 44. Lane 7. 1 Leon. 331, &c. 4 Leon. 47. 1 Rol. Rep. 54 Gerard and Wright, Cro. Jac. 627, 608. 1 Jon. 2, 3, &c. Hob. 307, 308. &c Slade and Drake, Hob. 298 2 Rol. Rep 250. Et vid. Sav. 62. Cro. El 579. —But it is a good Anſwer to ſuch Preſcription to ſhew that the Abbey was founded within Time of Memory. Yelv. 31. Hob. 311. And if the Lands were at any Time before demiſed, and the Farmers paid Tithes, this may be pleaded in a Prohibition. 2 Co. 48. a. 11 Co. 14. b. Moor 528. Pl. 669. Yelv. 31. Et vid. 1 Rol Rep. 143. Palm. 119. ſaid where a Prohibition is brought upon the Unity of Poſſeſſion at the Time of the Diſſolution, if the Farmers paid Tithes at the Time of the Diſſolution, this is meerly againſt the Unity. Et vid. Dyer 349. b. 1 Leon. 331, 332. &c. Cro. Jac. 452, 453. Hob. 298. Hard. 190. —And perpetual Unity is not well pleaded, unleſs you add, that Ratione inde they held diſcharged Time out of Mind; for though the Unity only is traverſable, and not the Concluſion, yet that Concluſion fixeth it to the Statute, and anſwers the real and perfect Diſcharge preſumed under the Unity, to which the Unity it ſelf is but argumentative. Hob. 298. but the Want thereof was ſaid to be a Fault in Form only, and cured by Verdict or general Demurrer.

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ple Manner, as the ſaid late Abbots, *&c.* (h) had held or enjoyed the ſame at their Diſſolution, Suppreſſion, *&c.* or Coming to the King.

(h) Though the Ciſtercians, &c. were by their Order diſcharged of Tithes only while the Lands were in propriis Manibus, and Lands belonging to them were in Leaſe at the Time of the Diſſolution, and paid Tithes, yet by theſe Words the King and all that claim under him ſhall be diſcharged of Tithes, for the Inheritance was diſcharged, and the Statute had Regard to the Inheritance, which was given to the King. Porter and Barburſt, 2 Rol. Rep. 143 adjudged. Cro. Jac. 559. adjudged. Palm. 118, 119. adjudged, and ſaid, That the Words had and held extend to the Diſcharge of the Abbot. N. Dyer 277. b. margine, cited. And in Hard. 174, 190. it was held clearly per Curiam, That if at the Time of the Diſſolution ſuch Lands were in Leaſe, or an Eſtate for Life or in Tail were out upon them, yet the Reverſioner ſhould have the Benefit of the Diſcharge after the Determination of thoſe Eſtates, for that the Diſcharge was not intetrupted, but ſuſpended only during the Time they were in the Hands of the particular Tenants. —But if before the Statute of Quia Emptores Terrarum, an Abbot had made a Feoffment of Lands, and after this Statute they had eſcheated, it was doubted. Hard. 190. Et vid. Hob. 248. 2 Leon. 71.

4. By 32 *H.* 8. *cap.* 24. it is enacted, That the King, his Heirs and Succeſſors, ſhall hold and enjoy the Hoſpital of St. *John* of *Jeruſalem*, and all their Manors, *&c.* (i) Privileges, Parſonages, and Tithes, *&c.*

5. By 1 *Ed.* 6. *cap.* 24. it is enacted, That all Colleges, Chanteries, *&c.* and their Lands, ſhall by Authority of that Act be veſted in the King, in (k) as large and ample Manner as the Prieſts, *&c.* had occupied or enjoyed, *&c.*

(i) Whether their Privilege of being diſcharged of Tithes was preſerved, and given to the King and his Patentees, Whitton and Weſton dubitatur. Bridg. 33. Lut. 89. Godb. 395, 396. 1 Jon. 182, to 191, debated; and by Three Judges againſt One held, that it was preſerved, and given, &c. Hurry and Boyer, 2 Brownl. 8. 23, 24. Cornwallis and Spurling, that it was not. Cro. Jac. 57. adjudged upon a ſpecial Verdict. Moor 913. Pl. 1291. adjudged. N. Dyer 277. b. margine, cited: But between Foſſet and Franklin it was adjudged upon a ſpecial Verdict, that their Lands are diſcharged of Tithes. Raym. 225. 3 Keb. 208. (k) Yet theſe general Words did not diſcharge the Lands of Tithes, for theſe iſſue not out of the Land, but are diſtinct from it. 2 Co. 49. a.

(a) The Remedy for the Recovery (b) thereof.

(a) Vide the Statute of Circumſpecte agatis, made the 13 Ed. 1. and the Expoſition thereof, 2 Inſt. 489, 490.

1. (c) BY the Common Law no Aſſiſe or Precipe lay of Tithes or other Eccleſiaſtical Duty. *C. L.* 159. a.

2. But Tithes, or other Eccleſiaſtical Duties which came to the Crown by the Statutes of 27 *H.* 8. 31 *H.* 8. 37 *H.* 8. and 1 *E.* 6. are by theſe Statutes, and 32 *H.* 8. and 1 *&* 2 *Ph. & M.* in the Hands of Lay-men; (d) Temporal Inheritances ſhall be accounted Aſſets; Husbands ſhall be Tenants by the Curteſy thereof, *&c.* and they have only this Eccleſiaſtical Quality, that the Poſſeſſors may ſue for Subſtraction thereof in the Eccleſiaſtical Court.

(b) How and where Tithes in London ſhall be ſued for, ante, 1 Rol. Abr. 636. Pl. 2. the Notes thereupon. (c) 2 Co. 44. a. S. P. Vaugh. 195. S. P. 2 Inſt. 648. (d) By the 32 H. 8. c. 7. Fines and Recoveries may thereof be had and levied.

3. Though Lay-perſons, having Parſonages, *&c.* could not by the Order and Courſe of the Eccleſiaſtical Law ſue for Tithes or other Duries, yet by 32 *H.* 8. *c.* 7. it is enacted, That all Perſons ſhall ſet out their Tithes and Offerings according to the Cuſtom of the Places where they grow due, and if not, the Party grieved, being Lay or Eccleſiaſtical, may convent him that (e) detains them before the Eccleſiaſtical Judge, who ſhall proceed, and give Sentence; and if either Party appeal, the Judge (f) upon ſuch Appeal ſhall adjudge to the other reaſonable Coſts of his Suit therein before expended, taking Surety of him to reſtore the ſame if the principal Cauſe paſs againſt him.

(e) But if he ſets them forth, and after detains them, whether he may be ſued in the Spiritual Court, vid. 2 Rol. Abr. 286. Pl. 41. vide, and the Notes there. (f) Cro. Eliz. 478. 1 Leon. 130.

4. And if any Perſon after ſuch definitive Sentence given obſtinately or wilfully refuſes to pay their Tithes or Money adjudged, then Two Juſtices of Peace, (one being of the *Quorum*) upon Certificate in Writing to them made by the Judge that gave the Sentence, may cauſe the Perſon to be attached, and committed to the next Gaol, there to remain, *&c.*

5. And it is further enacted by 32 *H.* 8. *c.* 7. That where any Perſon having any Eſtate of Inheritance, Freehold, Term, Right, or Intereſt, in any Parſonage, Vicaridge, Portion, Penſion, Tithes, or other Eccleſiaſtical Profit, which then was or thereafter ſhould be made Temporal, ſhall be diſſeiſed, outed, wronged, or otherwiſe kept from the ſame, by any other Perſon claiming or pretending to have an Intereſt or Title in or to the ſame, the Perſons ſo diſſeiſed, their Heirs, Wives, and ſuch other to whom ſuch Injury ſhall be done, ſhall have Remedy in the King's Temporal or other Temporal Courts, as the Caſe ſhall require, by Writs of *Precipe quod reddat*, Aſſiſe, Mortdanceſter, *Quod ei deforceat*, Writs of Dower, and other original Writs, in like Manner as for Lands, *&c.*

6. Provided that the Suit againſt a Perſon that denies to ſet out his Tithes, or pay his Offering, ſhall not be in the Temporal but in the Spiritual Court.

7. (g) By the 2 *&* 3 *Edw.* 6 *cap.* 13. it is enacted, That every of the (h) King's Subjects ſhall from thenceforth (i) truly and juſtly, without Fraud or Guile, ſet out, yield and pay, all their predial Tithes in their proper Kind, as they riſe and happen, in ſuch Manner and Form as had been of Right yielded and paid (k) within (l) 40 Years next before the Making of this Act, or of Right or Cuſtom ought to have been paid, and that no (m) Perſon ſhall take or carry away (n) any ſuch or like Tithes, which had been yielded or paid within the ſaid 40 Years, or of Right ought to have been paid, in the Place or Places titheable of the ſame, before he hath juſtly divided or ſet forth for the Tithe thereof, the tenth Part of the ſame, or (o) otherwiſe (p) agreed for the ſame Tithes, with the Parſon, Vicar, or (p) other Owner, Proprietory, or Farmour, of the ſame, (r) under the Pain of Forfeiture of treble Value of the Tithes ſo carried away.

(g) For the Expoſition of this Act, vid. 2 Inſ. 648, &c. (h) In the Recital of this Act it was ſet forth, that the Defendant was Subditus dicti Domini Regis, and held naught, becauſe by the Word dicti it was tied up to the King in his natural Capacity. Cro. Jac. 324. 2 Bulſ. 119. Et vid. 1 Sid. 265. Hard. 175. (i) Therefore if he ſets them out, and divides them juſtly from the nine Parts, and ſoon after carries them away, or if before Severance he grants them to another, of Intent that the Grantee ſhould take them away, to the Intent to defraud the Parſon, this is Fraud and Guile within the Act. 2 Inſ. 649. 13 Co. 23. Et vid. Cro. El. 607. Moor 912. Pl. 1287. Noy 152. 2 Bulſ. 184. (k) But if the Diſcharge for 40 Acres before was by reaſon of Unity, or of any Compoſition real, yet after Severance, or the Compoſition ended, they are within this Statute. Cro. Jac. 454. (l) Set down becauſe the uſual Time for Proof de modo decimandi. 2 Inſ. 649. Et vid. 2 Inſ. 653. (m) Where carried away by a Stranger. Cro. Jac. 324. 2 Bulſ. 129. (n) So that this Act extends only to predial Tithes. 2 Inſ. 649. 1 Brownl. 31. (o) An Agreement with one Leſſee only ſufficient. Moor 915. Pl. 1294. Et vid. Cro. Jac. 71. (p) An Agreement by Parol is a good Agreement within this Statute, though not ſufficient to paſs the Right of the Tithes. Bernard and Ewens, Ray. 14. But for Agreements for Tithes by Parol when good or not, vid. 2 Rol. Abr. 63. Pl. 17, 18, 19, and the Notes there. (q) In an Action upon this Statute 'tis ſufficient to ſhew, that the Plaintiff is proprietarius, &c. Cro. Jac. 362, 437. Hard. 173. Et vid. 1 Part 2. Pl. 2. with the Notes there. (r) Though the Penalty is not expreſly given to the Owner of the Tithes, yet forasmuch as he is the Party grieved, and hath the Property and Intereſt in the Tithes, the treble Value ſhall be to him, and whenever a Statute gives a Forfeiture againſt him, which wrongfully diſpoſſeſſeth another of his Duty or Intereſt, in that Caſe he that hath the Wrong ſhall have the Forfeiture. Co. Lit. 159 a. 2 Inſ 650. 4 Inſ. 84. Moor 238. Pl. 373. 710. Pl. 994. Savil 63. 13 Co. 48. —And he ſhall have an Action for it at Common Law. Co. Lit. 159. a. Cro. El. 608, 613, 621. Moor 912. Pl. 1288. 13 Co. 47. Cro. Jac. 70. Hard. 63. —And in ſuch Action 'tis ſufficient to ſhew that the Defendant Grano ſeminavit 20 Acras, &c. & quod Decimæ inde attingunt ad Valorem 150 l. without ſhewing what kind of Grain. 2 Inſ. 650. 13 Co. 47. Cro. Jac. 436. —But there can be no Suit in a Court of Equity for the Recovery of the treble Value. 3 Leon. 204. Hard. 190.

8. By the ſaid Statute it is further enacted, That if any Perſon carries away his Corn, Hay, or other predial Tithes, before the Tithes thereof be ſet forth, or willingly withdraws his Tithes, (t) or ſtops or lets the Owner to view, take, and carry away his Tithes, by reaſon whereof the Tithe is loſt, impaired, or hurt, upon due Proof thereof before the Spiritual Judge, the Party ſo carrying away, withdrawing, *&c.* ſhall pay the (u) double Value of the Tithe ſo taken, loſt, *&c.* over and beſides (w) the Coſts of the Suit, to be recovered before the Eccleſiaſtical Judge, according to the Eccleſiaſtical Law.

(t) So that if one is ſtopped carrying off his Tithes the uſual Way, he may have Remedy in the Spiritual Court; but if the Right of the Way comes in queſtion, it muſt be tried at Common Law. 1 Bulſ. 67, 68. 1 Jon. 230. (u) Though by a former Clauſe the treble Value is given where the Suit is at Common Law, yet the double Value is only given in this Caſe, becauſe in this Court he ſhall recover the Tithes themſelves, ſo that the Value recovered in the Spiritual Court is equivalent to the treble Value at the Common Law. 2 Inſ. 651. But vid. Godb. 255. 13 Co. 24. Co. Lit. 159. a. (w) The Suit in the Spiritual Court more advantagious than at Common Law, for at the Common Law no Coſts ſhall be recovered. 2 Inſ. 651.

9. By the ſame Act it is enacted, That if any Perſon refuſes to pay his perſonal Tithes, *&c.* the Ordinary, *&c.* may call the ſame Perſon before him, and by his Diſcretion examine him by all lawful Means, other than the Party's Oath concerning the true Payment of the ſaid perſonal Tithes.

10. And by the ſame Act it is enacted, That if the Eccleſiaſtcal Judge give any Sentence in a Cauſe of Tithes, *&c.* (no Appeal or Prohibition pending) and the Party condemned obeys not the Sentence, he ſhall be excommunicated, and if he continues ſo 40 Days, upon Publication thereof in the Pariſh-Church where he dwells, the ſaid Eccleſiaſtical Judge may ſignify into *Chancery* the State and Condition of the Excommunicate, and thereupon require Proceſs *de Excommunicato capiendo* to be awarded againſt nim.

11. How ſmall Tithes under the Value of 40 *s.* may be recovered by Complaint to Two Juſtices of Peace, *&c. vid.* (x) 7 & 8 *Will. cap.* 6.

(x) Continued for ſeven Years by 10 & 11 Will. cap. 15. and by the 3 & 4 An. made perpetual.

Fol. 658.

(a) Diſſeiſin.

(a) This ever implies a Wrong. Co Lit. 153. b. 181. a. —Diverſity between a Diſſeiſin, Abatement, and Intruſion. Co. Lit. 277. a.

(A) Diſſeiſin of a Rent.

Denier.

1. IF I have a Rent-Charge iſſuing out of Land, of which there are (b) ſeveral Tertenants, and I diſtrain upon any of the Land, and one of the Tertenants makes a Reſcous without the Conſent of the others, yet the others are Diſſeiſors alſo, for the Diſtreſs is a Demand in Law, and the (c) Non-payment a Denial, and ſo a Diſſeiſin. (d) 39 Aſſ. 4. adjudged.

(b) So if there be two Jointenants, and one of them makes Reſcous, they are both Diſſeiſors, for the Diſtreſs is a Demand in Law, and the Non-payment a Denial and Diſſeiſin; but he that made the Reſcous only is the Diſſeiſor with Force. Co. Lit. 161. b. Moor 53. (c) Dyer 84. Pl. 82. (d) Fitz. Aſſiſe 335. S. C. and all adjudged Diſſeiſors, but he that made the Reſcous only awarded to Priſon. Br. Diſſeiſor 59.

2. If the Grantee of a Rent-Charge demands the Rent, and after diſtrains, and a Stranger without the Aſſent of the Tenant makes Reſcous, yet this is a Diſſeiſin in the Tenant, for the Non-payment was a Denial, and the taking of the Diſtreſs has not waived this Diſſeiſin. The Caſe aforeſaid of (e) 39 Aſſ 4. proves this. 29 Aſſ. (f) 51. dubitatur.

(e) Fitz. Aſſiſe 335. S. C. Br. Diſſeiſor 59. S. C. (f) This is miſprinted in the Original as here, but I ſuppoſe ſhould be 59. which vid. Br. Diſſeiſor 53. Fitz Aſſiſe 291.

3. If he that ought to have a Rent-Charge comes to the Procor of the Tenant of the Land out of which the Rent iſſues, and demands (g) the Rent, and he refuſes to pay it, this is a Diſſeiſin. 18 E 3. Aſſiſe 78. adjudged.

(g) This Demand muſt be upon the Lands. Co. Lit 153. a. But for this, vid. 2 Rol, Abr. 428 Letters K. & L. with the Notes and Additions there.

4. If I have a Rent-Charge iſſuing out of Land, of which there are ſeveral Tertenants, a Demand upon the Land in the Poſſeſſion of one of the Tenants, and Non-payment, is a Diſſeiſin by all, for all the Rent iſſues out of every Part. 39 Aſſ. 4. admitted by the Judges.

5. When there is a lawful Demand of a Rent-Seck, and the ſame is not paid, whether the Tenant is preſent or abſent, this is a Denial in Law, and conſequently a Diſſeiſin. *Co. Lit.* 153. b.

6. There be Three Cauſes of a Diſſeiſin of a Rent-Service. *viz.* Reſcous, (h) Replevin, and Incloſure. *Lit. Sect.* 237.

(h) Though upon a Replevin the Diſtreſs is re-delivered by the Sheriff by Courſe of Law, yet this is a Diſſeiſin, becauſe the Party is thereby diſturbed of the Means by which he ought to come to his Rent, viz. of the Diſtreſs. Co. Lit. 161. a.

7. There be (i) Four Cauſes of the Diſſeiſin of a Rent-Charge, *viz.* Reſcous, Replevin, Incloſure, and (k) Denial. *Lit. Sect.* 238.

(i) To which may be added Reſiſtance to diſtrain, Counter-pleading, vouching a Record, and Failer thereof. Co. Lit. 161. b. (k) Note, That a Denial is a Diſſeiſin of a Rent-Charge as well as of a Rent-Seck, though he may diſtrain for a Rent-Charge as well as for a Rent-Service. Co. Lit. 161. b. —But Denier is no Diſſeiſin of a Rent-Service without Reſcous or Reſiſtance. Co. Lit. 161. b.

8. There are Two Cauſes of a Diſſeiſin of a Rent-Seck, Denial, and (l) Incloſure. *Lit. Sect.* 239.

(l) It is a Diſſeiſin of a Rent-Seck, becauſe the Grantee cannot come upon the Land to demand it. Co. Lit. 161. b.

9. There is another Cauſe of the Diſſeiſin of all Three, that is, if the Lord is going to the Land to diſtrain, or the Grantee of the Rent-Charge or Seck, to demand the Rent, and the Tenant foreſtalls him in the Way with Force and Arms, or menaceth him in ſuch Manner, (m) that he dares not come to the Land, *&c.* for Doubt of Death, or bodily Hurt; this is a Diſſeiſin, for that the Lord is diſturbed of the Means whereby he ought to come at his Rent. *Lit. Sect.* 240.

(m) N. Benl. 4. Pl. 3.

(B) Reſcous.

(B) Reſcous.

1. If a Man diſtrains for a Rent-Service, and a Stranger reſcues the Diſtreſs in the Name of the Tenant, this is a Diſſeiſin of the Rent. 56 H. 3. Itinere Stafford 16. per Curiam.

(C) What (a) Act ſhall be ſaid a (b) Diſſeiſin.

(a) Not an Entry without an Ouſter. Co. Lit. 181. a. 1 And. 134.

1. If Baron and Feme purchaſe Lands in Fee, and after the Baron is attainted of Felony, and the King ſeizes the Land, and after the Lord of whom it is held upon his Suggeſtion hath it delivered to him out of the Hands of the King as his Eſcheat, this is a Diſſeiſin to the Wife, (bb) who had a joint Eſtate with her Husband, for it was delivered out of the Hands of the King by a falſe Suggeſtion, and ſo a Diſſeiſin to the Feme. (c) 4 Aſſ. 4. adjudged.

(b) If Leſſee for Years is ouſted by his Leſſor, this is no Diſſeiſin, yet the Eſtate of the Leſſee is turned into a Right not grantable. Hob. 322. Et vid. Cro. Jac. 678. (bb) There was no Moieties between them. Co. Lit. 188. a. (c) Fitz. Aſſiſe 166. S. C. Br. Aſſiſe 113. S. C. 1 Part 271. E. 1. S. C.

(d) In what Caſe the Entry of one ſhall ſerve for another, vid. 1 Rol. Abr. 740.

2. If a Man deviſes Capite Lands to his youngeſt Son, and dies, which is void for a third Part, and after the Deviſee enters into the whole generally, (d) which is an Entry for the eldeſt Son alſo, and (e) after leaſes the whole to another for Years, yet this is not any Diſſeiſin to the eldeſt, (f) for one Tenant in Common cannot be ouſted without an actual Ejectment. M. 40, 41 Eliz. B. R. between (g) Hempſley and Brice, per Curiam.

(e) Cro. El. 615. S. P. in Caſe of Coparceners doubted. (f) Hob. 120. All. 8. Raym. 371. (g) Cro. Eliz. 639, 640. S. C. adjudged. Moor 546. Pl. 729. S. C. adjudged; but there ſaid, that a Leaſe for Life, with Livery, would have made it a Diſſeiſin. And vid. 1 Rol. Abr. 741. Pl. 5. and the Notes there.

(h) 1 Sid. 241.

3. (h) So it will be if the Deviſee levies a Fine of the whole. Ibidem, per Curiam.

* Fol. 659.

4. If a Man leaſes (i) ſeveral Acres for Years, rendring one entire Rent, and * the Leſſee is ouſted of one Acre by a Stranger, and afterwards this notwithſtanding pays the entire Rent to the Leſſor, yet this ſhall not continue the Seiſin of the Leſſor of the whole, but he is diſſeiſed of the ſaid Acre. (k) M. 11 Ja. B. R. dubitatur.

(i) A. being ſeiſed of a Cloſe, a Stranger enters, and occupies Part of the Cloſe, but A. continues in the Poſſeſſion of the Reſidue; and whether this ſhall preſerve his Poſſeſſion in the whole, being an entire thing. 1 Brownl. dubitatur. (k) 1 Brownl. 230. S. C. & S. P. dubitatur.

5. If a Man hath an Houſe, and locks it, and departs, and another comes to his Houſe, and takes the Key of the Door into his Hand, and ſays that he claims the Houſe to himſelf in Fee, without any Entry into the Houſe, this is a Diſſeiſin of the Houſe. P. 15 Jac. B. Plot's Caſe, admitted clearly upon Evidence at the Bar in an Aſſiſe taken by Default.

6. If A. cuts Trees in his own Soil, and B. that has Common there, ſays the Soil is his Soil, and commands him that he cuts nothing, &c. upon which A. departs out of the Land, yet this is not any Diſſeiſin to him, for he that has no Right cannot be ſeiſed of a Freehold by Parol. (l) 26 Aſſ. 17. adjudged.

(l) Fitz. Aſſiſe 237. S. C. Br. 262. S. C. Br. Diſſeiſor 41. S. C.

7. If a Man that has Right to enter into Lands, in coming towards the Land is diſturbed from entring, this is a Diſſeiſin. (m) 26 Aſſ. 17.

(m) Fitz. Aſſiſe 237. S. C. Br. 262. S. C. Br. Diſſeiſor 41. S. C.

8. (n) If a Stranger receives of my Tenant, by voluntary Payment, without Coercion of Diſtreſs, the Rent due to me, (o) this is a Diſſeiſin to me at my Election. (p) 40 Aſſ. 19.

(n) 9 Co. 51. a. Kelw. 113. a. Cro. Car. 303. Hob. 322. Co. Lit. 323. 2 Sid. 75. Styl. 407. (o) So if a Man feeds my Common without Right. Hob. 322. 9 Co. 51. a. 1 Brownl. 197. (p) Br. Diſſeiſor 60. S. C.

9. (q) If a Man enters into my Houſe by my Sufferance, without claiming any Thing from me, this is not any Diſſeiſin. 11 E. 3. Aſſiſe 86. adjudged.

(q) Dyer 178. b. Co. Lit. 323. S. P. 9 Co. 51. Hob. 322.

10. If the King be ſeiſed in Fee of the Manor of B. and a Stranger erects a Shop in a vacant Plot of the Manor, and takes the Profits thereof without paying any Rent to the King, and after the King grants over the Manor in Fee, and the Stranger (r) continues afterwards in the Shop, and occupies it as before, yet this Continuance is not any Diſſeiſin, becauſe the firſt Entry was not any Diſſeiſin. D. 9, 10 El. 266. 10 Co. 4. Adams and Lambert 103. reſolved.

(r) Where a bare Continuance in Poſſeſſion cannot work a Diſſeiſin without ſome other Act done. 1 Leon. 210. 2 Leon. 147. Ow. 96.

11. If a Man (*) enters into certain Land, Parcel of a Manor which is in Ward of the King by reaſon of the Nonage of J. S. and takes the Profits as Owner thereof, and after J. S. ſues Livery, and after the Intruder continues the Poſſeſſion, and the taking the Profits as before, yet the Continuance ſhall not be any Diſſeiſin to J. S. becauſe the firſt Entry was not any Diſſeiſin. M. 17 Ja. B. R. between the Lord Sands and the College of Corpus Chriſti in Oxon, reſolved per Curiam, and the Jury directed accordingly.

(*) If a Man enters, and ouſts a Copyholder of Inheritance of a Manor in the Hands of the King, by this he gains no Eſtate, but a Poſſeſſion againſt all Strangers. 3 Leon. 221. 4 Leon. 30. —But if a Man enters upon the Queen's Farmer, he thereby gains an Eſtate for Years; and if he leaſes to another, his Leſſee may maintain an Ejectment. 3 Leon. 206. Godb 138, 139.

12. If there be Tenant at Sufferance, and a Stranger not having any Right to the Land makes a Leaſe to him by Indenture, reſerving Rent, without putting the Tenant at Sufferance out of Poſſeſſion, and the (s) Tenant pays the Rent to the Stranger, this is not any Diſſeiſin to him that had Right. P. 3 Ja. B. R. between Prenſon and Stone, per Curiam, upon Evidence.

(s) Where by Payment of Rent to a Stranger without ſpecial Claim, he gains no Freehold. 1 Leon. 209, 210.

13. If Guardian by Nurture makes a Leaſe by Indenture to one, being under the Title of the Infant, reſerving Rent to himſelf, which is paid accordingly, yet this is not any Diſſeiſin to the Infant. P. 3 Ja. B. R. per Tanfield.

14. If Guardian in Chivalry continues the Poſſeſſion of the Land in Ward after the full Age of the Ward, without Title, this is a (t) Diſſeiſin to the Heir, becauſe he comes in by the Law, and therefore the Continuance beyond the Time which the Law hath limited, and againſt the Truſt repoſed in him by the Heir, and the Law, makes it a Diſſeiſin to the Heir, who was never out of Poſſeſſion, but the Guardian was ſeiſed in his Right. 7 H. 4. 42. per Culpepper.

(t) He was an Abator by the Common Law, which is proved by the Statute of Marlbridge, cap. 16. whereby it is declared, That an Aſſiſe of Mortdanceſtor lies againſt him. 2 Inſ. 134. Et vid. Co. Lit. 57. b. 271. a. Et vid. 1 Rol. Abr. 728. B. 861. D. 3. 1.

15. (tt) If Leſſee (u) for Years holds over his Term, yet he is not any Diſſeiſor, becauſe he comes in by the Act of the Party; but (w) he is called * a Tenant at Sufferance, Tempore H. 8. S. 356. (x) 9 H. 7. 24. per Curiam. Dubitatur, (y) 22 E. 4. 38. b.

* Fol. 660.

(tt) 1 Rol. Abr. 728. vide. (u) So if Tenant pur auter vie holds over. Rouſe's Caſe, Co. Lit. 57. But vid. Ow. 27, 35. 2 Leon. 45, 46. (w) And the Leſſor may either take him as ſuch, or have an Action of Entry ad Terminum qui præteriit againſt him as Tenant of the Freehold. 1 Jon. 316, 317. 4 Co. 24. a, b. (x) Br. Diſſeiſor 62. S. C. (y) Br. Eſtates 46. S. C.

16. If Tenant at Will, rendring Rent, and his Son enters generally, occupies the Land, and pays the Rent during his Life, and dies, and his Son alſo enters, and pays the Rent, no Freehold is gained by this Manner of Entry and Occupation, nor is it any Diſſeiſin. (z) *Hill.* 27 *Eliz.* 1 *And.* 134. adjudged.

(z) 1 Leon. 121. S. C. cited. But for this Point, vid. 1 Rol. Abr. 861. Pl. 2. and the Notes there.

(D) What Perſon may be a (a) Diſſeiſor.

1. (b) A Feme Covert ſhall not be a Diſſeiſoreſs by the Act of the Baron. 7 E. 4. 7. b. (c) 12 E. 4. 9. b.

(a) He who is preſent when a Diſſeiſin is made with Force, is a Diſſeiſor with Force; but he who being abſent commands a Diſſeiſin, or agrees to it when done with Force, is a Diſſeiſor, but not with Force. Goulſ. 42. Q. if he commands or agrees ſpecially to the Diſſeiſin with Force. Mid. Moor 53. (b) F. N. B. 179. G. S. P. (c) Fitz. Diſſeiſin 3. S. C. Br. 66. S. C.

2. A Feme Covert may be a Diſſeiſoreſs by her actual Entry or proper Act. *Co. Lit.* 357. b.

3. Though her (d) Husband is preſent. *Co. Lit.* 357. b.

(d) But if Baron and Feme preſent to a Church where they have no Right, this is the Act of the Husband, and the Wife gains nothing thereby. March 90.

A Monk could not be a Diſſeiſor, for he had no Capacity to take the Freehold. *Kelw.* 91. *per Fineux* Chief Juſtice: And though intended to be to the Uſe of a Secular Man, who after agrees thereto, yet he gains no Freehold.

(E) By (a) (b) Agreement.

1. AS if the Baron diſſeiſes another to the Uſe of the Feme, the Feme is not a Diſſeiſoreſs by this Act of the Baron. (c) 12 E. 4. 9. b.

(a) Noy 52. upon Evidence, it was held by Anderſon, that if a Feme Covert ejects one, and her Husband afterwards aſſents, yet he is not an Ejector; for an Ejectment is made in an Inſtant, and hath no Continuance; otherways of a Diſſeiſin. (b) If a Man with Force diſſeiſes another to my Uſe without my Command, and I after agree to the Diſſeiſin, I am a Diſſeiſor; but all the Force is only in the Coadjutor: But if I agree ſpecially to the Diſſeiſin with Force, then perhaps I ſhall be charged therewith. Moor 53. Pl. 155. Goulſ. 42. (c) Fitz. Diſſeiſin 3. S. C. Br. 66. S. C.

2. (d) So it ſhall be though the Wife agrees to it during Coverture, for her Agreement is void. (d) F. N. B. 179. G. S. P.

3. If one Man diſſeiſes another to the Uſe of a Feme Covert, if the Feme agrees during the Coverture, yet ſhe is not any Diſſeiſoreſs, for her Agreement is void.

4. So if the Baron agrees to the Diſſeiſin, this ſettles an Eſtate in the Feme; but ſhe ſhall not be a Diſſeiſoreſs by the Agreement of the Baron. (e) 12 E. 4. 9. b. (e) Fitz. Diſſeiſin 3. S. C. Br. 66. S. C. Br. Agreement 4. S. C.

5. The ſame Law if both agree, yet the Feme is not a Diſſeiſoreſs. Contra, (f) 15 E. 4. 15. b. admitted. 3 Leon. 272. (f) Br. Diſſeiſin 12. S. C.

6. But after the Death of the Baron, if the Feme agrees to the Diſſeiſin, ſhe ſhall be a Diſſeiſoreſs. (g) 12 E. 4. 9. b. Curia. (g) Fitz Diſſeiſin 3. S. C. Br. 66. S. C. Br. Agreement 4. S. C.

7. If a Man diſſeiſes another to the Uſe of an Infant, yet the Infant ſhall not be a Diſſeiſor by his Agreement thereto. Dubitatur, 2 E. 3. 32.

8. It is regularly true, that a Feme Covert cannot be a Diſſeiſoreſs by Commandment precedent, or Agreement ſubſequent. *Co Lit.* 357. b.

(F) By what Perſons and to whom it may be made.

1. AN Infant of the Age of 18 Years may be a Diſſeiſor with Force by actual Entry. 12 H. 4 22. b.

2. An Infant may be a Diſſeiſor by actual Entry. (a) 3 H. 4. 7. (a) Br. Aſſiſe 46. S. C. Br. Agreement 9. S. C.

3. So may a Feme Covert by actual Entry. 9 H. 4. 6. (b) 12 E. 4. 9. b. Curia. 7 E. 4. 7. b.

4. (c) But an Infant ſhall not be a Diſſeiſor by Agreement to a Diſſeiſin to his Uſe. (d) 3 H. 4. 17. 12 H. 4. 22. b. Br. Diſſeiſor 5. S. C.

5. If the Baron and Feme enter into Land in the right of the Feme, where ſhe hath no right, the Feme is not a Diſſeiſoreſs. 9 H. 4. 6. Vide (e) 35 Aſſ. 5. Contra, (f) 28 Aſſ. 37. Curia, for this ſhall be taken to be the Act of the Husband only. (b) Fitz. Diſſeiſin 3. S. C. Br. 66. S. C. (c) F. N. B. 179. G. S. P.

6. If a Man takes a Diſtreſs for Rent iſſuing out of the Land of a Feme Covert, and the Baron and Feme make Reſcous, they both are Diſſeiſoreſs. (g) 21 E. 4. 53. Curia. (d) Br. Aſſiſe 46. S. C. Br. Agreement 9. S. C.

7. If the Baron diſcontinues the Land of his Wife, the Feme being in Poſſeſſion, and diſagreeing to the Feoffment, claiming her firſt Eſtate, the Feme is a Diſſeiſoreſs thereby. 21 E. 3. 6. b. Br. Diſſeiſor 5. S. C. (e) Fitz. Aſſiſe 321. S. C.

Br. 339. S. C. Br. Coverture 41. S. C. (f) Br. Aſſiſe 286. S. C. Br. Diſſeiſor 69. S. C. 88. S. C.

(G) What

(G) What Perſon may be a Diſſeiſor.

To the Uſe of another.

1. A Feme Covert cannot make a Diſſeiſin to the Uſe of her Husband. 8 H. 6. 14 b. Curia, (becauſe tho' ſhe gains an Eſtate by her Entry, yet ſhe hath not Power to diſpoſe thereof to another, being Covert, as ſhe ought if ſhe could make a Diſſeiſin to another Uſe.) Contra, (a) 21 H. 7. 35.

Fol. 661.

2. A Feme Covert cannot diſſeiſe a Man to the Uſe of a Stranger for the Cauſe aforeſaid. Contra, (b) 21 H. 7. 35.

3. (c) But it ſeems a Monk may diſſeiſe a Man to the Uſe of another, becauſe he is not capable of an Eſtate to his own Uſe. (d) 21 H. 7. 35 admitted.

4. A Corporation aggregate cannot make a Diſſeiſin to the Uſe of another. (e) 8 H. 6. 14. b.

5. If a Corporation aggregate diſſeiſes one to the Uſe of another Man, they are Diſſeiſors in their natural Capacity. (f) 8 H. 6. 14. b.

6. If a Man brings an Infant with him into the Lands of J. S. and there claims the Land to the Uſe of himſelf and the Infant, yet the Infant is not any Diſſeiſor, becauſe he made no Claim. 26 Aſſ. 39. per Skipwith.

7. If *A* diſſeiſes one to the Uſe of *B.* who knows not of it, and *B.* aſſents to it, in this Caſe, till the Agreement *A.* is Tenant of the Land, and after the Agreement *B* is Tenant of the Land. *Co. Lit.* 180. b.

8. The Demandant in a Precipe, and others, diſſeiſed the Tenant to the Uſe of the others, and the Writ abated not, for the Demandant gained no Tenancy in the Land, being but a Coadjutor. *Co. Lit.* 180. b.

9. If one diſſeiſes Tenant for Life to the Uſe of him in Reverſion, and after he in Reverſion agrees thereto, it is ſaid that he in Reverſion is a Diſſeiſor in Fee, for by the Diſſeiſin made by the Stranger the Reverſion was diveſted, which they ſay could not be reveſted by the Agreement of him in Reverſion, for that it made him a Wrong-doer, and therefore no (g) Relation of an Eſtate gained by Wrong can help him. *Co. Lit.* 180. b.

(a) Br. Diſſeiſor 15 S.C.
(b) Br. Diſſeiſor 15. S.C.
(c) Kelw. 91. S. P. per Fineux Chief Juſtice con.
(d) Br. Diſſeiſor 15. S.C.
(e) Br. Corporation 24 S. C.
(f) Br. Corporation 24 S. C.

(g) The Agreement hath Relation to the Time of the Diſſeiſin, and if the Diſſeiſor makes a Leaſe before Agreement, the Party to whoſe Uſe agreeing after, ſhall avoid the Leaſe. 2 Leon. 223. per Jeffrys, arguendo: But Q. Et vid. Co. Lit. 272. a. at the Top.

(H) (a) Who ſhall be ſaid no Diſſeiſor at the Election of the Tenant.

1. (b) If a Man enters into the Land of another, claiming as Guardian where the Land is not held of him, or where he ought not to be Guardian, though he is a Diſſeiſor at the Election of the Heir, yet the Heir may elect him to be no Diſſeiſor. 28. Aſſ. 11. adjudged, for ſuch Guardian after Entry grants the Ward over, and the Grantee enters, and he adjudged a Diſſeiſor, and therefore the firſt Guardian was no Diſſeiſor by his Election, for if he was a Diſſeiſor, the ſecond Guardian could be no Diſſeiſor to him.

(a) Where one diſſeiſes me of Part of an Houſe, and I am in Poſſeſſion of the reſt, it is at my Election whether I will admit my ſelf out of Poſſeſſion of the Houſe or not. Styl. 341. But for this, vid. under Title Livery, What Poſſeſſion or Eſtate will hinder Livery.

(b) Cro. Car. 303. S. P. per Curiam; and that the Infant may charge him either as Diſſeiſor or Accountant. Cart. 162.

2. If

2. If Leſſee at Will makes a Leaſe for Years, (c) this is a Diſſeiſin at the Election of the Leſſor at Will that hath the Fee, for if he diſpoſes of the Land as if no Diſſeiſin had been, then it is no Diſſeiſin. P. 9 Car. B. R. between (d) Blunden and Baugh, adjudged in a Writ of Error per Curiam; contra, Richardſon; and the Judgment given to the contrary in Banco by the Court againſt Harvey reverſed accordingly. Intratur, Hill. 7 Car. B. R. Rot. 1106. where, after the Leaſe for Years made by the Leſſee at Will and Leſſor at Will joined in a Fine, and declared the Uſes of the Fee, and adjudged good. This was for the Manor of Blechingly, which concerned the Earl of Nottingham.

(c) Lat. 53.

(d) Cro. Car. 303. S. C. reported accordingly. But admitting it a Diſſeiſin, the Leſſee at Will becomes Diſſeiſor and Tenant.

End of the Caſe there is a Nota, That Sir Rob. Heath, Chief Juſtice of the Common-Pleas, Juſtice Crawly, the Barons Denham and Trevor agreed with the Judgment of the King's Bench, and conceived it would be very miſchievous if it ſhould be adjudged otherways: But Sir Humphry Davenport ſeem'd to doubt, whether the Leſſee for Years ought not ſtrictly to be taken for the Diſſeiſor and Tenant. 1 Jon. 315, 316. S. C. adjudged accordingly. Lit. Rep. 297, 370. S. C. adjornatur. Lat. 53. S. C. cited. Cart. 162. S. C. cited. 3 Mod. 197. S. C. cited. —But for which of them ſhould be the Diſſeiſor, vid. Co. Lit. 57. a. 2 Inſt. 413. Cro. El. 830. 2 Rol. Rep. 242, 243, 284. Bridg. 14. Ow. 28. 2 Leon. 46. Lit. Rep. 297, 298, 370. —Where it ſhall not be a Diſſeiſin, there being no Intention to make one. 1 Leon. 122. 2 Rol. Rep. 284. 1 And. 134. Styl. 407. Cart. 198. 3 Mod. 196, 197.

3. And in the Argument of this Caſe, another Caſe was vouched to be adjudged, between (e) Powſely and Blackman accordingly. Tr. 18 Ja. Rot. 130. B. R.

(e) Where the Mortgageor in Fee, who by Agreement was to hold the Land till Failure, leaſed for Years, &c. 1 Jon. 316. S. C. cited. Cro. Car. 304. S. C. cited. Cro. Jac. 659, 660. S. C. adjudged. 2 Rol. Rep. 242, 243, 284, 285. S. C. adjudged. Brid. 12, 13. S. C.

4. (f) But Judgment was given the 20 Jac. where after a Leaſe for Years made by Tenant at Sufferance upon a Mortgage, the Deviſe of the Mortgagee was adjudged good, and ſo no Diſſeiſin at his Election.

(f) Cro. Jac. 659, 660. S. C. 2 Rol. Rep. 242, 284, 285. Bridg. 14. S. C.

5. If a Man enters into the Land of an Infant (g) by his Aſſent, this is a Diſſeiſin to the Infant at his Election, for the Infant cannot prejudice himſelf by his Aſſent. 11 E. 3. Aſſ. 87. adjudged.

(g) If an Infant leaſes for Years, rendring Rent, and the Leſſee enters, the Infant may charge him in an Aſſiſe, or bring Debt for the Rent. Cro. Car. 303, 306.

6. If A. be ſeiſed of Lands in Fee, and a Stranger enters upon him by Colour of a Leaſe for Years, which is void, and (h) pays the Rent to him, this is not any Diſſeiſin at Election, for if A. after covenants to ſtand ſeiſed to the Uſe of himſelf in Tail, the Eſtate ſhall well riſe. P. 6 Ja. B. Molineux's Caſe, per Curiam.

(h) If Tenant for Years ſurrenders to the Leſſor, and yet continues in Poſſeſſion, paying his Rent to the Leſſor, this is no Diſſeiſin to the Leſſor but at his Pleaſure. Dyer 62. Pl. 43. And vid. 1 Rol. Abr. 730. Pl. 2. and the Notes there.

7. If A. ſeiſed in Fee, makes a Deed of Leaſe, by which he demiſes it to B. habendum a Die datus for Life, with a Letter of Attorney in the Deed to make Livery, and reſerving 6 s. 8 d. Rent, and the Attorney makes Livery the ſame Day of the Date, according to the Form of the Charter, and the Leſſee enters, claiming it by Force of the Indenture and Livery, and pays the ſaid Rent to the Leſſor, according to the Form of the Indenture; this is not any Diſſeiſin to A. at his Election, though prima facie he was a Diſſeiſor, yet inaſmuch as * he claimed but a Leaſe, and paid his Rent accordingly, the Leſſor may elect that he ſhall not

* Fol. 662.

(i) Cro. Car. 388. S. C. adjudged.

be a Diſſeiſor. Mich. 10 Car. B. R. between (i) Bull and Wiat. Intratur, Trin. 9 Car. Rot. 514. upon a ſpecial Verdict for a Garden in Briſtol. The Court ſeemed at firſt econtra; but after they gave a peremptory Rule for Judgment for the Plaintiff, upon the Non-attendance of the Defendant, by which they adjudged it to be no Diſſeiſin at Election, where the Caſe was, That the Heir of the Leſſor after the Leaſe made ſuffered a Common Recovery of the Land upon a Precipe brought againſt him, without any Entry into the Land; and by Conſequence it was adjudged, that this Recovery was good. But it ſeems that they adjudged it upon the laſt Point of the Recovery. Et P. 11 Car. B. R. between Sir Kenelm Digby and Jordan, per Curiam, upon Evidence at the Bar, reſolved, That this is an abſolute Diſſeiſin, becauſe the Leſſee enter'd claiming his Eſtate for Life, and that it had been otherways if he had claimed as Leſſee at Will.

8. If A. leaſes the Demeſnes of a Manor for Years to B. and after aſſures a Jointure of the ſame Land to his Wife for her Life, and after aliens the Fee, and the Alienee enjoys the Rent by the Hands of the Termor, and after A. dies, and the Wife enters, claiming her Jointure, and there keeps Court, &c. and B. aſſents thereto, and attorns to the Wife, and pays to her the Rent; this is a Diſſeiſin to the Alienee or not at his Pleaſure, notwithſtanding the Continuance of the Poſſeſſion of the Termor. D. 2 El. 178. 38.

2. If *A.* being ſeiſed for Life or in Fee of certain Lands, leaſes them for 4 Years, and the Leſſee enters, and after *A.* grants the ſame Premiſſes to B. *habend'* from *Midſummer* next for Life, and after that Feaſt the Leſſee attorns, and the Years expire, and *B.* enters, he is a Diſſeiſor, the Grant being void in Law. *Mich.* 39 & 40 *Eliz.* (k) *Buckler's* Caſe, 2 Co. 55. adjudged, and a Diverſity taken between a Grant made by Agreement of Parties, which ſtands not with the Rule of Law, and a Grant good in its Commencement, but to be perfected by a ſubſequent Ceremony, as in caſe of a Charter of Feoffment, if the Feoffee enters before Livery, he is not a Diſſeiſor.

(k) Cro. Eliz. 450, 585. S. C. Moor 423. Pl. 591. S. C. but S. P. does not appear to be adjudged. 2 And. 29. S. C. but S. P. does not appear to be adjudged.

(I) Who ſhall be ſaid a Diſſeiſor or not.

A (a) Man cannot qualify his own Wrong.

(a) If a Man enters into Lands of his own Wrong, and takes the Profits, his Words, to hold it at Will of the Owner, cannot qualify his Wrong, but he is a Diſſeiſor. Co. Lit. 271. a.

1. If a Diſſeiſor makes a Leaſe for Years or at Will, and the Diſſeiſee enters upon him, and after the Leſſee re-enters, claiming his firſt Eſtate, yet he is a Diſſeiſor, becauſe he cannot qualify his own Tort. D. 3, 4 Ma 134. 11.

2. If a Man enters into my Land, claiming a Leaſe for Years, he is a Diſſeiſor. 9 H. 6. 21. 31. b.

(b) Br. Diſſeiſor 84. S. C. Br. Aſſiſe 279. S. C.

3. So if a Man enters claiming as Guardian where he is not Guardian, he is a Diſſeiſor. 9 H. 6. 31. b. (b) 28 Aſſ. 11. adjudged.

(c) Fitz. Aſſiſe 136. S. C.

4. So if a Man enters into Land, claiming as Tenant by Statute-Merchant when he has no Right, &c. he is a Diſſeiſor. (c) 24 E. 3. 31. adjudged.

5. If

5. If Guardian in Chivalry aſſigns Dower to one, as the Wife of the Father of the Ward, where ſhe was not his Wife, ſhe is a Diſſeiſoreſs to the Heir, though ſhe enters as Tenant in Dower. 21 E. 3. 5.

6. If a Man leaſe for Years to another and his Heirs, and after the Leſſee dies, and his next Heir claiming the Land, enters into the Land; though this is but a Chattel, ſo that the Heir hath no Right thereto, yet becauſe he claims but the Term, he is no Diſſeiſor. 11 E. 3. 88. adjudged.

7. If a Copyholder leaſes for Years by Licence of the Lord, and after enters upon the Leſſee, and ouſts him, this is a Diſſeiſin to the Lord of the Freehold. M. 11 Ja. B. R. per Coke.

8. If the King Guardian continues the Poſſeſſion after the full Age of the Heir, he does not gain the Fee thereby, becauſe he hath Right to continue it till Livery ſued. 7 H. 4. 43.

9. (d) If the Guardian holds himſelf in after the full Age of the Heir without Cauſe, he is a Diſſeiſor. 7 H. 4. 43. But a Tenant at Sufferance, for which, vid. the Diviſions under Title Eſtate, 1 Rol. Abr. 861. D.

Fol. 663.

(d) 1 Rol. Abr. 861. Pl. 3. S. P.

10. But if Leſſee for Years holds over his Term, he is no Diſſeiſor. 7 H. 4. 43.

(K) Who ſhall be ſaid a Diſſeiſor.

By (a) Command.

(a) What is a ſufficient Command, vid. Lit. Rep. 372.

1. If a Man commands J. S. to enter into certain Land in his Name, if he hath Right thereto, or in the Name of his Couſin, if he hath Right, if J. S. enters accordingly, yet if the Commander or his Couſin have no Right, he ſhall not be a Diſſeiſor, but J. S. only, for his Command was conditional. (b) 34 Aſſ. 12. adjudged.

(b) Br. Entry Congeable 72. S. C. Fitz. Aſſiſe 315. S. C.

2. So if a Man ſays to J. S. that where his Anceſtor died ſeiſed of certain Land, he commands him to enter into it in his Name if his Anceſtor died ſeiſed of a Fee, otherways not: If J. S. enters in his Name, yet if the Anceſtor of the Commander did not die ſeiſed of a Fee, J. S. only is the Diſſeiſor, and not he that commanded him, for his Command was conditional. (c) 34 Aſſ. 12.

(c) Fitz. Aſſiſe 315. S. C.

3. If a Man commands J. S. to diſſeiſe J. D. and he does it accordingly, the Commander is a Diſſeiſor as well as J. S. (d) 22 Aſſ. 99.

(d) This is miſprinted, and I ſuppoſe ſhould be 34 Aſſ 12. or 27 Aſſ. 30. but Q

4. If a Man commands his Bailiff to make a Diſſeiſin, and he does it accordingly, the Commander is a Diſſeiſor. (e) 27 Aſſ. 30. adjudged.

(e) Fitz. Aſſiſe 254. S. C.

5. If a Man (g) counſels another to make a Diſſeiſin, and he does it accordingly, the Counſellor is a Diſſeiſor. (g) 27 Aſſ. 30. adjudged.

(f) The Coadjutors, Counſellors, Commanders, &c. are all Diſſeiſors. Co. Lit. 186. b.

6. If a Man makes a Leaſe for Years of the Land of another out of the Land, and the Leſſee enters, the Leſſee only is the Diſſeiſor, and not the Leſſor. P. 10 Ja. B. Contra, 23 H. 8. S. 27.

(g) Fitz. Aſſiſe 254. S. C. F. N. B. 179. G. S. P.

7. If Leſſee at Will makes a Leaſe for Years, and the Leſſee for Years enters, the Leſſee at Will is the Diſſeiſor, and not the Leſſee for Years, for that otherways the Leaſe for Years would be void. P. 9 Car. B. R. between Blunden and Baugh, in a Writ of Error upon a Judgment in Banco, reſolved per Curiam, præter Richardſon, and the Judgment given in Banco, by Richardſon, then being Chief Juſtice there, and by the Court, præter Harvy, reverſed accordingly. Intratur, Hill. 7 Car. B. R. Rot. 1106. This was for

for the Manor of Blechingly, which belonged to the Earl of Nottingham.

(h) Br. Diſſeiſin 67. S. C. Fitz. 4. S. C.

8. If Tenant at Will or Sufferance makes a Lease for Years, the Lessee at Will and Tenant at Sufferance are the Diſſeiſors, and not the Lessee for Years. (h) 12 E. 4. 12. b. by all the Juſtices.

(i) But if done with Force, A. is only guilty of the Force. Moor 53.

9. If *A.* diſſeiſes one to the Uſe of *B.* who knoweth not of it, and *B.* aſſents to it, in this Caſe till Agreement *A.* is Tenant of the Land, and after Agreement *B.* is Tenant of the Land, but both of them are (i) Diſſeiſors. *Co. Lit.* 180. b.

(L) Diſſeiſin by (a) Officers.

(a) Where the Sheriff or other Officer ſhall be excuſed, vid. 2 Rol. Abr. 552. Letter O.

1. IF a Man recovers ſeveral Houſes in an Aſſiſe, and after the Tenant reverſes it in a Writ of Error, and a Writ of Execution iſſues to the Sheriff to put him in Poſſeſſion of the Houſes which he loſt by the Judgment, though the Tertenants are Strangers to the Recovery, and (b) therefore ought not to be ouſted without a Scire Facias againſt them, yet if he does Execution, putting them out of Poſſeſſion by Force of this Writ, he ſhall not be any Diſſeiſor, becauſe he hath the direct Authority of the Court to do it. P. 15 Ja. B. R. per Curiam, reſolved between Floyd and Bethel.

(b) So if one takes out an Execution upon a Judgment after the Year, without ſuing out any Scire facias, this Execution is not void, but only voidable, and will juſtify the Officer that executes it. 3 Levin. 404. adjudged.

Fol. 664.

2. The ſame Law is in all Caſes where the Execution is of a Judgment in which the Demand was of a Thing certain, if the Sheriff make Execution of this Thing, he is no Diſſeiſor. P. 15 Ja. B. R. between Floyd and Bethel, reſolved per Curiam.

3. But where the Execution is in the Generalty, without mentioning any Thing in particular, there the Sheriff ought to make Execution of the right Thing at his own Peril, otherwiſe he will be a Diſſeiſor, for he is bound to take Notice thereof, and he hath no Warrant from the Court to make Execution but of the right Thing. P. 15 Ja. B. R. between Floyd and Bethel, reſolved per Curiam. 6 R. 2. Aſſ. 71.

(M) In what Caſes a Diſſeiſin of Part ſhall be a Diſſeiſin of the Whole.

(a) If the Corody be to take four Loaves and four Flagons of Drink every Week, and he is diſſeiſed of the Loaves, this is no Diſſeiſin of the Drink, but if diſſeiſed of two Loaves only, this is a Diſſeiſin of all four. 8 Co. 50. a

1. IF a Man be diſſeiſed of (a) Part of a Corody, this is not any Diſſeiſin of the whole. (b) 22 H. 6. 10.

2. If a Man be diſſeiſed of Part of the Profits of an Office, this is not any Diſſeiſin of the whole Office. (c) 22 H. 6. 10.

3. If a Man holds of me 20 s. Rent, and diſſeiſes me of 10 s. thereof, this is a Diſſeiſin of the whole. 22 H. 6. 10. b.

4 If I am ſeiſed of a Manor which extends into ſeveral Counties, and one diſſeiſes me of an Acre in one County, this is not any Diſſeiſin of the Reſidue of the Manor. (d) 22 H. 6. 10. b.

(b) Br. Diſſeiſor 10. S. C. 8 Co. 49. b. S. C. cited. (c) Br. Diſſeiſor 10. S. C. (d) Br. Diſſeiſor 10. S. C. Br. Entry Congeable 35. S. C.

Diſtreſs.

(A) Damage-Feſant.

What Things may be taken Damage-Feſant.

1. A Greyhound may be taken Damage-Feſant running after Coneys in a Warren. 2 E. 2. Fitz. Diſtreſs 20.

So a Man may take a Ferret that another hath brought into his Warren, and taken Coneys with. 2 E. 2. Fitz. Avowry 182.

3. (a) If a Man brings Nets and Gins through my Warren, I cannot take them out of his Hands. 7 E. 3. Avowry 199.

(a) Cro. El. 552. S. P. arguendo.

4. If a Man rides upon my Corn, (b) I cannot take his Horſe Damage-Feſant. 7 E. 3. Avowry 199.

(b) But per 1 Sid. 440. it was ſaid by the Chief Juſtice, That the Horſe upon which one is riding may be diſtrained Damage-Feſant; and it ſeems he ſhall be led to the Pound with the Rider upon him: But Q.

5. (c) Shocks of Corn may be taken Damage-Feſant. (d) 21 H. 7. 39. b. by all the Juſtices.

(c) Lat. 8. S. P. admitted per Curiam.

(d) Fitz. Avowry 263. S. C. Br. Diſtreſs 30. S. C.

6. If Men are rowing upon my Water, and endeavouring with their Nets to catch Fiſh in my ſeveral Piſchary, I may take their Oars and Nets, and detain them as Damage-Feſant, to ſtop their further Fiſhing. *Mich.* 7 *Car.* between *Reynell* and *Champernoon*, *Cro. Car.* 228. *per Curiam*; but adjudged he could not cut their Nets.

(B) The Goods of whom may be taken Damage-Feſant.

Fol. 665.

1. If the Lord agiſts the Cattle of a Stranger in the Common of the Tenants, where he himſelf hath Right to feed the Common, though he hath the Freehold, yet a Tenant may take theſe Cattle Damage-Feſant. 30 E. 3. 27.

(C) Who, in reſpect of his Eſtate, may take Cattle Damage-Feſant.

(a) For this, vid. 1 Part 806. Pl. 5. with the Notes there.

1. (a) A Commoner may juſtify the taking of the Cattle of a Stranger upon the Land Damage-Feſant. 30 Ed. 3. 27.

2. If there be a Shack-Common in a Town, where every one knows his Part, but it lies in Common, yet no Commoner may avow the taking of Cattle Damage-Feſant in any Part of the Common, but in that which is his own Part. Mich 8 Jac. B. Brodderidge's Caſe, per Curiam.

(b) Br. Avowry 29. S. C.

3. If a Man hath Common for 10 Cattle, and he puts in more, the Surpluſage above the ten may be taken Damage-Feſant. (b) 46 E. 3. 12. b.

(D) Diſtreſs Damage-Feſant.

In what Caſes it (a) may be.

(a) Where a Man may chaſe the Cattle out with a little Dog, and ſhall not be obliged to take them Damage-Feſant. 4 Co. 38. b. But for this, vid. 2 Rol. Abr. 566. Pl. 15. (b) 1 Rol. Rep. 449. S. C. & S.P. per Two Juſtices.

1. If a Man takes my Cattle, and puts them into the Land of another Man, the Tenant of the Land may take theſe Cattle Damage-Feſant, though I, who was the Owner, was not privy to the Cattle's being Damage-Feſant, and he may keep them againſt me till Satisfaction of the Damages. Trin. 15 Jac. B R. between (b) Robinſon and Waller per totam Curiam.

(c) 9 Co. 22. a. S. P.

2. (c) If a Man coming to diſtrain Damage-Feſant, ſees the Beaſts in his Soil, and the Owner on purpoſe chaſes them out before they are taken, he cannot diſtrain them. *Co. Lit.* 161. a.

(E) Diſtreſs.

In what Caſes a Diſtreſs may be of (a) common Right by a common Perſon.

(a) That is, by the Common Law. Co. Lit. 142. a.

For what Thing.

(b) Lit. Sect. 213. S. P.

1. (b) For Rent (c) Services a Diſtreſs may be taken of common Right. 45 E. 3. 15 b. 1 H. 4. 1. b. 3 H. 6. 21.

(c) If a Man makes a Gift in Tail, Leaſe for Life or Years, rendring Rent, this is a Rent-Service, and the Leſſee may diſtrain for it. Lit. Sect. 214. —Though reſerved payable at another Place out of the Land. Br. Diſtreſs 5. —But if a Termor grants all his Term, rendring Rent, he cannot diſtrain for it. Br. Diſtreſs 4.

2. If my Tenant holds Land to do Suit to my Hundred, I may diſtrain for this Suit if it be Arrear. (d) 8 H. 4. 15.

(d) Br. Diſtreſs 15. S. C. Fitz. Diſtreſs 11. S. C.

3. For

3. For Aid to marry his Daughter, or make his Son a Knight, a Diſtreſs may be taken of common Right. 39 E. 3. 34. (e) tho' it was objected he ought to have a Writ to the Sheriff to levy it.

4. (f) The Lord may diſtrain for Relief; but if he dies, his Executors cannot, but ſhall have an Action of Debt for it. D. 3, 4, Ma. 140. 37 Co. 4. Ognel 49. b.

5. For an Heriot-Service due after the Death of every Tenant, the Lord (g) may diſtrain. (h) 27 Aſſ. 24. admitted.

(e) That it may be levied either by Diſtreſs or by ſuch Writ, vid. 2 Inſ. 234.

(f) Co. Lit. 83. a. 162. b.

(g) It is in the Election of the Lord either to ſeiſe or diſtrain; but the Seiſure muſt be of the proper Beaſt of the Tenant, though the Diſtreſs may be of the Beaſts of any Man which are on the Land. Cro. El. 32, 590. Cro. Car. 260. 1 Jones 300. (h) Br. Heriot 6. S. C. Fitz. Avowry 177. S. C.

6. A Diſtreſs can be taken only for ſuch Services as are certain, or may be reduced to a Certainty. *Co. Lit.* 96. a.

7. If a Man holds of his Lord to ſhear all the Sheep depaſturing within his Manor, this is certain enough, though the Lord hath ſometimes more, and at other Times a leſſer Number there; and this Uncertainty being referred to the Manor which is certain, the Lord may diſtrain for it. *Co. Lit.* 96. a.

8. (i) If the Tenant holds of the Meſne by the Service of 5 *s.* and the Meſne of the Lord Paramount by the Service of 1 *s.* and the Lord Paramount purchaſes the Tenancy in Fee, the Meſne ſhall have 4 *s.* yearly of the Lord as a Rent-Seck. *Lit. Sect.* 231, 232. yet he may diſtrain for it, for the Fealty being extinct, the (k) Law reſerves the Diſtreſs to the Rent. *Co. Lit.* 153. a.

(i) 4 Rep. 22. b.

(k) Becauſe the Nature of the Rent is changed by the Act of Strangers. Kelw. 104. a.

9. But if a Rent-Service be made Seck by Grant of the Lord, the Grantee ſhall not diſtrain for it, for the Diſtreſs remains with the Fealty. *Co. Lit.* 150. b. 151. b.

10. If a Man makes a Leaſe for Life, reſerving a Rent, and binds himſelf in a Statute, and (l) the Rent is extended and delivered to the Conuſee, he may diſtrain for the Rent, becauſe he comes to it by Courſe of Law. *Co. Lit.* 153. a.

(l) I ſuppoſe this muſt be intended of the Reverſion and Rent.

11. If a Man leaſes at Will, rendring a Rent, though the Leſſee ſhall not do Fealty, yet the Leſſor may diſtrain for the Rent of common Right. *Co. Lit.* 142. a.

12. (m) If upon a Partition between Coparceners, a Rent is granted out of Part of the Lands deſcended for Equality of Partition, the Grantee of common Right may diſtrain for this. *Co. Lit.* 169 b.

13. So if a Rent be aſſigned out of the Lands to a Woman for her Dower. *Co. Lit.* 169 b.

Moor 36. Cro. El. 656. But yet vid. Br. Diſtreſs 72.

(m) 3 Rep. 22. b. S. P.

14. If one holds of another by Fealty and 10 *s.* Rent, who takes Wife, and dies, his Wife ſhall have the third Part of the Rent, as a Rent-Seck, and yet *in Favorem Dotis* ſhe ſhall diſtrain for it. *Kelw.* 104. a. *Et vid. Kelw.* 126. a.

(F) For an Amercement.

(a) For this, vid. 1 Rol. Rep. 201. Cro. Jac. 382.

(b) A Fortiori, if for an Offence done in Court. 8 Co. 41. a.

1. (a) For Amercements in a Court-Leet (b) for Offences done out of Court, a Diſtreſs is incident of common Right. Co. 8. Grieſly 41. Doctor and Student 74. M. 12 Ja. B. per Curiam.

Fol. 666.

2. So for Amercements in a Court-Leet for Offences done in Court, a Diſtreſs lies of Common Right. 10 H. 6. 7. 7 E. 2. & 8 E. 2. Avowry 211, 212. upon Default of Appearance.

3. So for Fines in a Court, a Diſtreſs is incident of common Right. 39 E. 3. 35. admitted.

(c) 1 Brownl. 36. S. P. Et vid. Moor 185. Pl. 331. Noy 20.

4. (c) But the Lord cannot diſtrain for an Amercement in a Court-Baron without a Preſcription. Doctor and Student 47. Co. 11. Godfry 45. Contra Kelloway. 20 H. 7. 66.

5. If the Lord of a Fair hath uſed to have certain Toll for every Sale of Cattle, and upon a Sale the Toll is not paid, the Lord may ſeize any of the Cattle ſo ſold, and retain them till Satisfaction. Mich. 13 Jac. B. between Agard and Lile.

6. And in ſuch Fair, if a Man buys one Beaſt of one Man, and another of another Man, and ſo many of ſeveral Men, and refuſes to pay Toll for any of them, the Lord may ſeize any of the Cattle ſo bought by him for all his Toll. Mich. 13 Jac. B. per Hobert.

7. If there is a Leet belonging to the Manor of *A.* and by Cuſtom Time out of Mind the Inhabitants of *B.* have uſed to ſend a Conſtable to the ſaid Leet, and they make Default, upon which they are fin'd by the Steward; and whether a Diſtreſs could be taken for this Fine without a ſpecial Cuſtom to diſtrain, *Mich.* 22 *Car.* 2. between (d) *Pierſon* and *Ridly*, *Raym.* 204. *adjornatur*; no ſpecial Cuſtom to diſtrain being alledged; but *Twyſden* ſaid, when a Duty is raiſed by Cuſtom, a Diſtreſs for that Duty muſt be maintained by the like Cuſtom.

(d) 1 Vent. 105. S. C. adjornatur; but ſaid, the Court inclined, that where a Cuſtom only enabled to ſet a Fine, it cannot be diſtrained for without a Cuſtom alſo. 2 Keb. 701, 739, 745. S. C. adjornatur; by which Report it appears there was a Cuſtom laid to fine.

(G) For what Thing againſt common Right a Diſtreſs may be taken.

(a) Where by Cuſtom a Diſtreſs may be taken for a Tax to repair a Church. 1 And. 71.

1. If there be a Cuſtom in the Town of Tewksbury, that the Bailiffs and principal Burgeſſes of the Town have uſed Time, &c. to rate and tax every Inhabitant within the Town (a) for the Reparation of any Bridge within the Town, if a Tax be made according to the Cuſtom, a Diſtreſs may be taken for this Rate of the Goods of any Inhabitant ſo taxed, though upon the making of the Tax it is not ordained that a Diſtreſs ſhall be taken for it, inaſmuch as here no Perſon can have an Action of Debt for this Tax, inaſmuch as the Corporation is not to have it, and then if a Diſtreſs ſhould not be for this, there ſhould be no Remedy for it. Paſch. 11 Car. B. R. between Smetheſden and Aſhton, reſolved per totam Curiam after a Verdict for the Avowant, in which the Diſtreſs was made by Warrant under the Seal of the Bailiffs, Burgeſſes, and Commonalty,

which was the Name of the Corporation, and yet reſolved good, becauſe the Bayliffs could not have made a Warrant by other Seal.

2. If a Rent-Charge be granted, and that if it be Arrear, that the Grantee ſhall have a penal Sum, if the Penalty be forfeited, the Grantee may diſtrain for it. 11 H. 4. 85. Quære of this.

3. If a Rent-Charge is granted for Years, with a *Nomine Pœnæ*, and Clauſe of Diſtreſs if not paid at the Day, and the Rent is behind, and the Years incur, he cannot diſtrain for the *Nomine Pœnæ*, for that depends upon the Rent. between *Tutler* and *Fryer*, *Winch.* 7. adjudged.

4. If by Cuſtom Time out of Mind there hath been paid at a Leet, certain Money call'd (b) *Certum Letæ*, the Lord, without a ſpecial Cuſtom enabling him, cannot diſtrain for it, becauſe being againſt common Right, and for the private Benefit of the Lord, as he muſt preſcribe in the Principal, ſo he muſt preſcribe in the Diſtreſs. *Mich.* 12 *Jac.* (c) *Godfrey's* Caſe, 11 *Co.* 44. b.

(b) For this, vid. 6 Co. 77. b.

(c) 1 Rol. Rep. 33, 35, 75, 76, 77. S. C. adjudged.

5. If there be a Cuſtom within a Manor, that every free Tenant of the Manor, upon every Alienation of their Tenancy, ſhall pay ſo much by way of Relief as their yearly Rent amounts to, this is not properly a Relief, but a Fine for the Alienation due by Cuſtom, and therefore cannot be diſtrained for unleſs by Cuſtom. Otherwiſe if due by Tenure. *Trin.* 2 *Car.* between (d) *Hungerford* and *Havyland*, 1 *Jon.* 132. agreed *per totam Curiam:* And it being alledged, That the Tenant held by 5 *s.* Rent, *& per Relevium quando acciderit ſecundum Conſuetudinem Manerii*, it was held by Three Judges againſt *Dod* that it ſhould be intended a Relief due by Tenure; for though it was firſt averred, that ſuch Relief was due by Cuſtom of the Manor, yet it is after expreſly alledged, that the Tenant held by Relief *quando acciderit.*

(d) Lat. 37. 95, 130. S C. 3 Bulſ. 323. S. C. 1 Jon. 132, 133. S. C.

(H) What Thing may be diſtrained.

1. A Diſtreſs for Rent or, &c. ought to be of a Thing of which there is a valuable Property in ſome Perſon; and for Dogs, Deer, Coneys, and ſuch like, which are Feræ Naturæ, they cannot be diſtrained. Co. Lit. 47.

2. Furnaces or Cauldrons fixed to the Freehold, or the Doors or Windows of an Houſe, or ſuch like, cannot be diſtrained. Co. Lit. 47. b.

(a) 2 Inſ. 82. S. P.

3. A Man cannot cut the Corn growing, and take it as a Diſtreſs. 18 E. 3. 4.

(b) 1 Jon. 197. S. P. per Curiam. 2 Mod. 61. S. P. adjudged upon Demurrer.

4. Such Things of which no Replevin lies, becauſe they cannot again be known from other Things, cannot be diſtrained for Services, as Money out of a Bag. 22 Ed. 4. 50. b.

5. (a) Or Sheafs out of a Cart. Contra, 22 Ed. 4. 50. b.

6. (b) Or Shocks of Corn. 11 H. 7. 14.

(c) 21 H. 7. 39. b. Curia.

(c) Fitz. Avowry 263. S. C. Br. Diſtreſs 30. S. C.

7. (d) Another Reaſon is given that Shocks cannot be diſtrained, for that by the Carriage there would be Damage by ſhedding. 22 Ed. 4. 50. b. 2 H. 4. 15. Co. Lit. 47.

Fol. 667.

8. Grain or Barley cannot be diſtrained. 18 Ed. 3. 4. 20 H. 7. 8. b.

9. Nor after it is ground. 18 Ed. 3. 4.

(d) 2 Mod. 61. ſame Reaſon: But vid. Kelw. 145. a, b. 2 Inſ. 82.

10. But ſuch Things of which a Replevin lies, and which can be known again, may be diſtrained. 22 Ed. 4. 50. b.

11. (e) As a Cart of Grain. 22 Ed. 4. 50. b.

12. (f) Curia, Co. Lit. 4. a Cart of Corn. (g) 2 H. 4. 15.

13. Or a Horſe laden with a Load of Sheaks. 22 Ed. 4. 50. b.

14. (h) Or Money in a ſeal'd (i) Bag. 22 Ed. 4. 50. b.

(e) 2 Inſ. 82. a. S. P. 1 Jon. 197. S. P. per Curiam.

2 Mod. 61. S. P. per Curiam. (f) This is printed as in the Original, but ſeems to belong to the preceding Section. (g) Br. Diſtreſs 11. S. C. Fitz. Diſtreſs 9. S. C. (h) 1 Rol. Rep. 59. S. P. arguend'. (i) But Money out of a Bag cannot. 1 Rol. Rep. 59.

15. A Man cannot diſtrain (k) Corn in the Ear or Hay for Services. 3 E. 2. Avowry 189.

(k) In the Original it is per blees taſſes ne per feins: Q. if properly tranſlated.

16. A Man may diſtrain other Goods beſides Cattle. 18 Ed. 3. 4.

17. A Man cannot diſtrain Hay in a (l) Barn for Services, becauſe this cannot be known again to have Deliverance in a Replevin. Mich. 4 Car. B. R. between (m) Cooper and Pollard, adjudged upon a Demurrer; which intratur, Trin. 4 Car. Rot. 457.

(l) But in a Cart it may. 1 Jon. 197. per Curiam. (m) 1 Jon. 197. S. C. adjudged.

18. If a Man leaſes Tithes, rendring Rent, when the Tithes are ſevered from the nine Parts, he cannot diſtrain the Tithes for the Rent. 11 H. 4. 40. quære: But Brook Diſtreſs 81. it is ſaid he ſhall not, becauſe it is the Thing leaſed.

19. No Man can be diſtrained by the Utenſils of his Trade. Co. Lit. 47.

20. As the Ax of a Carpenter cannot be diſtrained for Rent. Co. Lit. 47.

21. Nor the Books of a Scholar. Co. Lit. 47.

22. If an Horſe be laden with a Burden of Sheaks, the Horſe only or the Sheaks only may be diſtrained for Services, (R. admitting the Sheaks only may be diſtrained.) 22 Ed. 4. 50. b.

23. (n) The Materials for making of Cloth in a Weaver's Shop cannot be diſtrained. Co. Lit. 47.

(n) Cro. El. 569. S. P. and like Point per Curiam arguendo.

24. Equitatura hoc eſt Equus palfridus, or an Horſe that a Man keeps for Journies (o) cannot be diſtrained. Regiſtrum Originale (p) 100. b. but it does not appear for what the Diſtreſs was.

(o) Vide 2 Inſ. 133.

(p) Vide there the Recital brought in a Writ by a Prior, viz. Quare cum non liceat alicui præfat' Magnatem ſeu aliam Perſonam Eccleſiaſticam alicubi tranſeuntem, Occaſione alicujus Contractus ſeu Debiti, per Equitaturam ſuam propriam diſtringere dum alia Averia ſeu Catalla ibidem habeat, per quæ rationabilis Diſtrictio ſuper ipſum fieri valeat. Et vid. 2 Rol. Abr. 160. Pl. 9.

25. (q) An Horſe upon which another rides (r) cannot be diſtrained. Co. Lit. 47.

(q) Cro. El. 552. S. P. arguend'.

(r) For Rent, 1 Vent. 36. 1 Sid. 440. But the Chief Juſtice ſaid, an Horſe upon which a Man was riding might be diſtrained Damage-Feſant. And by that Book it ſeems he ſhall be led to the Pound with the Rider upon him: But Q

26. (s) An Horſe in a Smith's Shop cannot be diſtrained for the Rent iſſuing out of the Shop, becauſe this is for the Maintainance of Trade, or of the Commonwealth. Co. Lit. 47. for he is there by Authority of Law.

(s) 3 Bulſ. 270. S. P. arguend'.

27. (t) So an Horſe cannot be diſtrained in an Inn. Co. Lit. 47.

(t) 3 Bulſ. 270 S. P. arguend'.

28. So Sacks of Corn or Meal cannot be diſtrained (u) in a Mill. Co. Lit. 47.

(u) So if an Horſe carries Corn to a Mill, and is tied at the Mill-Door during the Grinding of the Corn, he ſhall not be diſtrained. Cro. El. 552. per Curiam, arguendo.

29. So Sacks of Corn or Meal cannot be diſtrained in a Market. Co. Lit. 47.

30. So

30. So Cloth or Garments cannot be diſtrained in a Taylor's Shop. Co. Lit. 47. (w) 10 H. 21.

31. Averia (x) Carucæ (y) cannot be diſtrained. Co. Lit. 47.

(w) Br. Diſtreſs 99. S. C.

(x) By the Common Law, the Plough, or any thing belonging to it, was not diſtrainable ſo long as any other Diſtreſs might be taken. 2 Inſ. 133. (y) While other Goods, or other Beaſts (which Bracton calls Animalia otioſa) may be diſtrained. Co. Lit. 47. a, b.

22. Things diſtrained Damage-Feſant cannot be diſtrained for Rent, becauſe they (z) are in Cuſtody of Law. Co. Lit. 47.

(z) In Debt againſt an Executor, he pleads, riens in ſes mains, but certain Goods diſtrained and impounded. Cro. El. 23. adjudged no Aſſets to charge him.

33. A covenable Diſtreſs is not of Armour or Veſſel, or Apparel, or Jewels, ſo long as there are other ſufficient or covenable, nor of Sheep, Saddle-Horſe, Beaſts of the Plough, Poultry, or Fiſh. 2 *Inſ.* 133.

34. By the Statute *De Diſtrictione Scaccarii*, made 51 *H.* 3. no Man ſhall be (a) diſtrained by the Beaſts that gain his Land, nor by his Sheep, (b) but (c) until another Diſtreſs or Chattels ſufficient be found, except for Damage-Feaſant.

(a) This Statute extends not only to Diſtreſſes between Lord and Tenant, but to all other Diſtreſſes, as well at the Suit of the King, as at the Suit of a Subject. 2 Inſ. 133. Dal. 84. (b) In an Action upon this Statute, it is not neceſſary to ſhew that there was a ſufficient Diſtreſs, preter, &c. but it muſt come on the other Part, ſcil', to plead there was not a ſufficient Diſtreſs, preter, &c. Dyer 312. Pl. 86. 3 Sid. 348. (c) It muſt be intended there was Cattle ſufficient at the Time of the Diſtreſs, and it is not material what was before or after. 2 Inſ. 133.

35. By the Statute of 2 *W. & M. Seſſ.* 1. *cap.* 5. any Perſon having Rent due upon any Leaſe or Contract, may ſeize any Sheaves or Cocks of Corn, or Corn looſe, or in the Straw, or Hay in any Barn or Granery, or upon any Hovel, Stack or Rick, upon the Lands charged with ſuch Rent, and lock up or detain the ſame when found, as a Diſtreſs till replevied, and in Default, *&c.* ſell, *&c.*

(I) The Goods of whom may be diſtrained.

* Fol. 668.

1. If the Cattle of a Stranger eſcape into the Lands holden, and the Owner (a) knows it, and (b) ſuffers them to continue there after, for a Day or more, the Lord may diſtrain them for his Services. 27 Ed. 3. 80.

(a) Cro. Eliz. 550.

(b) Otherways if the Owner freſly follows to take them. 2 Inſ. 296. Palm. 43. Hob. 265. 2 Brownl. 170.

2. If the Cattle of a Stranger eſcape into the Lands held, though the Owner does not know them to be there, yet (c) if they are levant and couchant there, the Lord may diſtrain them for his Services. Contra, 27 Ed. 3. 80.

(c) 'Tis not material whether they are levant and couchant or not. Co. Lit. 47. b. 2 Sand. 190. Et vid. 2 Brownl. 170. Palm. 43. Hob. 265. Poſt, Letter O. 1.

3. The Cattle of a Stranger that eſcapes into the Land (d) may be diſtrained for (e) Services.

(d) I ſuppoſe this muſt be intended before they are levant and couchant. 2 Leon. 8. per Manwood. (e) Which are due upon an ancient Tenure between Lord and Tenant, and for the Antiquity favoured. 2 Leon. 7, 8. Et vid. Dyer 317, 318. 2 Brownl. 170. But by Palm. 43. there is no Diverſity where between Leſſor and Leſſee, and where between Lord and Tenant. —Diverſity where a Diſtreſs is taken for Services, and where for an Amercement for not doing Services. Noy 20.

4. But

(f) 1 Mod. 63. S. P. per Kelynge; and ſaid, it must come on the other Side, to ſhew they were not levant and couchant.

4. (f) But the Cattle of a Stranger that comes into the Land by Eſcape cannot be diſtrained for a Rent-Charge. 18 Ed. 2. Avowry 219.

5. The Cattle of a Stranger may be diſtrained for Rents and Services, tho' they eſcape into the Land of the Tenant, if they do a Treſpaſs to the Tenant. 22 Ed. 4. 49. b. Contra, 27 E. 3. 80.

6. The Cattle of a Stranger cannot be diſtrained by the Lord if they eſcape into the Land of the Tenant, if they do no Treſpaſs to the Tenant. 22 Ed. 4. 49. b.

7. As if the Tenant ought to incloſe againſt the Highway by Preſcription, and in driving my Cattle by the Way, by Default of the Incloſure they eſcape into the Land of the Tenant, the Lord cannot diſtrain them. 22 Ed. 4. 49. b. 15 H. 7. 17. b.

(g) 2 Leon. 7. S. P. per Manwood, S. P. con. Et vid. poſt, under this Title.

8. (g) So if he ought to enclose by Preſcription againſt my Land, and my Cattle eſcape, &c. 22 Ed. 4. 49. b.

9. In theſe Caſes, after the Eſcape if my Cattle continue in the Land levant and couchant for four, ſix, or more Days, or for half an Year, yet if I have no Notice thereof, the Lord cannot diſtrain them. 22 Ed. 4. 49. b.

(h) 2 Rol. Rep. 124. S. P. for I ſuppoſe this Book muſt be intended after Notice. Cro. El. 550.

10. (h) But otherwiſe it is if I have Notice, and ſuffer them to continue there after. 22 Ed. 4. 49. b. 50.

(i) Fitz. Diſtreſs 8. S. C. Br. 42. S. C. (k) Br. Diſtreſs 99. S. C. (l) Br. Treſpaſs 281. S. C. Fitz. Diſtreſs 8. S. C. Br. 42. S. C. (m) This is miſprinted in the Original as here, and ſhould be 49.

11. My Goods cannot be diſtrained in a Market or Fair for the Prejudice to the Publick. (i) 7 H. 7. 2.

12. So my Gown in a Taylor's Shop cannot be diſtrained by the Lord of the Shop for Services, nor my Horſe in an Inn. (k) 10 H. 7. 21. b. (l) 7 H. 7. 2. Nor my Horſe in the Shop of a Smith who is to ſhoe him, for the Law gives me a Liberty to put my Goods there. 22 Ed. 4. (m) 39. b.

(n) In the Original it is tantoſt come moy pleaſe, and in the Year-Book tantfois. (o) This is miſprinted in the Original as here, and ſhould be 49.

13. And in theſe Caſes, the Lord cannot diſtrain theſe Goods, though they continue there (n) as long as I pleaſe, for they may retain them till Satisfaction. 22 Ed. 4. (o) 39. b.

(p) In the Original it is, Et la miſt le Saddill deſouth le droit doſe del chivals. In the Year-Book it is, Wittera le Saddil de ſouth le droit de chival.

14. If I put my Horſe to a Smith to be ſhod, although he be there three or four Days before he is ſhod, yet the Lord cannot diſtrain him. 22 Ed. 4. 50. b.

15. But if I come with my Horſe to be ſhod, (p) and there put the Saddle under the right Side of the Horſe, the Lord may diſtrain the Saddle. 22 Ed. 4. 50. Quære this.

16. If a Man rides to any Place, and there he is took ſick, upon which he remains there two or three Days, yet his Horſe cannot be diſtrained for Rent. 15 E. 2. Avowry 216.

17. If a Man puts his Hoyſe into a Common (q) Herbage per Jours, & in beverie ſon chivall, & lui remove, yet this Hoyſe cannot be diſtrained foy Rent there. 15 E. 2. Avowry 216. adjudged.

18. If the Diſtreſs is to be taken foy any Cauſe touching the Soil, the Cattle of a Stranger may be diſtrained, being upon the Land, foy Rent, &c. (r) 41 Ed. 3. 26. b.

19. If an Heriot-Service due after the Death of a Tenant be ſtoigned, the (s) Loyd may diſtrain the Cattle of any Stranger manuring upon the Land. (t) 27 Aſſ. 24. adjudged.

20 The ſame Law if a Diſtreſs be to be taken foy a Cauſe touching the Perſon; (u) as foy an Amercement in Frankpledge, the Cattle of a Stranger may be diſtrained, being upon the Land. (w) 41 Ed. 3. 26. b Vide contra, 47 Ed. 3. 23.

21. (x) The Cattle of a Stranger cannot be ſold foy the Debt of the King. 41 Ed. 3. 26. b.

22. But they may be diſtrained if they are depaſtured in the Place where, &c. (y) 11 H. 4. 2.

23. Cattle which are in certain Land by way of Agiſtment may be diſtrained foy Rent. 18 Ed. 2. Avowry 219. admitted by the Iſſue.

24. If a Town be aſſeſſed to 40 s. foy the Expences of the Knights of the Shire in Parliament, this may be levied upon the Goods of one Man of the Town only. (z) 11 H. 4. 2.

25. If there are ſeveral Jointenants, and one grants a Rent-Charge out of the Land, the Gyantee may diſtrain the Cattle of the Gyantoy. (a) 11 H. 6. 23. b. 28, 33.

26. But he cannot diſtrain the Cattle of the (b) other Jointenants. (c) 11 H. 6. 23. b. 28, 33.

27. But he may diſtrain the Cattle of a Stranger that comes upon the Land. (d) 11 H. 6. Brook Diſtreſs 69. quære.

28. If there be two Jointenants, and one leaſes his Part to the other foy Years, rendring Rent, and they occupy it accoyding-ly, now the Leſſoy may diſtrain his Cattle, foy now he ſhall occupy the whole without the Diſturbance of the Leſſoy, and he cannot ouſt him. (e) 11 H. 6. 34. M. 18 Ja. B. R. between (f) Sir Henry Snelgrave and Dalſton, adjudged upon Demurrer, where the Leaſe was made to a Stranger, who leaſed it to the other Jointenant.

29. If there be ſeveral Jointenants, and one grants a Rent-Charge, and after leaſes his Part to the other Jointenants at Will, and they occupy the whole; yet their Cattle cannot be diſtrained foy the Rent, becauſe the Leaſe at Will is void, inaſmuch as a Jointenant ought to occupy per my & per tout by the Law. 11 H. 6. 28, 34.

30. But admitting the Leaſe at Will to them to be good, then their Cattle may be diſtrained foy the Rent, becauſe they come to the third Part under the Charge, and they ſhall be in the ſame Plight that the Gyantoy himſelf was. (g) 11 H. 6. 28. a, b.

31. If a Man leaſes at Will, and after grants a Rent, (admitting this does not determine the Will, quod quære) the Gyantee cannot diſtrain the Cattle of the Tenant at Will, becauſe he was in befoye the Charge, and therefoye the Tenant of the Free-hold cannot charge him befoye the Will determined. 11 H. 6. 28. b.

32. If a Man be ſeiſed of a Rent-Charge by Preſcription iſſuing out of the Manoy of D. yet it ſeems he cannot diſtrain the Cattle of the Copyholders of the Manoy, if they have not been uſed to be diſtrained, becauſe they are in by Preſcription alſo, and ſo as high as the Owner of the Rent. M. 12 Ja. B. between Cannon and Turner, dubitatur.

(q) So is the Original, but how to tranſlate it I know not.

Fol. 669.

(r) Br. Diſtreſs 3. S. C.

(s) But vid. Ow. 146. Noy 20. F. N. B. 100. H.

(t) Fitz. Avowry 177. S. C. Br. Harriots 6. S. C.

(u) But vid. Ow. 146. Noy 20. F. N. B. 100. H.

(w) Fitz. Diſtreſs 3. S. C. vide.

(x) For this, vid. 2 Rol. Abr. 159. Pl. 2, 3. and the Notes there.

(y) Fitz. Diſtreſs 52. S. C.

(z) Fitz. Diſtreſs 52. S. C. Br. Avowry 42.

S. C. Br. Diſtreſs 95. S. C.

(a) Br. Diſtreſs 69. S. C. Br. Charge 39. S. C.

(b) Lit. Rep. 59.

(c) Br. Diſtreſs 69 S. C. Br. Charge 39. S. C.

(d) Br. Diſtreſs 69. S. C. Br. Charge 39. S. C.

(e) Br. Diſtreſs 69. S. C.

(f) Cro. Jac. 611. S. C. adjudged. 2 Rol. Rep. 212.

(g) Br. Diſtreſs 69. S. C.

33. But in the ſaid Caſe it is clear, if the Owner of the Rent hath it by Grant or otherwiſe, and not by Preſcription, yet the Cattle of the Copyholders * cannot be diſtrained for it. M. 12 Ja. B. between Cannon and Turner adjudged.

* Fol. 670.

(h) Goulſ. 62. S. P. per Curiam.

34. (h) If a Rent be granted out of Two Parts of certain Land, and after a Leaſe is made of the two Parts to A. and the other third Part alſo comes to A. by another Leaſe of him that hath the third Part, (i) the Cattle of the Leſſee may be taken for this Rent. Hobert's Reports 110. between Newman and Moor, where but one third Part came to the Leſſee of the two Parts.

(i) But if he aſſigns this third Part to another, the Cattle of the Aſſignee cannot, for this third Part was not charged. Goulſ. 62. —So if he only leaſes it at Will, for ſo long as the Will continues he hath a Right to the Profits of the third Part, which was never charged. Goulſ. 62. adjudged.

35. If for an Amercement for Default of Suit the Lord preſcribes to diſtrain the Goods of his Free Tenant, he cannot take a Diſtreſs of the Beaſts of his (k) Under-Tenant, who is not within the Preſcription. *Mich.* 40 *Eliz.* between (l) *Pill* and *Towers*, *Cro. El.* 791, 792. adjudged.

(k) But the Preſcription may be ſo laid as to extend to the Beaſts of the Tenant or Under-Tenant. March 161, 162. Et vid. 1 Sid. 17, 18.

(l) Noy 20. S. C. but S. P. does not appear.

36. If a Clothier having put his Wool to ſpin, comes with an Horſe to carry it back, but becauſe there is no Beam or Weights at the Spinner's Houſe to weigh it, the Clothier and Spinner, with the Leave of a Neighbour who had a Beam and Weights in his Houſe, bring the Horſe thither, and enter the Houſe to weigh the Yarn; the Lord of the Houſe whilſt they are there cannot diſtrain the Horſe for Services. *Hill.* 39 *Eliz.* between (m) *Read* and *Burly*, *Cro. Eliz.* 549, 596. adjudged.

(m) 3 Levin. 261. S. C. cited.

37. If *A.* and *B.* have two Cloſes lying contiguous, and *A.* by Preſcription is bound to repair the Fences between both the ſaid Cloſes, and *A.* leaſes his Cloſe to *C.* for Years, rendring Rent, and the Fences between the two Cloſes being out of Repair, the Cattle of *B.* eſcape into the Cloſe of *A.* he may diſtrain them for Rent-Arrear, and it is not material whether they are levant or couchant or not. *Hill.* 20 & 21 *Car.* 2. between *Pool* and *Longueville*, 2 *Saund.* 289, 290. adjudged, and that Judgment affirmed upon a Writ of Error; though objected, that they eſcaped there through the Default of *A.* who ought to have taken Care that the Hedges were repaired. And by *Saunders*, *Nota*, this was a hard Caſe to maintain, there being a vaſt Difference between the Lord's taking a Diſtreſs within his Seigniory, and the Leſſor's diſtraining for Rent reſerved upon his own Leaſe, for the Lord hath nothing to do with the Land or Fences, and ſo it concerns not him whether they are in Repair or not. Otherways of the Leſſor, for he ought to repair them, or provide that his Tenant repair them, elſe he will have Advantage of his own Wrong.

38. If a Man that is driving his Cattle to *London* to ſell, asks Leave of the Leſſor to put his Cattle into the Ground for a Night, and he gives him Leave ſo to do with the Conſent of the Leſſee, and the Cattle are put in accordingly, the Leſſor is not concluded by this Licence, but that he may diſtrain them for Rent. *Trin.* 1 *Will' & Mar.* between (n) *Fowkes* and *Joice*, 2 *Vent.* 50. adjudged upon Demurrer; and it not appearing by the Pleading, that the Ground belonged to a common Inn, it came not in queſtion, Whether in that Caſe they might have been diſtrained?

(n) 3 Levin. 260, 261. S. C. adjudged.

39. Cattle driving to a Market, and by the Way put into a Paſture, may be diſtrained. (o) 2 *Vent.* 50. *per Curiam.*

(o) 3 Levin. 261. ſaid this Point ſeemed to be admitted.

40. If *A.* is ſeiſed of one Part of a Cloſe, and *B.* is ſeiſed of the other two Parts thereof in common with *A.* and *A.* lets his third Part, rendring Rent, and *B.* or a Stranger by his Licence puts in Cattle, thoſe Cattle cannot be diſtrained for the Rent. *Hill.* 2 & 3 *Will. & Mar.* between *Kempe* and *Cory*, 2 *Vent.* 228, 283. adjudged.

(K) In what Place a Diſtreſs may be taken *de Jure.*

By the King.

1. THE King may diſtrain for Rent-Services in (a) all the Lands of the Tenant, as well thoſe that are held of others, as of the King. (b) 44 E. 3. 45. Curia. (c) 9 H. 6. 9. 44 Aſſ. 22. by all the Juſtices.

(a) This muſt be intended in ſuch other Lands as his Tenant hath in his own actual Poſſeſſion, and manured with his own Beaſts, and not in the Poſſeſſion of his Leſſee for Life, Years, or at Will, for their Beaſts are not ſubject to ſuch Diſtreſs. 2 Inſ. 132. 4 Inſ. 119. (b) Br. Diſtreſs 6. S. C. Fitz. Grant 47. S. C. (c) Fitz. Grant 6. S. C.

2. So the King may diſtrain for a Fee-Farm in all the Lands of the Farmor. (d) 44 E. 3. 45. 8 H. 6. 1. b.

(d) Br. Diſtreſs 6. S. C. Fitz. Grant 47. S. C.

3. If a Town be aſſeſſed to a certain Sum, a Diſtreſs may be taken in any Part ſubject to the Diſtreſs for the whole Duty. 11 H. 4. 35. b.

4. If a Corporation be amerced in B. R. (e) this may be levied upon the Will or Land of the Will, or upon the Goods which they have in their natural Capacity. 8 H. 6. 1. a, b.

(e) But if a Man recovers Debt or Damage againſt a Corporation, he ſhall have Execution only of ſuch Goods as belong to the Corporation. Fitz. Execution 128.

5. If a Man holds of the King by Rent, &c. and Arrearages incur, and the Tenant leaſes it to another, the King may diſtrain in the Lands of the Under-Tenant for theſe Arrearages in any Place out of the Land held. M. 17 Ja. B. between (f) Catford and Oſmond, per Hobert.

(f) 1 Brownl. 17. S. C. but S. P. does not appear.

6. By the Stat. of *Marlbridge*, made (g) 52 *H.* 3. *c.* 2. none ſhall diſtrain any to come to his Court (h) which is not of his Fee, or upon whom he has no Juriſdiction, by reaſon of an Hundred or Bailiwick, nor take Diſtreſſes out of the Fee or Place where he hath (hh) Juriſdiction.

(g) This is declarative of the Common Law. 2 Inſt. 104.

(h) This is intended of Suit-Service in reſpect of a Seigniory, and not of Suit-Real in reſpect of Reſiance. 2 Inſ. 104. (hh) But no Diſtreſs is prohibited by this Act in any Place where he hath Power by Cuſtom or otherways to diſtrain. 2 And. 71, 72.

7. By the ſame Statute, *cap.* 15. it is enacted, That from (i) thenceforth (k) it ſhall be lawful for no Man, (l) for any Manner of Cauſe,

(i) Yet this is only in Affirmance of the Common Law; but the King by his Prerogative diſtraining for his Rents in any other the Lands of his Tenants, ſeveral other Lords before this Act took upon them ſo to do. 2 Inſ. 131. (k) This muſt not be taken ſimpliciter, ſo as to take Advantage thereof in Bar of an Avowry; but ſecundum quid, viz. that the Tenant may have an Action againſt the Lord upon this Statute, in which he ſhall be fined. 2 Inſ. 132. and if it might be pleaded in Bar of the Avowry, the King ſhould loſe his Fine. (l) This muſt be intended only of Diſtreſſes by reaſon of a Seigniory, and not of Diſtreſſes for Rent-Charges, &c. or by reaſon of a Leet. 2 Inſ. 131. 1 And. 72. —Nor of ſuch Things for which no Diſtreſs can be taken but in the Highway, as for Toll-thorough due by Cuſtom. Cro. El. 710.

to

to take (m) Diſtreſſes out of his Fee, or in the King's Highway, or in the common Street, but only to the King and his Officers, having ſpecial Authority ſo to do.

(m) But an Heriot-Cuſtom may be ſeized in the Highway, for that is not a Diſtreſs, but a Seiſure; but a Diſtreſs cannot be taken there for an Heriot-Service. 2 Inſ. 132. Goulſ. 97.

(n) For the Expoſition hereof, vid. 2 Inſ. 627. F. N. B. 173. b.

8. By the Statute (n) *Artic' Cleri, cap* 9. made 9 *Edw.* 2. Diſtreſſes ſhall not be taken in the Highway, nor in the ancient Fees of the Church.

(L) For an Amercement.

1. FOR an Amercement in the Sheriff's Turn for ſtopping a Way, the Sheriff may take a Diſtreſs through the whole County. (a) 2 H. 4. 24. b. 8 R. 2. Avowry 194.

(a) Br. Diſtreſs 13. S. C. Fitz. 10. S. C. Br. Leet 28. S. C. 41. S. C. Br. Amercement 13. S. C.

2. So where an Amercement is within an Hundred, the Lord of the Hundred may diſtrain through the whole Hundred, (b) as well out of the Land as upon the Land, for the Amercement does not extend to the Land, nor iſſue out of it. (c) 2 H. 4. 24. b. (d) 11 H. 4. 89. b. for the Juriſdiction of the Hundred is entire through the whole Hundred. 13 H. 4. 9. b. 8 R. 2. Avowry 194.

(b) Where a Deciner is amerced at the Leet of the Hundred, a Diſtreſs for it may be taken at any Place within the Hundred, though not in the ſame Decinary. 11 Co. 45. a. (c) Br. Diſtreſs 13. S. C. Fitz. 10. S. C. Br. Leet 28. S. C. 41. S. C. Br. Amercement 13. S. C. (d) Fitz. Avowry 57. S. C. Br. Diſtreſs 18. S. C.

3. The Lord may take a Diſtreſs for an Amercement in a Leet in his own Land which is within the Hundred, if he can find the Cattle of him that is amerced, for the Amercement charges only the Perſon and not the Land. (e) 47 E. 3. 13.

(e) Fitz. Diſtreſs 15. S. C.

4. So a Diſtreſs may be taken for this in the High-ſtreet, (f) 47 E. 3. 13.

(f) Fitz. Diſtreſs 15. S. C.

But for this, vid. the Notes upon the Statute of Marlbridge, cap. 15. Supra, Letter K.

5. If a Man be amerced in a Leet, a Diſtreſs cannot be taken for it of the Goods of the Party amerced in the Lands which is in the Hands of the King, though it be within the Limits of the Hundred, for during this Time it is out of the Juriſdiction of the Leet. (g) 47 E. 3. 13.

(g) Br. Diſtreſs 10. S. C. Fitz. Diſtreſs 15. S. C.

(M) (a) By a common Person.

Fol. 671.

In the House.

(a) If the King is by Office entitled to Land out of which I have a Rent-Charge, I cannot distrain upon the King's Possession; but if he grants the Land over, I may distrain, for I am not out of Possession of the Rent by the Office; but he that pretends Title to the Land is out of Possession thereof by the Office. Br. Distress 27. (b) 5 Co. 92. a. S. P. (c) The Words in this Placit' seem to be misprinted. Vide Post. Pl. 6.

1. (b) A Distress for Rent may be taken in a House, if the Doors be open, else not. 46 E. 3. 26. b.

2. (c) Among the Petitions of Parliament of the 18 E. 1 Fol. 7. it is said, that he shall distrain for Rent per Ostia & Fenestras, prout a Distress for Rent may be taken in an House. 29 Ass. 49. Moris est.

3. A Man cannot distrain for a Rent-Service but in the Land out of which it issues. 8 H. 4. 18. b. 9 H. 6. 9.

4. As he cannot distrain in other Land, though it be within his Fee. 8 H. 4. 14. b.

5. A Distress out of his Fee for Services is not lawful. 17 E. 3. 43.

6. A Distress in a Way within his Fee was lawful at the Common Law. 17 Ed. 3. 43.

7. A Man may distrain for the Rent of an House per Ostia & Fenestras, among the Petitions of Parliament of 18 E. 1. Fol. 7. it is said, that he may distrain per Ostia & Fenestras, prout Moris est; it seems as if this was intended that he might go to the House, and take a Distress, or take it out of the Windows.

8. If a Man leases an Advowson for Life, rendring Rent, he cannot distrain for this in the Glebe. 11 H. 6. 5.

9. If a Man leases a Manor to which an Advowson is appendant, rendring Rent, he cannot distrain for the Rent in the Glebe, beause the Lessor hath nothing to do therewith. 11 H. 6. 5.

10. If a Rent-Service issues out of Land which is in several Counties, a Distress for the whole may be taken in one County. 18 E. 3. 32. b.

11. If a Rent-Charge issues out of Land lying in several Counties, a Distress for the whole may be taken in one County. 18 E. 3. 32. b.

12. So if a Rent-Charge issues out of the Land which is in the Hands of several Men, a Distress may be taken for the whole Rent upon the Possession of one, for all the Rent issues out of every Part, 39 Ass. 4. adjudged.

13. If a Man grants a Rent-Charge for Life out of his Lands, and after enfeoffs several Persons to the Use of himself and his Heirs so long as he pays 100 *l.* yearly, till 7000 *l.* is paid to the King, and after Breach, to the Use of the King, his Heirs and Successors, until the said Sum of 7000 *l.* or so much thereof, as should then be unpaid, should be satisfied, and after he makes Default, which is found by Office, and the King entitled, and the King grants the Lands to *A.* and *B.* and their Heirs, to hold until the said Sum of 7000 *l.* should be paid, *&c.* though while the Land was in the Possession of the King it was privileged and discharged from the Distress, yet when it was transferred from his Possession, the Distress was revived, and might be taken as well for the Arrears incurred before the King's Seisure as after. *Mich.* 32 *&* 33 *El. Savil* 125. the Court inclined accordingly, but no Rule was given in the Case, for the Parties agreed to pay the Rent, but not the Arrears, by the Mediation of the Court.

(N) In what Places it may be taken for a collateral Cauſe.

1. When the Lord is (a) in view of the Cattle, if the (b) Tenant, to avoid the Diſtreſs, chaſes them into a Place not within his Diſtreſs, (c) yet the Lord may take them freſhly, for he ſhall not have Advantage of his own Wrong. 44 Ed. 3. 20. b.

(a) Otherways if the Lord was coming to diſtrain, but had not the View. Co. Lit. 161. a. (b) Or other Perſon. Co. Lit. 161. a. 2 Inſ. 131. (c) And in Judgment of Law, they are taken within his Fee, within the Statute of 21 H. 8. Co. Lit. 268. a.

2. But if the Tenant after the Lord has the View, chaſes the Cattle (d) for other lawful Cauſe out of his Fee, and not on purpoſe to avoid the Diſtreſs, the Lord cannot take them. 44 E. 3. 21.

(d) So if after the View the Cattle of themſelves go out of the Fee. Co. Lit. 161. a. 2 Inſ. 131. —But by the Statute 8 An. If Leſſee for Life, for Years, at Will, or otherways, fraudulently or clandeſtinely convey or carry off from the demiſed Premiſes his Goods or Chattels, with intent to prevent the Landlord or Leſſor from diſtraining for Rent ſo reſerved, the Leſſor, &c. or any Perſon by him impower'd, within 5 Days after may ſeize ſuch Goods, &c. wherever found, as a Diſtreſs, &c. Vide the Act.

3. If the Lord coming to diſtrain, hath the View of the Beaſts within his Fee, and before he can diſtrain them the Tenant chaſes them into the Highway, the Lord, notwithſtanding the Statute of *Marlbridge*, *cap.* 15. may diſttain them there. 2 *Inſ.* 132.

(O) At what Time it may be taken.

1. If the Cattle of a Stranger eſcape into the Lands holden they may be diſtrained, (a) though they are not levant and couchant. Co. Lit. 47.

(a) Ante, Letter (I) * Fol. 672. Pl. 2. vide, with the Notes there.

2. If the Cattle of a Stranger eſcape into the Lands holden, &c. they * cannot be diſtrained. 48 E. 3. 34. 2 H. 4. 16. b. Contra, 7 H. 1. b. Curia.

3. But the Cattle of the Tenant himſelf may be diſtrained, if they eſcape there. 48 E. 3. 34.

4. So if there be Arrearages, and after the Tenant alien, and after the Cattle of the Alienee eſcape there, yet they may be diſtrained. 48 E. 3. 34 quære.

5. If a Stranger keeps or cauſes his Cattle to be kept in the Place where, &c. they may be diſtrained, for this is not any Eſcape. 2 H. 4. 16. b.

6. So if a Stranger hath Notice that his Cattle are uſually or are accuſtomed to be in the Place where, &c. they may be diſtrained, for this is not an Eſcape. 2 H. 4. 16. b.

(b) 2 Leon. 7, 8. S. P. per Wanwood and Dyer.

7. (b) The Grantee of a Rent-Charge cannot diſtrain the Cattle of a Stranger which come there by Eſcape, and are freſhly purſued by the Owner. Demurrer, Trin. 17 Ja. B. between (c) Reynolds and Cakely.

(c) Reignolds and Okely ſeems to be S. C. but S. P. does not appear. Hob. 265. 1 Brownl. 170. But vid. Ante, Letter (I) Pl. 4.

8. If a Man leaſes for Years, rendring Rent, and Rent is behind, and after the Term expires, the Leſſor cannot afterwards

wards diſtrain (d) for the ſaid Rent; (it ſeems to be intended that he held over.) (e) 14 H. 4. 31.

(d) But may diſtrain his Cattle Damage-Feſant. Kelw. 96. a. (e) Kelw. 96. a. S P. per totam Curiam con. and this Caſe cited, with an ideo quære thereupon. 6 Co. 64. b. S. C cited. —But by the Statute of 8 An. a Diſtreſs may be taken for Rent due on any Leaſe for Life, Years, or at Will, ended or determined as if not ended or determined, provided it be taken within 6 Kalendar Months after the Determination of ſuch Leaſe and during the Continuance of the Landlord's Title, and Tenant's Poſſeſſion from whom due.

9. For Rent due the laſt Day of the Term, the Leſſor cannot diſtrain, becauſe the Term is ended before the Rent is due, for the Leſſee hath the whole Day to pay it. Co. Lit. 47.

10. If a Man leaſes Land for Years, rendring Rent, and after the Leſſee holds over the Term, the Leſſor cannot diſtrain upon the Land for the Rent incurred during the Term, becauſe the Leaſe was ended before, and the Leſſee not in in Privity of the Leaſe. 14 H. 4. 31. per Hill and Hankford. Mich. 15 Jac. B. R. between (f) Harriſon and Metcalf, per Curiam, this being moved in Arreſt of Judgment, and the Poſtea ſtay'd accordingly. Contra, 23 H. 7. 96. per Curiam, Kelleway.

(f) Cro. Jac. 442. S. C. where the Term out of which the Rent-Charge was granted was determined.

11. If a Man be ſeiſed in Fee or for Life of a Rent-Charge, and after Arrearages incur, he grants over the Rent to another, he himſelf cannot afterwards diſtrain for the Arrearages incurred before the Grant, becauſe now the Arrearages are divided from the Freehold of the Rent, and ſo the Diſtreſs gone. (g) Co. 4. Ognell 50. b. per Curiam.

(g) Vaugh. 40, 41. S. C. cited.

12. The ſame Law is of a Rent-Service. Co. 4. Ognell 50. b. per Curiam.

13. If Leſſee for Twenty Years makes a Leaſe for Ten Years, reſerving Rent, and Arrearages incur, and after Leſſee for 20 Years dies, by which the Reverſion and Arrearages deſcend to his Executors; the Executors, and Executors of Executors, may diſtrain for the Arrearages incurred in the Life of the Teſtator, becauſe theſe Arrearages were never ſevered from the Reverſion, but the Executors have the Reverſion, and Rent as annexed thereto, and in the ſame Plight as the Teſtator himſelf had it, inaſmuch as they repreſent the Perſon of the Teſtator, and it is not like a Reverſion, which deſcends to the Heir, (gg) and the Arrearages go to the Executors. Trin. 3 Car. between (h) Wade and Marſhe, adjudged in a Replevin.

(gg) But in this Caſe Executors may diſtrain by the 32 H. 8. c. 37. for the Expoſition of which Act, vide ante 492.

(h) Lat. 211. S. C. adjudged.

14. An Attachment by Cattle in an Action of Treſpaſs ought not to be made in the Night. Hill. 37 Eliz. per Curiam.

15. (i) A Diſtreſs for a Rent-Service or Rent-Charge cannot be in the Night. Co. Lit. 142.

(i) 7 Rep. 7. a. S. P. 9 Rep. 66. a. S. P. Et vid. 4 Leon. 218.

16. (k) A Man may diſtrain Cattle Damage-Feſant in the Night, for otherways perhaps the Cattle will be gone before he can take them. Co. Lit. 142.

(k) 7 Rep. 7. a. S. P. 9 Rep. 66. a. S. P.

17. If for 10 *l.* Rent due at one Day, a Man diſtrains Goods of the Value of 40 *s.* only, (l) and at the Time of the taking the Diſtreſs there are Goods of a ſufficient Value upon the Premiſſes, he cannot for the ſame Rent (m) diſtrain again, for it was his Folly that at the firſt he diſtrained no more. (n) *Mich.* 3 *Ed.* 6. *Moor* 7. *Pl.* 26. adjudged.

(l) Otherways he may diſtrain again. Cro El. 13. Br. Diſtreſs 98.

18. But if there be Rent in Arrear at ſeveral Days, a Diſtreſs may be taken for what was due at one of the Days, and after a Diſtreſs may be taken for what was due at the other Days. *Moor* 7. *Pl.* 26. *per Brown.*

(m) But now vid. 17 Car. 2. c. 7. by which it is enacted, That where the Value of the Cattle diſtrained ſhall not be found to be to the full Value of the Arrears diſtrained for, the Party to whom the Arrears were due, his Executors or Adminiſtrators, may from Time to Time diſtrain again for the Reſidue of the ſaid Arrears. (n) Cro. El. 13. S. C. adjudged.

Fol. 673.

(P) Pound, (a) how he ſhall demean himſelf (b) towards the Diſtreſs.

(a) If a Lord takes a Diſtreſs for an Amercement in a Leet, he may impound or ſell it at his Pleaſure.

1. A Pound-Overt is a Pinfold made for ſuch Purpoſes, or the Cloſe of him that diſtrains, or the Cloſe of a Stranger with his Conſent where the Diſtreſs is taken. Co. Lit. 47.

8 Co. 41. b. 1 Rol. Rep. 76. Noy 17. —Where a Statute ſays, that a Penalty ſhall be levied by Diſtreſs, a Power to ſell is thereby given without further Words. 2 Jon. 25. per Curiam. —Where by the Statute of 2 Will' & Mar', Seſſ. 1. cap. 5. a Diſtreſs taken for Rent due upon any Leaſe or Contract, if not replevied in 5 Days, may be appraiſed and ſold. Vid. the Act. (b) He cannot work it becauſe he hath no Property therein, nor Poſſeſſion in jure, but only a bare Power by Act of Law to take it, &c. Ow. 124. Dyer 280. Pl. 14. —So if a Man hath a Return irrepleviſable, yet he cannot work it, for the Judgment is to remit it to the Pound, ib'm remanſur'. Ow. 124. —But Cattle taken in Withernam may be uſed. Ow. 46. —Where it cannot be removed, but muſt be ſecured upon the Land, per 2 W. & M. Seſſ. 1. c. 5.

2. A Pound-Covert or Cloſe is when the Diſtreſs is impounded in an Houſe. Co. Lit. 47.

3. He that diſtrains any thing that hath Life ought to impound it in a lawful Pound within 3 Miles in the ſame County. Co. Lit. 47. b

4. But if a Man diſtrains dead Goods, as Utenſils of an Houſe, or ſuch like, which may take Damage by Wet or Weather, and the like, he ought to impound them in an Houſe, or other Pound-Covert with 3 Miles in the ſame County, for if he impounds them in a Pound-Overt, he ought to anſwer for them. Co. Lit. 47. b.

(c) 2 Inſ. 106. S. P.

5. (c) If a Man diſtrains Cattle, and puts them in a Pound-Overt, the Owner ought to keep them at his Peril. Co. Lit. 47. b. for it is lawful for him to come there for this Purpoſe.

6. But if he puts the Cattle in a Pound-Covert or Cloſe, there he ought to keep them at his Peril, and yet he ſhall not have any Satisfaction for it. Co. Lit. 47. b.

7. If a Man takes a Diſtreſs, and puts it into a Pound-Overt, and the Horſe which he diſtrains leaps three times over the Pound, which is as high as it uſed to be, and therefore he takes the Horſe, and ties him with a (d) Rope to a Poſt in the ſame Pound, and after he ſtrangles himſelf, yet this will not excuſe him, but he may be puniſhed in an Action of Treſpaſs. 27 Aſſ. 64. adjudged.

(d) In the Original it is chivetter.

8. If a Man takes a Cow for a Diſtreſs, he cannot milk her, for though the Cow be the better for this, yet he ought not to do Good to the Owner without his Conſent, and perhaps the Owner would have come before any Damage by this came to the Cow; and if it periſh by this, yet he that took the Diſtreſs may diſtrain again, and ſo he is at no Damage. H. 4 Ja. B. R. between (e) Bagſhaw and Galliard, per Curiam.

(e) 1 Rol. Abr. 879. Pl. 2. S. C. Noy 119. S. C. & S. P. reſolved. Cro. Jac. 147. S. C. but S. P. does not appear. Yelv. 96. S. C. but S. P. does not appear.

9. By the Statute of *Marlbridge*, (f) made 52 *Hen.* 3. *c.* 4. (g) none ſhall cauſe a Diſtreſs to be driven (h) out of the County where taken, (i) on Pain of Fine, *&c.*

(f) Confirmed by the Statute of Weſtminſter, made 3 Ed. 1. which vid. 2 Inſ. 191. (g) Yet if the Tenancy is in one County, and the Manor in another, the Lord may drive the Diſtreſs taken in the Tenancy unto the Manor in the other County, for the Tenant doing Suit to the Manor, by common Intendment knows what is done there. 2 Inſ. 106. Kelw. 50. Et vid. Br. Diſtreſs 33. —But where for Rent reſerved by reaſon of a Leaſe for Years of Land in one County, Parcel of a Manor in another County, Kelw. 50. dubitatur. Quære. (h) By the Common Law, a Man might have driven a Diſtreſs whither he pleaſed, which was very miſchievous; Firſt, becauſe the Tenant was bound to give the Beaſts Suſtenance if impounded in an open Pound, and being driven into another County, by Intendment of Law he could not tell where they were. Secondly, he could not tell where to have a Replevy. 2 Inſ. 206. (i) He that will take Advantage of this Act of 1 & 2 Ph. & Mar. muſt do it by way of Action, ſo as to entitle the King to a Fine. 3 Levin. 48.

10. By the Statute of the 1 *&* 2 *Ph. & Mar. cap.* 12. no Diſtreſs ſhall be driven out of the (k) Hundred, Rape, Wapentake, or Lathe, where taken, except to a Pound-Overt within the ſame Shire not above (l) Three Miles diſtant from the Place where taken, and that no Diſtreſs ſhall be impounded in ſeveral Places, (m) whereby the Owner ſhall be conſtrained to ſue ſeveral Replevies, upon Pain that (n) every Perſon offending ſhall forfeit to the Party grieved 5 *l.* and treble Damages.

(k) Not into the County of the City of Litchfield; though till 1 Mar. Part of the Hundred in which, &c. Goulſ. 100. (l) Godb. 11. Goulſ. 101. (m) As if impounded in ſeveral Liberties, &c. elſe it is no Offence within the Statute. Noy 52. Dyer 177. b margine. (n) But where three Perſons diſtrain a Flock of Sheep, and ſeverally impound them in three ſeveral Pounds, whereby, &c. yet they ſhall forfeit but one 5 l. and one treble Damage. Partridge and Naylor, Cro. Eliz. 480. adjudged. Moor 453. Pl. 620. adjudged. Noy 52, 62. adjudged. Goulſ. 45. adjudged. Dyer 177. b. margine. —But Noy 62. by Fenner, if the Plaintiff brings his Action againſt them ſeverally, every one ſhall pay 5 l. But quære.

11. If there be a Cuſtom within a Town, That if a Butcher kills any Beaſts within the Town, and ſells the Fleſh within the Market, he ſhall pay 2 *d.* for every Hide, and that the Bailiffs may diſtrain the Hide for the 2 *d.* if denied; admitting the Cuſtom good, and the Diſtreſs of an Hide well taken, yet the Bailiffs cannot tan the Hide to prevent its being rotten, for the Cuſtom to diſtrain the Hide does not enabl them to tan it, for the Property is *quaſi* altered thereby, the Marks by which it might be known being taken away from the Owner, ſo as he cannot have it again. *Mich.* 42 *Eliz.* between (o) *Duncomb* and *Reeve* and others, *Cro. Eliz.* 783. adjudged. But by *Popham*, in ſome Caſes a Man may meddle with and uſe a Diſtreſs (p) where it is for the Benefit of the Owner; as if one diſtrains Armour, he may cauſe it to be ſcour'd, to avoid Ruſt; or if one diſtrains Raw Cloth, he may cauſe it to be fulled.

(o) Ante, 471. Pl. 6. S. C. 2 Rol. Abr. 562. Pl 14. S. C. (p) But where a Man diſtrained a Trunk for Rent, and being informed there were Things of Value in it, he cauſed it to be corded to prevent Damage, he was for this adjudged a Treſpaſſer ab initio. 1 Vent. 37. cited by Twyſden to have been adjudged before Roll Chief Juſtice.

12. If Horſes are (q) drawing a Cart loaded with Oats, yet they may be ſevered from the Cart, and diſtrained for a Rent-Service. *Trin.* 21 *Car.* 2. between (r) *Welch* and *Bill*, 1 *Sid.* 422, 440. reſolved after ſeveral Debates; but Judgment was given againſt the Defendant, becauſe he had not anſwered as to the Conſumption of the Graſs laid in the Nar'. *Quære*, if a Man had been upon the Cart, if the whole Team had not been privileged.

(q) Where Horſes traced together are but one Diſtreſs, March 91. (r) 1 Vent. 36. S. C. adjornatur. 2 Keb. 529, 595, 631. S. C. and by the Report of this Caſe in Vent. and Keb. it appears there was a Servant in the Cart. —If Horſes are yoked and tied to a Plough, they may be untied, and ſeverally diſtrained Damage-Feſant, for every Horſe treſpaſſed ſeverally, and for the Treſpaſs done by every Horſe, a ſeveral Action lies. Cro. Eliz. 7, 8. —Otherwiſe if for Rent, for they are an entire Diſtreſs, and he claims no Intereſt in the Land, but only a Rent with which the Land is charged. Cro. El. 8. per Manwood. Et vid. Br. Diſtreſs 15.

13. If Turfs lie upon a Common Damage-Feſant, though for this a Commoner may diſtrain them, yet he cannot burn them. *Paſch.* 34 *Car.* 2. between *Bromhall* and *Norton*, 2 *Jon.* 193.

(Q) (a) Reſcous of a Diſtreſs.

Who (b) may make it.

1. If a Man diſtrains my Cattle without a Cauſe, (c) yet a Stranger cannot of his own Head reſcue them from him, for he hath good Cauſe to have them againſt him. 39 E. 3. 35. b.

(a) By the Statute of 2 W. & M. Seſſ. 1. cap. 5. upon any Pound-Breach or Reſcous of Goods or Chattels diſtrained for Rent, the Party grieved, in a ſpecial Action upon the Caſe, ſhall recover his treble Damages and Coſts. (b) Where a Diſtreſs taken in the King's Highway for Services may be reſcued. Cro. El. 710. (c) F. N. B. 102. E.

2. If a Man diſtrains my Cattle, together with the Cattle of J. S. without Cauſe, J. S. or I may juſtify the Reſcue of all. 39 E. 3. 35. b. per Thorpe.

3. If a Diſtreſs be taken of Goods without a Cauſe, the Owner may reſcue them. Co. Lit. 47. b.

(d) 1 And. 31. S. P. adjudged. N. Benl. 30. Pl. 48. S. P.

4. (d) But if a Diſtreſs be taken without a Cauſe, and put into the Pound, the Owner cannot break the Pound, and take them out, becauſe they are in the Cuſtody of the Law. Co. Lit. 47. b.

Fol. 674.

5. If a Man takes Cattle Damage-Feſant, and puts them into a Pound, and the Owner that hath Common there makes freſh Suit, and finds the Doors unlock'd, he may juſtify the taking out the Cattle in a Parco fracto. Co. Lit. 47. b.

(e) For this, vid. Co. Lit. 47. b F. N. B. 100. Winch. 80, 81.

6. But if the Owner breaks the Pound, and takes out his Goods, he that diſtrained them may have his Action (e) de Parco fracto, and may alſo take again the Goods diſtrained where he finds them, and impound them again. Co. Lit. 47.

7. If a Man coming to diſtrain for Damage-Feaſant, ſees the Beaſts in his Soil, but the Owner on purpoſe chaſes them out before they are taken, the Owner of the Soil cannot diſtrain them, and if he doth, the Owner of the Beaſts may reſcue them, for the Beaſts ought to be Damage-Feſant at the Time of the Diſtreſs. *Co. Lit.* 161. a.

8. If *A.* being a Commoner, puts his Sheep into the Common, and they, together with other Sheep of *B.* who has no Right of Common there, are diſtrained Damage-Feſant, and in one Flock chaſed together towards the Pound, *A.* may ſtop them all, and chaſe them to a convenient Place to ſever them from the reſt. *Paſch.* 18 *Jac.* between (f) *Jennings* and *Plaſtow*, *Cro. Jac.* 568. reſolved *per Curiam*; but Judgment was given againſt the Plaintiff, becauſe the Defendant had juſtified too much, *viz.* the driving them all away.

(f) 2 Rol. Rep. 163. S. C. and ſaid per Dod. he might have drove all into the Common again till ſevered; but the Pleading was ill, viz. becauſe he could not ſever them, reſcuſſit, cepit, & abduxit, all the ſaid Sheep, till he had ſevered his own from the others.

(R) (a) What ſhall be ſaid exceſſive, and what not.

(a) By the Statute of Marlbridge, made 52 H. 3. c. 4. Diſtreſſes muſt be reaſonable, and not too great. Et vid. 51 H. 3. the Statute De Diſtriction' Scaccarii; and if the Lord takes an unreaſonable Diſtreſs, an Action lies upon this Statute; but an Indictment or Information will not lie againſt him, becauſe a private Offence. The King and Leginham, 1 Mod. 71, 288. 1 Lev. 299. Raym. 205. 1 Vent. 104. (b) So if two or three Oxen are diſtrained for 12 d. 2 Inſ. 107. (c) But four Diſhes being taken for 3 s. 4 d. it was not held exceſſive, becauſe it appeared not of what Value they were. 2 Vent. 183.

1. If 40 Sheep are taken for 2 d. and (b) 16 Oxen for 9 d. (c) this is exceſſive. 41 E. 3. 26.

2. If two Oxen for 4 Pair of Gloves, 10 Sheep for one Pair, and 10 for another, it is an exceſſive Diſtreſs. 29 E. 3. 24. adjudged.

3. (d) But if a Man takes 5 Horſes joined in a Cart for 3 d. Rent, this is not exceſſive for the Intirety. 8 H. 4. 15. (d) 2 Vent. 183. S. P.

4. (e) No Diſtreſs for Homage ſhall be ſaid exceſſive, for the High Eſteem thereof in Law. 42 E. 3. 26. Co. 4. Bevill 8. b. (e) 4 Rep. 8. b. S. P. 2 Inſ. 107. S. P.

5. (f) The ſame Law is of Fealty. Co. 4. Bevill 8. b. 29 E. 3. 24.

6. (g) A Diſtreſs of more than the Value ſhall not be ſaid exceſſive for the Expences of Knights of Parliament, becauſe the King is in a manner Party. 13 H. 4. Fitz. Avowry 239. but ſaid, the Statute of Marlbridge, was general, and extended to all Diſtreſſes. (f) 2 Inſ. 107. S. P. but ſaid, the Statute of Marlbridge was general. (g) 2 Inſ. 107. S. P. but ſaid, the Statute of Marlbridge was general.

7. If the Lord diſtrain an Ox or an Horſe for a Penny, if there were no other Diſtreſs upon the Land holden, the Diſtreſs is not exceſſive; but if there were Sheep, or Swine, *&c.* then the taking of the Ox or Horſe is exceſſive, becauſe he might have taken a Beaſt of leſs Value. 2 *Inſ.* 107.

(S) How it is to be taken.

(a) Notice for what a Diſtreſs is taken.

(a) What and how Notice ſhall be given before the Diſtreſs ſold, per 2 Will. & Mar. Seſſ. 1. cap. 5.

1. If the (b) Lord diſtrains for Rents or Services, he need not give Notice to the Tenant for what Thing it is he diſtrains, (c) for the Tenant by Intendment of Law knows what is in Arrear from his Land. 45 E. 3. 9.

2. The ſame Law is if the Lord diſtrains for an Amercement in a Leet. 45 E. 3. 9.

(b) The Bayliff that diſtrains muſt ſhew in whoſe Right he does it. Br. Diſtreſs 78. (c) If a Man takes a Diſtreſs for one Thing, yet when he comes unto a Court of Record, he may avow for another. 3 Co. 26. 2. Mod. Br. Diſtreſs 62.

Aſſiſe

Aſſiſe de ſovent Diſtreſs.

1. IF the Lord, or another that has a Rent, diſtrains ſeveral Times for his Service or Rent where none is in Arrear, the Tenant may by the Common Law have an *Aſſiſe de ſovent Diſtreſs*. *F. N. B.* 178. I.

2. But if the Lord diſtrains for Homage or Fealty ſo often that the Tenant cannot manure his Land, yet the Tenant ſhall not have an *Aſſiſe de, &c.* 4 *Rep.* 8. b.

3. This Action lay at Common Law, in which the Writ is general, and Count ſpecial that the Lord diſtrained, *&c.* and Judgment not that the Demandant *recuperet Seiſinam*, for he hath that, but *quod teneat abſque multiplici Diſtrictione*. 8 *Rep.* 50. a. b.

In what Caſe a Diſtreſs may be taken by the King.

1. IF the King hath a Rent-Seck, he may diſtrain for it. *Kelw.* 104. a.

(a) Dower.

Fol. 675.

(a) 'Tis that Portion of Lands or Tenements of the Husband which the Wife hath for Life after the Death of her Husband, for the Suſtenance of her ſelf, and Education of her Children. Co. Lit. 30. b. —For the Conſummation thereof there are three Things neceſſary, Marriage, Seiſin, and the Death of her Husband. Co. Lit. 31. a. 32. a. (b) Not the Wife of a Man baniſhed by Parliament. 3 Bulſ. 188. (c) Of what Age ſoever. Co. Lit. 40. (d) Women in ancient Time have had Children at that Age, whereunto no Woman doth now attain, and therefore the Law cannot judge that impoſſible which by Nature was poſſible. Co. Lit. 40. a. (e) And tho' a Woman cannot conſent before 12, nor a Man before 14, yet this inchoate and imperfect Marriage (from which either of the Parties at the Age of Conſent might diſagree) ſhall give Dower. Co. Lit. 33. a. Dyer 369. a. 2 Inſ. 234. 3 Leon. 54. (f) But a Woman under the Age of 9 Years may be endowed ad Oſtium Eccleſiæ, or ex Aſſenſu Patris, for omnis Conſenſus tollit Errorem. Co. Lit. 37. a. (g) If a Man marries an Alien, ſhe ſhall not be endowed. Co. Lit. 31. b. But vid. 1 Part 321. Pl. 1. with the Notes there. —But if the King marries an Alien, ſhe ſhall be endowed by the Law of the Crown. Co. Lit. 31. b.

(A) (b) What Woman ſhall be endowed.

1. IF a (c) Man marries a Woman of an Hundred Years of Age, yet ſhe ſhall have Dower, (d) though by Poſſibility of Nature ſhe cannot have Iſſue. 12 H. 4. 2. b.

2. If the Husband dies before his Wife is of the (e) Age of (f) 9 Years, ſhe ſhall not be endowed. Lit. 8. 12 H. 4. 3.

3. Rot. Parliamenti, 8 H. 5. Numero 15. the Commons pray'd That (g) all Manner of Women aliens that ſhould be married to Engliſh Men by the Royal Licenee, ſhould be endowed, &c.

(B) Let

(a) (B) Anſwer. Let it be done as deſired by the Petition.

(a) This ought not to have been printed as a Title, but that it is ſo in the Original.

1. ROT. Parliamenti 9 H. 5. Numero . a Petition was delivered to the King in this Parliament, for Beatrice, who was the Wife of Thomas late Earl of Arundell, ſhewing, That whereas ſhe was born in Portugal, and took to Husband the ſaid Earl, who was ſeiſed in Fee and Fee-Tail of divers Caſtles, Lands, &c. the Heirs and Tertenants now diſturb her of her reaſonable Dower, becauſe ſhe was born and begotten in the ſaid Land of Portugal, that it would pleaſe him to declare and ordain by Authority of Parliament, that ſhe ſhould have her Dower.

(C) (a) Anſwer.

(a) This alſo ought not to have been printed as a Title, but that it is ſo in the Original.

1. THE King, of the Aſſent of the Lords in this Parliament, hath declared openly and ordained in the ſame Parliament as ſhe hath deſired.

2. In ſome Caſes a Woman ſhall be endowed, though there is a Divorce between her and her Husband. 39 E. 3. 33. (b) But quære.

(b) And vid. poſt. Letter (R)

3. *Edmond* the Brother of King *Edw.* 1. married the Queen of *Navarre*, and died; it was reſolved by all the Judges, That ſhe ſhould be endowed of all the Lands of which her Husband was ſeiſed in Fee. *Co. Lit.* 31. b. *Et Rot. Parl.* 26 *Ed.* 1. *Rot.* 1. is there cited to be ſo adjudged.

4. A Jew born in *England* married a Jew born here alſo; the Husband is converted to the Chriſtian Faith, and purchaſed Lands, and enfeoff'd another, and died, and his Wife brought a Writ of Dower, and was barr'd, and the Reaſon yielded in the Record is this, *quia vero contra Juſtitiam eſt, quod ipſa Dotem petat, vel habeat de Tenemento quod fuit Viri ſui, ex quo in converſione ſua noluit cum eo adherere, & cum eo converti.* *Co. Lit.* 31. b. at the Bottom: And there *Dorſ. Clauſ.* 18 *H.* 3. *M.* 17. is cited.

5. If a Man takes a Wife of the Age of 7 Years, and after aliens his Land, and after the Alienation the Wife attains the Age of 9 Years, and after the Husband dies, his Wife ſhall be endowed; for though at the Time of the Marriage ſhe was not abſolutely dowable, yet ſhe was conditionally ſo, *viz.* if ſhe attained the Age of 9 Years before the Death of her Husband. *Co. Lit.* 33. a.

6. The Wife of a Villein of a common Perſon, ſhall be endowed, if entitled before the Entry of the Lord. *Co. Lit.* 31. a.

7. If a Freeman marries a Nief, and dies, (c) ſhe ſhall be endowed. *Co. Lit* 31. a.

(c) But vid. Co. Lit. 123. a. 136. b.

8. The Wife of an Ideot or *Non compos* ſhall be endowed. *Co. Lit.* 31. a.

(D) Of what (a) Things ſhe ſhall be endowed.

(a) A Woman ſhall not be endowed of an Uſe. 4 Co. 22. a. 2 And. 75. —or of a Copyhold without ſpecial Cuſtom. 4 Co. 22. a. Et vid. ante 175.

1. SHE ſhall not be endowed of the Goods of her Husband. 7 H. 4. 13. b. Vetus Nat. Brevium 7. b.

2. But by the Civil Law ſhe ſhall be endowed of the Goods. 7 H. 4. 14.

3. She ſhall be endowed of Villeins regardant. 2 H. 6. 11. b.

(b) Co. Lit. 164. b. S P. 307. a. S. P.

4. (b) So ſhe ſhall be endowed of Villeins in Groſs, for this is an Inheritance. 2 H. 6. 11. b. Vet. Nat. Br. 7. b.

for in them a Man may have an Eſtate in Fee, Fee-Tail, for Life or Years.

(c) Nor of a free Foldage, if not for a certain Number. Godb. 21.

(d) Cro. Car. 300. S. C. adjudged,

5. She ſhall not be endowed of a (c) Common ſans Number, becauſe then the Land would be double charged. Co. 11. Rich. Godfry 45. Perkins, S. 341. Vet. Nat. Br. 7. b. P. 9 Car. B. R. (d) between Prewet and Drake, per Curiam, agreed in a Writ of Error upon a Judgment in Dower, but Judgment affirmed, (e) becauſe it ſhall not there be (f) intended to be Common ſans Number, but appendant.

after an Iſſue upon ne unque ſeiſee que Dower, &c found for the Demandant, ſo that it muſt appear upon Evidence to be ſuch a Common of which ſhe was dowable. Jon. 315. S. C. adjudged, the Demand by the Report in both theſe Books being of the third Part of a Meſſuage, Lands, Meadow, Paſture, & de Communia Paſturæ pro omnibus averiis. (e) Of a Common certain a Woman ſhall he endowed, but not of a Common ſans Number in Groſs. Co. Lit. 32. a. (f) In a Writ of Dower de tertia Parte liberæ Faldæ, or of a Common, the Certainty thereof ought to have been ſhewed, per Godb. 21.

Fol. 676.

(g) Co. Lit. 32. a. S. P.

6. (g) She ſhall be endowed of the Office of Marſhalſea de B. R. 21. E. 3. 57. b. admitted.

7. The Queen ſhall not be endowed of the Crown. Liber Succeſſionis 92. b.

(h) She ſhall not be endowed of a Caſtle maintained for the Defence of the

8. A Woman ſhall not be endowed of the Caſtles of her Huſband, (h) which are de Guerra. 1 E. 1. Rot. Patentium, Membrana 17. Fol. 3. reſolved, as it appears by a Writ to the Steward of Ireland, to reform ſuch Endowments there. Otherways of the Queen. 2 E. 1. Rot. Pat. M. 3. Dorſo.

Realm, becauſe it ought not to be divided, Otherways of a Caſtle that is maintained only for the private Uſe and Habitation of the Owner. Co. Lit. 31. b. 165. a.

9. A Woman ſhall not be endowed de Homagiis of her Husband quæ ſunt de Guerra. 1 E. 1. Rot. Pat. M. 17. reſolved.

(i) She ſhall be endowed of it, ſi non ſit Caput

10. The Wife ſhall not be endowed of the (i) capital Meſſuage. The Law of Scotland agrees with this. Skene Regiam Majeſtatem 41. b. Verſ. 62.

Comitatus ſive Baroniæ. Co. Lit. 31. b. Et vid. Bract. Brit. and Fleta there cited.

(k) Of ſuch Liberties and Profits in which her Husband had an Eſtate of Inheritance, &c. F. N. B. 148.

11. A Woman ſhall be endowed of the third Part of the (k) Profit of Stallage of a Fair, *&c.* *Co. Lit.* 32. a.

12. Of the third Part of the Profits of keeping a Park. *Co Lit.* 32. a.

13. Of the third Part of the Profit of a Dovehouſe. *Co. Lit.* 32. a

14. Of the third Part of a Piſchary, *viz tertium Piſcem, vel Factum Retis tertium.* *Co. Lit.* 32. a.

15. Of

15. Of the third Part of the Profits of Courts, Fines, Heriots, (i) *&c. Co. Lit.* 32. a.

16. Of a Rent-Service, Charge, *&c. Co Lit.* 32. a.

17. But not of an Annuity, which only charges the Perſon, and iſſues not out of any Lands or Tenements. *Co Lit.* 32. a.

18. If *A.* holds Lands of *B.* by Homage, Fealty, and 10 *s.* Rent, and *B.* dies, his Wife ſhall not be endowed of the Homage and Fealty, but ſhall have a third Part of the Rent as a Rent (m) Seck. *Kelw.* 126. a.

(i) Cro. Jac. 621.

(m) But ſhe may diſtrain for it. Kelw. 104. a.

(E) (a) Dower *ad Oſtium* (b) *Eccleſiæ.*

(a) Lit. Sect. 39.

(b) That it muſt be ad Oſtium Eccleſiæ ſive Monaſterii, and not ad Oſtium Caſtri ſive Perſuagii. Co. Lit. 34. a. —It muſt be after Marriage, for before the Woman is not entitled to Dower. Co. Lit. 34. a. —It is good without Deed, for he cannot make one to his Wife. Co. Lit. 34. a. (c) If Tenant in Tail endows his Wife ad Oſtium Eccleſiæ, this ſhall not bind his Iſſue. Co. Lit. 38. a.

Of what Things (c) he may endow her.

1. **A Man cannot endow his Wife** ad Oſtium Eccleſiæ **of his capital Houſe, having other Land ſufficient for her Dower.**

2. **With this agrees the Law** of Scotland. Skene Leges Burgorum, cap. 3.

3. (d) In ancient Time it was taken, that a Man could not endow his Wife *ad Oſtium Eccleſiæ* of more than a third Part, tho' of (e) leſs he might; but at this Day the Law is taken to be otherways. *Co. Lit.* 34. a, b.

(d) Co. Lit. 36. a.

(e) By the Statute of Magna Charta, cap. 7. for Dower ſhall be aſſigned the third Part of all the Lands which were the Husband's during the Coverture, except ſhe was endowed of leſs at the Church-Door.

(F) Of what Eſtate ſhe ſhall be endowed.

1. **If A. ſeiſed in Fee of Land, covenants to ſtand ſeiſed thereof to the Uſe of himſelf and his Heirs,** (a) **till C. his middle Son takes a Wife, and after to the Uſe of C. and his Heirs, and after A. dies, by which it deſcends to B. the elder Son of A. who has a Wife, and dies, and after C. takes a Wife, it ſeems the Wife of B. the elder Son, ſhall not be endowed of the ſaid Eſtate of her Husband, becauſe his Eſtate is ended by an expreſs Limitation, and therefore the Eſtate of the Wife being derived out of it, this cannot continue longer than the original Eſtate.** P. 10. Ja. B. **between** Flavill and Ventrice, dubitatur **upon a ſpecial Verdict, for upon Argument the Court was divided,** ſcilicet, Crawly **and** Vernon **that ſhe ſhall not be endowed, and** Hutton **and** Heath econtra. (b) Intratur, Tr. 8 Car. Rot. 1343.

(a) If a Feoffment is made to the Uſe of J. S. and his Heirs, until J. D. has done ſuch a Thing, and then to the Uſe of J. D. and his Heirs; the Thing is done, and J. S. dies; his Wife ſhall be endowed. 1 Leon. 168. per Anderſon! But Q. (b) 2 Sid. 66. S. C. cited. 1 Vent. 377. S. C. cited.

2. A Woman ſhall be endowed of an Eſtate-Tail determined, (c) in like Manner as a Man ſhall be Tenant by Curteſy. *Co. Lit.* 31. b.

3. If (d) Tenant in Tail of a Rent grants it to another, and his Heirs, and the Grantee dies, his Wife ſhall be endowed. 3 *Co.* 84. b.

(c) Et vid. Co. Lit. 30. a. 8 Co. 32, 33. 1 And. 184. 1 Leon. 167. Gouldſ. 81. Et vid. Br. Dower 86. (d) And vid. 10 Co. 96. a. 24 Ed. 3. 28. b.

4. If

4. If Lands are granted to *A.* and his Heirs during the Life of *B* if *A.* dies, his Wife ſhall not be endowed, and the Heir of *A.* takes by ſpecial Occupancy. 10 Co. 98. a.

(G) Of what (a) Eſtates the Wife ſhall have Dower.

(a) Where the Husband is ſeiſed of ſuch an Eſtate, that the Iſſue of the Woman, if ſhe had any, might by Poſſibility inherit. Co. Lit. 40. a. Winch 77.

1. (b) If a Man leaſes for Life, rendring Rent, his Wife ſhall not be endowed of this Rent, for this is but an Eſtate for Life in the Rent, though it deſcends to the Heir. 7 H. 6. 3. b. 17 E. 3. 12. 28 Aſſ. 3. adjudged.

—Not where the Eſtate of the Husband was by Diſſeiſin, and is avoided by the Diſſeiſee. (b) Co. Lit. 32. a. S. P.

2. If Leſſee to him and the Heirs of his Body, or to him and his Heirs for the Life of J. S. dies, his Wife ſhall not be endowed, becauſe this is but an Eſtate for Life. 18 E. 3. 44. b. 3 H. 3. 19. b.

3. If Leſſee for Life leaſes for the Life of another, his Wife ſhall not be endowed, for he gains this Fee in an Inſtant. 3 H. 4. 6.

(c) Co. Lit. 31. b. S. P.

4. (c) If the Baron and another are jointly ſeiſed in Fee, and the Baron makes a Feoffment of his Moiety, his Wife ſhall not be endowed of this, for the Baron had an Eſtate dowable, ſcilicet, a ſole Eſtate, (d) but for an Inſtant. 14 H. 4. 13. b.

(d) So if Ceſtuy que uſe, after the Statute of 1 Rich. 3. and before the Statute of 27 H. 8. had made a Feoffment in Fee, his Wife ſhould not have been endowed. Co. Lit. 31. b. So if the Conuſee of a Fine grants and renders the Land to the Conuſor, the Wife of the Conuſee ſhall not be endowed, for it is not poſſible that the Husband could have endowed his Wife of ſuch an Eſtate as the uſual Pleading is. Co. Lit. 31. b. 3 Leon. 11. Cro. Jac. 615. Cro. Car. 191. And by Vaugh. 41. the Seiſin of the Conuſee of a Fine is but a meer Fiction, and invented Form of Conveyance.

(e) Amcots and Catherich, Cro. Jac. 615.

5. (e) If Tenant in ſpecial Tail takes a ſecond Wife that is not dowable of the Tail, and after makes a Feoffment in Fee, and dies, his Wife ſhall not be endowed, becauſe he gains the Fee but in an Inſtant. Co. 8. Whit. 43. b. will prove this, for there it is that if the Baron be within Age at the Feoffment, * his collateral Heir ſhall not avoid it, becauſe he is not inheritable of the Right, for ſuch Right ſo gained does not deſcend.

* Fol. 677.

S. P. adjudged.

(f) Co. Lit. 42. a S. P. 1 Rep. 137. a.

6. (f) If there be Leſſee for Life, the Reverſion to the Huſband in Fee, and the Leſſee leaſes the Land to the Husband for the Life of the Husband, and after the Husband dies, and the Leſſee dies, the Wife ſhall not be endowed thereof, becauſe there was a Poſſibility of a Reverſion during the Coverture as to the Freehold. 1 E. 3. 16. per Tond.

7. If the Baron be Tenant in ſpecial Tail, the Remainder to his own right Heirs, and takes a ſecond Wife, and then becomes Tenant after Poſſibility, and dies, his Wife ſhall be endowed. 46 E. 3. 24. b. 22 E. 3. 3.

8. So if the Remainder had been limited to him in general Tail. 50 E. 3. 5. adjudged. 7 H. 4 25. b.

9. The Husband ought to have a Fee or Tail, and Freehold in Poſſeſſion, otherwaps the Wife is not dowable. 46 E. 3. 16. b.

10. If the Baron hath an Eſtate for Life, Remainder to B. in Tail, Remainder to the right Heirs of the Baron, and dies during the Life of B. the Wife ſhall not be endowed, for it is not a Fee in Poſſeſſion. 49 E. 3. 15. b. 46 E. 3. 16. b.

11. But if Tenant for Life ſurrenders to the Remainder-man in Tail or Fee, his Wife ſhall be endowed, for the Eſtates are united. 44 E. 3. 31. b.

12. The ſame Law if the Tenant for Life grants his Eſtate upon Condition, if the Condition be not broke. 44 E. 3. 31. b. 45 E. 3. 13. b adjudged.

13. If Leſſee for Life leaſes the Land to the Leſſor, and the Heirs of his Body, for the Life of the Leſſee, and after the Leſſor dies, living the Leſſee, the Wife of the Leſſor ſhall be endowed, for he had the Fee and Freehold in him. 18 E. 3. 45. adjudged.

14. If the Husband hath a Fee and Freehold defeaſible, yet his Wife ſhall be endowed till it is defeated. 45 E. 3. 13. b.

15. If Baron and Feme Leſſees for Life ſurrender to him in Reverſion, this is defeaſible by the Feme after the Death of the Baron, yet in the mean time if he in the Reverſion dies, his Wife ſhall be endowed. 45 E. 3. 13. b.

16. (g) If the Grandfather dies ſeiſed, (h) and the Son endows the Grandmother, who dies, yet the Wife of the Father ſhall not be endowed. 45 E. 3. 32. for by Relation the Father had but the Reverſion. 43 E. 3. 13. 18 E. 3. 44. b. M. 11 E. 1. B. Rot. 46. adjudged, Dos de Dote peti non debet.

(g) Co. Lit. 31. a. S. P.

(h) Some Words ſeem here to be wanting, viz. and the Lands deſcend to the Father, and he dies.

17. But in ſuch Caſe, if the Son enters, and endows his Mother of a third Part, againſt whom the Grandmother recovers a third Part, and dies, the Mother ſhall enter again into the Lands recovered by the Grandmother, becauſe ſhe had therein an Eſtate for her own Life, which in Judgment of Law was greater than the Eſtate for the Life of the Grandmother. *Co. Lit.* 31. b.

18. If the Grandfather enfeoffs the Father, the Wife of the Father, after the Death of the Wife of the Grandfather, ſhall be endowed of the Part aſſigned to the Grandmother, for the Purchaſe which took Effect in the Life of the Grandfather, was defeated only *quoad* the Grandmother; ſo that in this Caſe there ſhall be *Dos de Dote*. *Co. Lit.* 31. a.

19. If the Husband makes a Gift in Tail, reſerving a Rent to him and his Heirs, and after the Donor marries, and dies, the Wife ſhall be endowed of this Rent, becauſe it is a Rent in Fee, and by Poſſibility may continue for ever. *Co. Lit.* 32. a.

20. The Father and Son were Jointenants to them and the Heirs of the Son, and becauſe the Son ſurvived, as appeared by ſome Tokens, *viz.* his ſhaking his Legs, *Trin.* 38 *Eliz.* between *Broughton* and *Randal*, *Cro. El.* 503. upon the Iſſue *ne unque ſeiſee que Dower*, it was found for the Demandant.

21. If *A.* in Conſideration of 100 *l.* by Bargain and Sale inroll'd, conveys to *B.* and his Heirs, to the Intent that *B.* ſhall re-demiſe to *A.* for Life, with a Condition, That if *A.* paid the 100 *l.* at the End of 20 Years, the Bargain and Sale ſhould be void, and *B.* redemiſes accordingly, and dies, his Wife ſhall be endowed, for though re-demiſed upon the former Agreement, yet *A.* takes it ſubject to the Title of Dower; and it was his Folly that he did not join another with the Bargainee, as is the ancient Courſe in Mortgages. *Paſch.* 6 *Car.* between (i) *Naſh* and *Preſton*, *Cro. Car.* 190. agreed *in Cancellaria* by *Jones* and *Croke*, and upon a Conference with the other Juſtices certified accordingly; and that ſhe being entitled to it at Law, without Fraud or Covin, a Court of Equity ought not to relieve againſt it.

(i) 1 Part. 769. Pl. 2. Caſ. in Parl. 72.

(H) Of what Eſtates for a collateral Reſpect ſhe ſhall be endowed.

1. IF the Baron had a Fee and Freehold, though it be defeaſible, yet his Wife ſhall be endowed till it is defeated. 45 E. 3. 13 b.

2. As if the Baron and Feme, Leſſees for Life, ſurrender to him in Reverſion, this is defeaſible by the Feme; yet in the mean time, if he in Reverſion dies, his Wife ſhall be endowed. 45 E. 3. 13. b. 18 E. 3. 45.

3. If a Diſſeiſor dies ſeiſed, and after the Diſſeiſee abates, the Wife of the Diſſeiſor ſhall have Dower againſt him ſo long as the Diſcent is in Force. 17 E. 3. 24. admitted by the Iſſue.

4. If A. endows his Wife ad Oſtium Eccleſiæ, and after makes a Feoffment of the Land to B. who makes a Feoffment thereof to C. the Wife of B. ſhall be endowed againſt C. till the Wife of A. recovers her Dower. Temp. E. 1. 66. b. admitted.

5. But in this Caſe, after the Endowment of the Wife of B. if the Wife of A. brings a Writ of Dower againſt the Wife of B. and ſhe vouches C. to * Warranty, this Endowment of the Wife of A. ad Oſtium Eccleſiæ ſhall be a good Counterplea of the Warranty, quia Dos de Dote peti non debet. Temp. E. 1. 66. b. adjudged.

* Fol. 678.

6. If A. ſeiſed of the Manor of D. takes B. to Wife, and after aliens to C. who takes E. to Wife, and after aliens to F. and dies, and after E. is endowed, and after B. is aſſigned Dower of a third Part of the Manor, and ſhe brings a Precipe thereof againſt the Wife of C. ſcilicet E. who vouches to Warranty F. who counterpleads it by this Matter, and ſays, That the Wife of C. cannot be endowed, eo quod non poteſt habere Dotem de Dote, & ſic per Conſiderationem Curiæ adjudicatum fuit, quod eſſet inconveniens, ideo *F.* ſit quietus de Warrantia, & *B.* recuperet Seiſinam, & Defendens in Miſericordia. M. 11 E. 4. B. Rot. 46.

7. If a Woman (a) recovers Dower of a Reverſion expectant upon a Leaſe for Years, upon which a Rent is reſerved, ſhe ſhall have a third Part of the Reverſion, and the Rent preſently, as incident to the Reverſion, and the Execution ſhall not ceaſe till the Leaſe expires, (b) for the Sheriff ſhall put her in Execution of the Freehold, and the Termor ſhall continue his Term. Tr. 7 Ja B. per Curiam. P. 8 Ja. B. per Curiam. Hill. 10 Ja. B. per Curiam.

(a) If the Tenant ſhews, that before the Husband had any Thing in the Land, A. was ſeiſed in Fee, and leaſed for Years, rendring Rent, and granted the Reverſion to the Husband, who died ſeiſed of the Reverſion, and demands Judgment if the Demandant ſhall have Dower, &c. this is no Plea in Bar of Dower, but proves ſhe had Title of Dower, but ſhe ſhall have Judgment only of the Reverſion and Rent. Winch. 80. adjudged. —In Dower the Tenant made Default after Default, and a Termor came and pray'd to be received for his Term made to him before Coverture, and was received, and his Term ſaved: And it being a Queſtion, How the Judgment and Execution ſhould be? for if it ſhould be, quod ceſſet Executio during the Term, ſhe would loſe the Rent reſerved on the Leaſe, Cro. El. 564. it was agreed by all, That the Judgment ſhould be general, that ſhe ſhould recover a Moiety of the Land, (being Gavelkind,) and that the Writ of Execution ſhould be ſpecial, that the Sheriff ſhould not ouſt the Termor, but that he ſhould come upon the Land, and demand Seiſin for the Feme, and thereby ſhe ſhould have the Moiety of the Reverſion. And Beamond ſaid, it was ſo done in his Mother's Caſe, upon a Petition of Dower. (b) A Woman ſhall be endowed of the third Part of the Reverſion expectant upon a Leaſe for Years by Metes and Bounds, togethet with the third Part of the Rent, and Execution ſhall not ceaſe during the Years. Co. Lit. 32. a.

8. But

8. **But if no Rent be reſerved upon the Leaſe for Years, then the Execution ſhall ceaſe till the Term expires.** Tr. 7. Ja. Br. per Curiam.

9. (c) If Lands or Tenements deſcend to the Husband, and he dies before Entry, ſo that he had only a Seiſin in Law, and not an actual Seiſin, yet his Wife ſhall be endowed, for it was not in the Power of the Wife to reduce it to an actual Seiſin. *Co. Lit.* 31. a.

(c) Lit. Sect. 448. S. P. Co. Lit. 31. S. P. 8 Co. 32. b. S. P. arguendo.

10 A Woman ſhall not be endowed both of the Lands given and taken in Exchange, though her Husband was ſeiſed of both, but ſhe may have her Election to be endowed of which ſhe will. *Co. Lit.* 31. b.

11. If the Freehold of Rents, Common, *&c.* are ſuſpended before, and continue ſo during the Coverture, the Wife ſhall not be endowed of them. *Co. Lit.* 32. a.

12. But if after the Coverture they are extinguiſh'd by Releaſe or otherways, yet the Wife ſhall be endowed of them, for in Judgment of Law, as to her Dower, they have Continuance. *Co. Lit.* 32. a.

13. A Rent *de novo* was granted to a Man and his Heirs, with a *Proviſo*, that if the Grantee died, his Heirs being within Age, that then the Rent ſhould ceaſe during his Minority, and he died, his Heir being within Age, and the Wife of the Grantee brought a Writ of Dower againſt the Tertenant, and held it lay, and that the Demandant ſhould have Execution againſt the Heir when he came of full Age. 1 *Co.* 87. for which, *Fitz. Dower* 143. is there cited.

14. If Lands are given to the Husband and Wife in Tail, and after the Death of the Husband the Wife diſagrees, ſhe may recover her Dower, for by her waiving the Eſtate, her Husband in Judgment of Law was ſole ſeiſed *ab Initio.* 3 *Rep.* 27. b.

(I) Of what Eſtate for a collateral Reſpect ſhe ſhall be endowed.

For collateral Qualities.

1. **If a Man makes a Feoffment to the Husband, upon Condition that he ſhall enfeoff his Wife and his Son, and he makes a Feoffment accordingly, and dies, the Wife ſhall be endowed of this, for the Feoffment to her by her Husband was (a) void. But it appears the Intent of the firſt Feoffor was, that ſhe ſhou'd have an Eſtate in the Land; and inaſmuch as ſhe could not have the Eſtate according to his Intention, ſhe ſhall have the Eſtate which the Law gives her.** 28 Aſſ. 4. Curia. Brook Dower 62.

(a) The Word void is wanting in the Original, and ſo appears to be miſprinted there.

2. **So it ſeems if a Feoffment be made to a Husband, upon Condition to enfeoff J. S. and he does it accordingly, and dies, his Wife ſhall be endowed, for his Intent does not appear to exclude the Wife of her Dower; and if this had appeared, yet it ſeems it would not have ſtood with Law. It ſeems as if this was the Reaſon of the Caſe in** 28 Aſſ. 4. Brook Dower 62.

3. If Tenant in Tail general makes a Feoffment in Fee, and takes back an Eſtate to him and his Wife, and the Heirs of their two Bodies, and they have Iſſue, and the Wife dies, and the Husband takes another Wife, and dies, the Wife ſhall not be endowed, for during the Coverture he was ſeiſed of an Eſtate in ſpecial Tail, and yet the Iſſue by the ſecond Wife might by Poſſibility inherit. *Co. Lit.* 31. b.

4. So

4. So if he had taken back an Eſtate in Fee, and after taken Wife, and had Iſſue by her, and died, ſhe ſhould not be endowed, for the Fee vaniſhed by the Remitter, and her Iſſue had the Lands by Force of the Intail. *Co. Lit.* 31. b. But in this Caſe the Tenant cannot plead, that the Husband was never ſeiſed of ſuch an Eſtate whereof the Demandant might be endowed, but muſt plead the ſpecial Matter.

(K) At what Time ſhe ſhall be endowed.

(a) Co. Lit. 132. b.

1. (a) If the Husband enters into Religion, though it is a civil Death, inaſmuch as he is dead as to the World, for his Heirs ſhall have his Land, and a Writ of Mortdanceſter, yet his Wife ſhall not be endowed during his natural Life, becauſe he enter'd into Religion with her Conſent, otherwiſe ſhe might deraign him; and ſo by her own Aſſent, ſhe in a manner vows Chaſtity as well as her Husband. 32 E. 1. Dower 176.

(L) By what Act or Thing a Woman may (a) delay her ſelf of her Dower.

Fol. 679.

(a) Where Detainment of the Charters, or of the Heir, is pleaded, if the Demandant delivers the Evidence or Heir, ſhe may have Judgment; but if ſhe denies the Detainer, and that is found againſt her, ſhe loſes her Dower. Hob. 199. 9 Co. 18. a. (b) She is not worthy to be endowed of the Inheritance of her Husband, who will wrongfully detain from his Heir the Charters by which he ſhould defend it. 9 Co. 17. b. (c) And not other Lands deſcended to the Heir. 9 Co. 17. b.

(b) Detainment of Charters, or of the Heir.

What Charters or Heir.

1. Detaining of Charters concerning the (c) ſame Land of which ſhe demands Dower, is a good Plea in Delay of her Dower. 14 H. 4. 3. b. 14 H. 6. 4. 21 E. 3. 8. b.

2. Detaining a Fine concerning the Land, &c. is a good Plea in Delay of Dower, though the Fine may be had again in the Treaſury. 1 E. 3. 12. b.

(d) Till ſhe renders him unmarried; but if married ſhe loſes her Dower. 9 Co. 19. a.

3. Detaining the Heir is a good Plea (d) in Delay of Dower brought againſt the Guardian in Chivalry. 17 E. 3. 58. b.

4. If a Woman be endowed ad Oſtium Eccleſiæ, and after the Death of the Baron ſhe brings a Writ of Dower againſt the Guardian in Chivalry of the Heir of her Husband, it is a good Plea in Delay of this Dower, that the Demandant detains the Heir from him. 11 H. 3. Rot. 6. inter Idoneam Burdett & Willielmum Burdett, admitted per Iſſue, and agreed by Plea. 11 H. 3. Dower 187. the ſame Caſe, as it ſeems; but in Burdett's Caſe it is not expreſſed what Dower this was, but ſhe claims it as Land of which ſhe was nominatim dotata by her Husband.

5. The ſame Law in a Writ of Dower ex Aſſenſu Patris or Matris. 11 H. 3. Dower 186.

(M) Detinue of Charters.

Who may plead it.

1. If the Wife be with Child, the Heir for the Time being cannot plead Detinue of Charters, for she may keep them for the Infant. 41 E. 3. 11 b.

2. (a) In a Writ of Dower against the Guardian in Chivalry, he may plead in Delay of Dower, that the Plaintiff detains the Heir from him. 17 E. 3. 58. b. admitted.

3. (b) In a Writ of Dower, if the Tenant vouches the Heir in Ward, the Guardian may plead in Delay of Dower, that she detains the Heir from him, though the Guardian could not have render'd to her Dower before this Time, for he may render it now. (c) 17 E. 3. 58. b. Curia.

4. But Guardian in Chivalry cannot plead Detainment of the Charters, (d) because the Charters concerning the Inheritance of the Heir belong not to the Guardian. *Co. Lit.* 39. a.

5. No (e) Stranger, though he is Tenant of the Land, and has the Evidences conveyed to him, can plead Detainment of Charters, for this Plea lies only in Privity for the Heir of the Husband. 9 *Co.* 18. a.

6. The Heir in several Cases stands in the Degree of a Stranger, and shall not have this Plea. 9 *Co.* 18. a.

7. As if the Heir hath the Lands by Purchase. 9 *Co.* 18 a.

8. If the Heir hath delivered the Charters to the Woman, he shall not plead the Detainment of them, for she hath them with his Consent. 9 *Co.* 18. a.

9. So if the Heir is not immediately vouched by the Tenant, but the Tenant vouches one, who vouches the Heir. 9 *Co.* 18. a.

10. So if the Heir coming in as Vouchee, has no Land in the same County. 9 *Co.* 18. a.

11. So if the Heir comes in as Tenant by Receipt. 9 *Co.* 18. a. 19. a.

(a) Co. Lit. 39. a. S. P. because the Marriage of the Heir belongs to him.

(b) Co. Lit. 39. a. S. P.

(c) 9 Co. 18 b. S. C. cited.

(d) And he cannot conclude his Plea, and if the Demandant will deliver to him the Charters, &c. 9 Co. 19. a.

(e) The Feoffee cannot have this Plea. Cro. El. 367. per totam Curiam.

(N) (a) How to be pleaded.

1. If Detinue of Charters is pleaded in Delay of Dower, he that pleads it ought to alledge what Charters they are, so (b) certainly as in a Declaration of Detinue for them. 14 H. 6. 4. 1 E. 3. 12. b.

(a) He that pleads Detainment of Charters, ought to plead that he hath been always ready to render Dower, and yet is, if the Demandant would deliver to him the Charters and Tenant by Receipt, &c. Who cannot say so, cannot have this Plea. 9 Co. 18. a. 19. a.

(b) As that a certain Issue may be thereupon taken. 9 Co. 18. a. 19. a.

(O) What Act of the Baron may bar the Wife of her Dower.

1. If Land be mortgaged to the Baron, and the Condition is broke, and afterwards upon the Agreement the Mortgagor hath the Lands again by Payment, yet the Wife of the Mortgagee shall be endowed after the Heir of the Baron hath recovered, and so it seems before; (a) but this is a Quære. 41 E. 3. 1. b.

(a) 1 Part 769. vide.

Fol. 680.

(P) (a) What Act of the Feme will bar her of her Dower.

(b) Elopement.

1. If she elopes from her Husband with another Man, and continues in Adultery with him, without being reconcil'd to her Husband before the Death of her Husband, she shall lose her Dower. 43 E. 3. 19. 19 E. 4. 30. Perkins, S. 354. 47 E. 3. 25. Vide Statutum Roberti Primi, cap. 13. apud Scotos, according. West. 2. cap. 38. according.

(a) A Case temp. Ed. 2. by which, if a Woman says she is with Child by her Husband while he lived, and is not, she loses her Dower. 2 Inst. 436. cited.

(b) This was no Bar of Dower by the Common Law. 2 Inst. 435.

2. (c) The same Law if she elopes with the Adulterer, and is not reconcil'd, though she does not (d) stay with the Adulterer. Perkins, S. 354.

3. (e) The same Law if she be reconciled to her Husband by the Coercion of Holy Church. Perkins, S. 354. and not of her Good-Will.

4. (f) So if the Wife elopes with her Good-Will, and (g) stays with the Adulterer against her Will, she shall lose her Dower. Perkins, S. 354.

5. So if she be ravished, and stays with the Adulterer during the Life of her Husband willingly, without Reconcilement, she shall lose her Dower. 43 E. 3. 13. b.

6. But if the Wife be ravished, and stays with the Adulterer against her Will, she shall not lose her Dower. 43 E. 3. 19. b.

7. So if after Elopement the Wife be reconcil'd to her Husband of his free Will, without Coercion of Holy Church, she shall have Dower. Perkins, S. 354. D. 5, 2. Ma. 107, 23.

8. If a Man grants his Wife with her Goods to another, by Force of which the Wife lives with the Grantee afterwards all the Life of the Husband, this shall lose her Dower, because she lived in Adultery with the Grantee, notwithstanding the Grant of the Baron. 30 E. 1. Libro Parliamentorum, Fol. 96. (h) Williel-mus Paynell and Margery his Wife's Case, adjudged in Parliament.

(c) Co. Lit. 32. b. S. P. 2 Inst. 430. S. P.

(d) In the Original it is demur.

(e) Co. Lit. 32 b. S. P.

(f) Co. Lit. 32. b. S. P. 2 Inst. 436. S. P.

(g) Or is turned away by him. 2 Inst. 436.

(h) 2 Inst. 435. S. C. cited, together with the Deed of Grant at large.

9. If the Friends of the Husband eſloin him from his Wife, ſo that the Wife does not know what is become of him, and the Friends of the Husband publiſh that the Husband is dead, and after they procure the Wife to releaſe all Marriages and Intereſts which ſhe can have in him as her Husband, and after the Wife by the Perſwaſion of the Friends of the Husband marries with another, that dies, and ſhe takes another Husband, to whom Notice is given that the firſt is living, but no Notice was given thereof to the Wife; though the Wife lives in Adultery, and though the Husband was not out of the Realm, or beyond Sea, ſo that the Wife ought to take Notice that he was living, yet inaſmuch as ſhe non reliquit Virum ſponte, as the Statute ſays, but by the Perſwaſion of the Friends of her Husband that he was dead, and it does not appear that ſhe ever knew that he was living, this is not any ſuch Elopement as to bar her of her Dower. Mich. 12 Jac. between Green and Harvey, per Curiam.

10. If the Wife elopes, and after lives with her Husband Years and Days till the Death of the Husband, with the Good-Will and Aſſent of the Husband, without Coercion of Holy Church, this ſhall not bar her of her Dower, though it is not averred that ſhe was reconcil'd to her Husband. 19 E. 3. Elopement 94.

11. If a Woman elopes into another County, and lives in Adultery in a Manor that is of the joint Purchaſe of the Baron and Feme, without being reconcil'd, yet this ſhall not bar her of her Dower, becauſe the Baron is to ſee that none ſuch live within his Land. 8 E. 2. Dower 153. adjudged.

12. (i) The ſame Law, though the Wife lives in an Houſe of a free Tenant of the Manor. 8 E. 2. Dower 153. adjudged.

(i) 2 Inſ. 436. S. P.

13. If the Wife be divorced for Adultery, (which does not diſſolve the Bond of Marriage by the Canon Law, nor of our Church in this * Realm, but is only a Menſa & Thoro) (k) yet this ſhall bar her of her Dower.

* Fol. 681.

14. With this agrees the Law of Scotland. Skene Regiam Majeſtatem 43. b. Verſ. 5.

15. With this agrees the Civil Law. Reynolds of Divorces 86.

16. So the Canon Law is accordingly. Reynolds of Divorces 86.

(k) But vid. Co. Lit. 33. b. con.

17. By the Statute of *Weſtminſter* 2. made 13 *Ed.* 1. *cap.* 34. it is enacted, That if the Wife willingly leaves her Husband, (l) and goes away, and (m) continues with her Adulterer, ſhe ſhall be barr'd to (n) demand Dower of the Lands of her Husband, if ſhe be convict thereupon, except her Husband willingly, and without Coercion of the Church, reconcile her, (o) and ſuffer her to dwell with him.

(l) Though the Words are in the Conjunctive, yet if ſhe be taken away not willingly, but againſt her Will, and after conſent, and remain with the Adulterer, without being reconcil'd, &c. ſhe ſhall loſe her Dower, for the Manner of her going away is not the Cauſe of the Bar, but her remaining with the Adulterer. 2 Inſ. 435. (m) Whether the Stay be ſmall or great. 2 Inſ. 436. (n) But Noy 108. per Daniel, an Elopement is no Bar of Dower ad Oſtium Eccleſiæ. (o) Cohabitation without Reconciliation is not ſufficient. 2 Inſ. 436.

(Q) What

(Q) What Act of the Baron ſhall bar the Feme of her Dower.

(a) Recoveries at the Common Law.

1. **AT the Common Law, if the Baron was once ſo ſeiſed, that the Wife was entitled to Dower, if he after aliened the Land, and a Recovery was after had in a real Action upon another Poſſeſſion, yet his Wife ſhould have had Dower.** 47 E. 3. 13. b. 14 H. 4. 33. admitted per Iſſue.

(a) If the Baron is Tenant in Tail, and a Recovery is had againſt him and his Wife, with a Voucher over, this ſhall bar her of her Dower, though the entire Recompence in Value ſhall go to the Iſſue in Tail. 2 Co. 78. a. —And per 10 Co. 43. a. the Uſage upon a Recovery againſt Baron and Feme hath always been to examine the Feme: But vide 2 Rol. Abr. 395. Letter D. with the Notes and Additions there.

2. If in a real Action againſt the Husband, he renders the Land to the Demandant, and dies, and in a Writ of Dower the Tenant pleads this Recovery in Bar, ſhe may reply, that it was by Fraud, Colluſion, or Agreement of the Husband, for ſuch a Recovery by Reddition, where the Demandant had no Right, did not bind her by the Common Law. 2 *Inſ.* 349, 350.

3. Otherwiſe if the Recovery had been by Default without Covin. 2 *Inſ.* 349.

4. But by the Statute of *Weſtminſter* 2. made 13 *Ed.* 1. *cap.* 4. a Woman ſhall be endowed as well where a Recovery was had againſt her Husband by Default, as by Covin, *&c.* unleſs the Right be ſhewed.

(R) What Act in Law will bar the Wife of her Dower.

(a) Divorce.

1. (b) **IF the Divorce be** Cauſa Precontractus, **the Wife ſhall not have Dower.** 47 E. 3. Pl. 78.
2. (c) **So if it be** Cauſa Conſanguinitatis. 47 E. 3. Pl. 78.
3. (d) **So if it be** Cauſa Affinitatis. 47 E. 3. Pl. 78.
4. **So if it be** Cauſa Frigiditatis. 47 Ed. 3. Pl. 78.
5. **But if it be** Cauſa Profeſſionis, **the Wife ſhall be endowed.** 47 Ed. 3. Pl. 78.
6. **If a Woman be endowed** ad Oſtium Eccleſia, (e) yet ſi Matrimonium in Vita contrahentium, accuſatum & diſſolutum ſit, quacunque Ratione, deſinit eſſe Dos cum deficiat Matrimonium, & deſinit Dotis Exactio. Bracton, Lib. 2. Fol. 92. S. 4. & Lib. 4. Fol. 304.

(a) This muſt be intended of a Divorce a Vinculo Matrimonii. Co. Lit. 32. a. —Not of one a Menſa & Thoro only. Co. Lit. 33. b. —Where it ſhall be a Vinculo Matrimonii, and where a Menſa & Thoro only vid. 1 Part 699. Pl. 10, 702. Pl. 8, 730. Letter G. and the Notes there. Et vid. Noy 100. 2 Inſ. 93.

(b) Co. Lit. 32. a. S. P. (c) Co. Lit. 32. a. S. P. (d) Co. Lit. 32. a. S. P. (e) But it is ſaid, that if, upon the Aſſignment of Dower ad Oſtium Eccleſie, it be ſpecified, viz. that notwithſtanding any Divorce ſhall happen, yet that ſhe ſhall hold it for her Life, it is good. Co. Lit. 32. and Bracton there cited to be accordingly.

(S) In what Caſes Aſſignment of Dower is neceſſary.

1. If a Woman recovers Dower of Land, ſhe cannot enter before Execution is ſued. 40 Ed. 3. 22. 45 Ed. 3. 5. b.

2. (a) The ſame Law is where the Recovery is of a Rent. 40 Ed. 3 22. Yet there it is certain enough.

(a) As if a Writ of Dower be brought of

61 l. Rent Charge, and Judgment is given, that ſhe ſhall recover the third Part, though it is certain ſhe ſhall have 40 s. yet ſhe cannot diſtrain for it until the Sheriff hath delivered the ſame to her. Co. Lit. 34. b. 37. b. —So if the Wife of one Tenant in Common recovers a third Part of a Moiety, yet after Judgment ſhe cannot enter, until the Sheriff hath delivered to her a third Part, although the Delivery of the Sheriff ſhall reduce it to no more Certainty. Co. Lit. 34 b. 37. a, b.

3. If a Man endows his Wife *ad Oſtium Eccleſiæ*, he then openly declares the Quantity and Certainty of the Land which ſhe ſhall have for Dower; and (b) in ſuch Caſe the Wife, after the Death of the Huſband, (c) may enter into the Land of which ſhe was endowed, without other Aſſignment. *Lit. Sect.* 39.

(b) For this Reaſon Dower ad Oſtium Eccleſiæ, or ex Aſſenſu Patris, is better for the Wife than the Dower at the Common Law. Co. Lit. 36. b. (c) Or may have a Writ of Dower for it, as for the third Part at Common Law. Co. Lit. 35. b.

(T) What Perſon may aſſign Dower of common Right.

1. An Infant may aſſign Dower in Pais, becauſe he is compellable by Writ.

2. An (a) Infant in Ward cannot aſſign Dower of the Land in Ward, for the Prejudice that may come to the Lord thereby. 9 H. 6. 6 b.

(a) But before the Guardian in Chivalry entered, the Heir within Age might have aſſigned Dower, for that the Guardian might waive the Wardſhip. Co. Lit. 35. a. 37. b.

3. (b) Guardian in Chivalry may endow her. 9 H. 6. 6. b. 24. b.

4. (c) And a Writ of Dower lies (d) againſt Guardian in Chivalry. 47 Aſſ 5. per Finchden.

(b) Co. Lit. 35. a. S. P. 39. a. S. P. (c) Co. Lit. 35. a. S. P. (d) Vid. the Diviſion under this Title Dower, viz. Againſt whom a Writ of Dower lies.

5. (e) If a Husband hath a Ward in the Right of his Wife as Guardian in Chivalry, a Writ of Dower lies againſt the Husband, without naming the Wife. 47 Aſſ. 5. per Finchden.

(e) Co. Lit. 38. b. S. P.

Fol. 682.

6. A Writ of Dower does not lie againſt Guardian in Socage. 29 Aſſ. 68.

7. (f) A Guardian in Socage cannot aſſign Dower. 29 Aſſ 68. But quære.

(f) Co. Lit. 35. a.

8. The King committed the Wardſhip during the Nonage of the Infant; and whether the Committe might aſſign Dower ſo as to bind himſelf, *Kelw.* 112. *dubitatur.*

(V) Of what Things it may be.

1. If the Wife recovers Dower of a Rent, ſhe ſhall not (a) have the Rent incurred before Judgment, nor after Judgment before Execution. 40 E. 3. 22.

(a) But if her Husband died ſeiſed, ſuch Woman ſhall recover Damages by the Statute of Merton, made 20 Hen. 3. cap. 1. But for the Expoſition of this Act, vid. poſt under this Title, Where Damages ſhall be recovered in a Writ of Dower.

(X) Aſſignment.

(a) How it is to be made.

1. If a Woman recovers Dower of Land, of which the Tenant is (b) ſole ſeiſed, (c) it ought to be aſſigned by Metes and Bounds. 45 Ed. 3. 5. b.

(a) Where ſhe ought to be endowed according to the Value at the Time of the Aſſignment, and not according to the Value it was of in the Time of her Husband, Co. Lit. 32. a. —If her Husband ſows the Ground, and dies, and his Heir aſſigns unto her the Land ſow'd for her Dower, ſhe ſhall have the Corn, for ſhe ſhall be in de optima Poſſeſſione Viri above the Title of the Executors. 2 Inſ. 81. (b) For in ſome Caſes, though the Husband was ſole ſeiſed, the Wife ſhall not be endowed in Severalty by Metes and Bounds; as if a Man ſeiſed in Fee marries, and enfeoffs 8 Perſons, and dies, and his Wife brings Dower againſt the eight, and two confeſs the Action, and the other ſix plead in Bar, and deſcend to Iſſue, the Demandant ſhall have Judgment to recover the third Part of two Parts of the Land in eight Parts to be divided, and after the Iſſue being found for the Demandant againſt the ſix, the Demandant ſhall have Judgment to recover againſt them the third Part of ſix Parts of the ſame Land, in eight Parts to be divided. Co. Lit. 32. b. (c) Otherwiſe it is Error. Styl. 277. per Roll.

2. But otherwiſe it is where the Thing recovered is not ſeverable. 45 E. 3. 15. b.

3. If A. ſeiſed of Lands in Fee, takes a Wife, and after deviſes it for 21 Years to B. and dies, and after C. his Heir aſſigns to the Wife the third Part of the Land for her Dower, without ſetting it out by Metes and Bounds, and the Wife accepts it in Satisfaction of her Dower; though ſhe was not bound to accept it ſo in common, without ſetting it out by Metes and Bounds, nor the Heir bound to aſſign it but by Metes and Bounds, for the Prejudice that may accrue to them to occupy it in common, yet inaſmuch as the third Part in common is due by Law, and they both conſented to accept it according to Law, they may by their Conſent waive the Aſſignment by Metes and Bounds, which is only for their own Advantage, and accept it as it is due by Law: And though the Leſſee for Years did not agree thereto, yet the Aſſignment of the Tenant of the Freehold ſhall bind him. Trin. 1651. between (d) Coots and Lambert, adjudged upon a ſpecial Verdict. Intratur Somerſet, H. 1649. Rot. 201.

(d) Booth and Lambert, Styl. 276. S C. where the Tenant of the Land ſaid theſe Words to the Widow, viz. I do endow you of a third Part of all the Lands your Husband died ſeiſed of; and upon a Special Verdict it was debated, Whether this was a good Aſſignment of Dower, not being per Metas & Bundas? And it ſeems to have been held good per Curiam, who ſaid, it need not be by Metes and Bounds, if the Parties conſent it ſhould be otherwiſe.

4. A Rent may be reſerved for Equality of Dower, if the Thing aſſigned be of greater Value than ſhe ought to have. 17 E. 3. 10.

5. But this cannot enure as a Reſervation, if the Wife in another Clauſe of the Deed makes a Grant of a Rent, without any

any Mention in the Deed that the Thing is of greater Value. 17 Ed. 3. 10.

6. If the Guardian aſſigns Dower, reſerving a Rent for Equality during the Nonage of the Heir, this is not good, becauſe this ſhall not go to the Heir. 17 Ed. 3. 10.

7. If Dower be aſſigned upon Condition, (e) the Condition is void. Com. Colthirſt. Bieu. for ſhe comes in by her Husband.

(e) Cro. Eliz. 452.

8. If Dower be aſſigned of the Lands, excepting the Trees growing on the Land, this is a void Exception for the Cauſe aforeſaid. Mr. Coventry at a Moot cited 44 El. B. R. between Bullock and Finch, to be ſo adjudged.

9. If Dower be aſſigned with a Remainder over, it is a void Remainder, becauſe ſhe comes in by her Husband; and then if it ſhould be a good Remainder, it would be without a particular Eſtate. (ee) Com. Colth. Beiu.

(ee) Pl. Com. 25. b.

10. The King may aſſign Dower without limiting any Eſtate. Fitz. Natura 263. Da. 1. 46.

11. If a Woman be endowed of an Advowſon, ſhe ſhall be aſſigned the third Part of the Advowſon, and not only the third Part of the Profit, (f) ſcilicet, the third Preſentation. 17 E. 3. 38. b. Contra, 17 E. 3. 22. b.

Fol. 683.

(f) That the third Preſentation ſhall be aſſigned, vid. Co. Lit. 32. a. Poſt. 668. Y. 1.

12. If a Woman recovers Dower of a Rectory impropriate, where there is not any Glebe, the Sheriff ſhall put her in Poſſeſſion of the third Part of the Tythes generally, and (g) not of the Tythes that iſſue out of any third Part of the Land of the Pariſh in certain. Mich. 9 Jac. B. per Curiam.

(g) The ſureſt Endowment of Tythes is of the third Sheaf, for what Land ſhall be ſowed is uncertain. Co. Lit. 32. a. 11 Co. 25. b. Et vid. 1 Brownl. 126. 2 Brownl. 143. —It was agreed the Sheriff might aſſign this Dower without a Jury. 2 Brownl. 143.

13. (h) If a Woman be dowable of three Manors, the Sheriff may aſſign her one of the Manors in lieu of all three. 12 E. 4. 2. where the Moiety of a Manor. Ancient Entries, Quare impedit 529. 10.

(h) Moor 12. Pl. 47. 19. Pl. 66. S. P. adjudged con. upon a Writ of Dower de Tribus Maner. &c. —But if the Writ had been of all his Lands and Tenements, and there had been Meadow and Paſture, the Sheriff might have aſſigned all the Meadow. Moor 12. Pl. 47. 19. Pl. 66. agreed per Curiam.

14. So if an Advowſon be appendant to one or more of the ſaid Manors, the Sheriff may aſſign one of the Manors with the Advowſon appendant in lieu of Dower. 12 E. 4.

15. If a Woman be dowable of one Manor, the Sheriff may aſſign the third Part of the Manor in common in lieu of Dower, without ſetting it out by Metes and Bounds. Ancient Entries, Quare 529. 10. and Quare impedit in Dower 1. ſo aſſigned in Chancery.

16. A Woman (i) ſhall not be endowed of a Mill by Metes and Bounds, nor in common with the Heir, (k) but either ſhe may be endowed of the third Toll-diſh, or *de integro Molendino per quemlibet* 3 *Menſem. Co. Lit.* 32. a.

(i) For if it ſhould be divided, neither of the Parties could make any Uſe of their Part: And in a Writ of Dower, where Judgment was given for a Woman, That ſhe ſhould recover the third Part of a Will and Mill in Separalitate per Metas & Bundas, it was for this Cauſe reverſed. Gilpin and Cook, 1 Lev. 182. Et vid. 11 Co. 25. b. N. Bendl. 120. Pl. 151. Styl. 101. (k) 2 Brownl. 143.

17. So of a Villein, a Woman ſhall be endowed of the third Day's Work, or of every third Week's or Month's Work. *Co. Lit.* 32. a.

18. If

(l) So if a Rent be aſſigned, it muſt not be for leſs Eſtate than for her Life. Hob. 153. 1 And. 288.

18. If (l) Land be aſſigned to a Woman for Years in Recompence of her Dower, this is no Bar thereof, becauſe ſhe has no ſuch Eſtate therein, as ſhe would have had if endowed. *Trin.* 38 *Eliz.* 2 *And.* 31. *per Curiam.*

(m) Styl. 69.

19. Upon an *Habere facias Seiſinam* in Dower the Sheriff returned, *quod Habere fecit Seiſinam de tertia Parte* of the Honour, Hundreds, Tenements, *&c. viz. de uno Tenemento ſive Firma in C. vocat. Weſton-Farm, in Tenura J. S.* and 12 other Tenants by Copy, and it was held, that this being in an Aſſignment of Dower, and only the Return of the Sheriff, was certain enough, and that there needed not ſuch preciſe Certainty (m) therein as in Declarations and Indictments. *Mich.* 18 *Jac.* between Sir *Charles Howard* and Sir *William Cavendiſh*, *Cro. Jac.* 621. adjudged.

(Y) Aſſignment of Dower againſt common Right in lieu of Dower.

What it is.

(*) Ante 667. 11.

1. (*) TO aſſign Dower of an Advowſon is againſt common Right, for ſhe ought to have the third Preſentation of common Right. 12 E. 4. 2.

2. So an Aſſignment of Rent out of Land is againſt common Right. 12 E. 4. 2.

(a) That the Sheriff may make ſuch Aſſignment, vid. Moor 12. Pl. 47. 19. Pl. 66. Ante 667. Pl. 13.

3. An (a) Aſſignment of all the Wood, or all the Meadow in lieu of all the Wood, Meadow, Paſture, and Arable, is not againſt common Right, but common Right is the third Part of each. 12 Ed. 4. 2. b.

(b) Co. Lit. 173. a. Moor 19. Pl. 66.

4. (b) If ſhe be dowable of three Manors, and ſhe accepts of the Heir of one Manor in Dower in Allowance of all, this is an Endowment againſt common Right. 18 H. 6. 27. 19 E. 3. Qure impedit 154.

(Z) What Perſon may aſſign it.

1. THE Sheriff cannot aſſign Dower againſt common Right. 12 Ed. 4. 2. Contra, 18 H. 6. 27.

2. The Heir may. 12 Ed. 4. 2. b. 26 Aſſ. 41.

(a) It muſt be made by him that is Tenant of the Land. Co. Lit. 34. b. —By the Tenant of the Freehold againſt whom the Writ of Dower lies. Co. Lit. 35. a. —By Guardian in Chivalry, becauſe a Writ of Dower lies againſt him; but not by Guardian in Socage. Co. Lit. 35. a. But vid. ante, Letter (T), Pl. 4, 5.

3. And ſo the (a) right Tenant of the Land may. 12 Ed. 4. 2. b.

4. The Sheriff may aſſign a Rent in lieu of Dower. 20 Aſſ. 41.

(b) 9 Co. 16. a. 17. a.

5. If the Heir be in Ward to the King, (b) and the Wife is to be endowed in Chancery, the Chancery may aſſign a Rent de novo to her out of the Land of which ſhe is dowable, in lieu of Dower, and this ſhall bind the Heir. 26 Aſſ. 41.

6. So if a Writ be directed out of Chancery to the Eſcheator to deliver to the Wife 10 Marks Rent, and the Land in the Name of Dower, and the Eſcheator aſſigns to her 5 Marks Land, and 5 Marks Rent de novo, out of other Land of which ſhe is dowable, this ſhall bind the Heir. 26 Aſſ. 41. adjudged by all the Juſtices.

7. (c) A Rent out of the ſame Land may be aſſigned in lieu of Dower. 7 H. 6. 34. b. 26 Aſſ. 41. (c) Co. Lit. 34. b.

8. (d) One Jointenant may aſſign Dower of a third Part of the Land in Certainty, and this ſhall bind his Companion, becauſe they were compellable by Law ſo to do. *Co. Lit.* 34. b. (d) 2 Rep. 67. a. S. P.

9. But if one of them aſſign a Rent out of the Land in lieu of the Thirds of the Land, this ſhall not bind his Companion, becauſe they were not compellable by Law ſo to do. *Co. Lit.* 35. a.

10. (e) If the Husband makes a Feoffment of ſeveral Parcels, and dies, and one Feoffee aſſigns Dower to the Wife of Parcel of the Land, in Satisfaction of all the Dower which ſhe ought to have in the Lands of the other Feoffees, the other Feoffees can take no Benefit of this Aſſignment, becauſe they are Strangers thereto, and cannot plead the ſame. *Co. Lit.* 35. a. (e) Moor 28. ſeems to be S. P. cited to be adjudged; but the Book miſprinted.

11. (f) But in ſuch Caſe, if the Husband die ſeiſed of other Lands in Fee, which deſcend to his Heir, and the Heir endows the Wife of certain Lands, in full Satisfaction of all the Dower that ſhe ought to have, as well in the Lands of the Feoffees as in his own Lands, this Aſſignment is good, and the ſeveral Feoffees may take Advantage of it, for if the Wife brings a Writ of Dower againſt any of them, they may vouch the Heir, and he may plead it. *Co. Lit.* 35. a. (f) Moor 28. S. P. cited to be adjudged. 9 Co. 18. b.

12. (g) An Aſſignment by a Diſſeiſor, Abator, *&c.* if they came to the Eſtate by Colluſion between the Widow and them, though indifferently made, and after Judgment by the Sheriff of an equal third Part, ſhall not bind the Diſſeiſee. *Co. Lit.* 35. a. (g) Co. Lit. 357. S. P. For this, vid. ante 309. Pl. 2. 3. and the Notes there.

13. (h) But an Aſſignment by a Diſſeiſor, *&c.* if there be no Covin, and it be not prejudicial to the Diſſeiſee, *&c.* is good. *Co. Lit.* 35. a. (h) Co. Lit. 357. S. P. 2 Rep. 67. a. S. P.

14. But a Diſſeiſor, *&c.* cannot aſſign a Rent out of the Land to her for Dower to bind the Diſſeiſee, *&c.* *Co. Lit.* 35. a.

15. The Guardian in Chivalry may aſſign a Rent out of the Land in lieu of Dower. *Co. Lit.* 39. a.

16. If Tenant in Tail aſſigns a Rent out of the Land in lieu of Dower, this ſhall bind his Iſſue, unleſs it amount to more than a third Part. *Paſch.* 34 *Eliz.* between *Bichly* and *Bichly*, 1 *And.* 288. by Two Judges.

(A) Aſſignment, common Right.

Fol. 684.

(a) How.

1. If a Man aſſigns a Rent out of Land of which ſhe is dowable upon (b) Condition, in lieu of Dower, this is not good; for ſhe ought to have it free of any Condition, as ſhe ſhould have the Land. Maſter Bridgman, at a Moot in Aula, cited a Report 27 Eliz. B. between (c) Wentworth and Wentworth, to be ſo adjudged.

2. A Rent out of the ſame Land may be aſſigned in lieu of Dower without Deed, 12 H. 4. 17. b. 7 H. 6. 33. b.

(a) No Livery of Seiſin, or Writing neceſſary to an Aſſignment of Dower, becauſe due of common Right. Co. Lit. 35. a.

(b) An Aſſignment of Dower muſt be abſolute, and not conditional, or ſubject to any Limitation. Co. Lit. 34. b.

(c) 2 And. 30, 31. S. C. adjudged. Cro. Eliz. 451. S. C. adjudged, it appearing by the Pleading, that the Condition was broke. Noy 55. S. C. adjudged.

3. If upon an *Habere facias Seiſinam* upon a Judgment in Dower, the Sheriff returns, That *habere fecit Seiſinam de tertia Parte Hundredorum, Tenementorum, &c. viz. de uno Tenemento ſive Firma in C. vocat. Weſton's Farm, tunc vel nuper in Occupatione J. S.* this is certain enough, becauſe it is only the Return of the Sheriff, and there needs not ſo much Certainty as in Declarations and Indictments. *Mich.* 8 *Jac.* between Sir *Charles Howard* and Sir *William Cavendiſh*, *Cro. Jac.* 621, by all the Juſtices, *præter Houghton*, who inclined otherways: And it was ſaid by *Lea* Chief Juſtice, That *Meſſuagium ſive Tenementum in Tenura J. S.* is good and uſual; and it would be infinite to ſet down here every of them by it ſelf: But when he ſaith in the End, that he hath deliver'd them all by Metes and Bounds, it ſufficeth.

(B) What Things may be aſſigned in lieu of Dower.

(*) That ſuch Rent may be aſſigned by Parol, vide Co. Lit. 34. b. 169. a. 1 And. 288. Hob. 153. Palmer 264.

1. AN Aſſiſe lies for Rent aſſigned (*) without Deed out of Land of which ſhe is dowable; therefore it is in lieu of Dower. 33 H. 6. 2. b.

2. An Aſſiſe lies not for Rent aſſigned without Deed out of other Land of which ſhe is not dowable; therefore it is void, and not in lieu. 33 H. 6. 2. b. Perkins, S. 407.

3. The Aſſignment muſt be either of ſome Part of the Land whereof ſhe is dowable, or of a Rent or other (a) Profit iſſuing out of the ſame. *Co. Lit.* 34. b.

(a) As 20 Acres of Corn, &c. Moor 59. Pl. 167.

4. But an Aſſignment of other Land (b) whereof ſhe is not dowable, or of a Rent iſſuing out of the ſame, is no Bar of Dower. *Co. Lit.* 34. b.

(b) If the Heir conveys to the Widow for her Life any

5. Upon an Aſſignment of Part of the Lands in Dower, the Heir by Parol may aſſign a Way through the other Parts. *Mich.* 22 *Jac.* between *White* and *Robinſon*, 2 *Rol. Rep.* 475. adjudged.

Land of which ſhe is not dowable, in full Satisfaction of her Dower, this is no Bar of her Dower. 4 Co. 1. b.

(C) In what Caſes a Woman ſhall be twice endowed.

1. IF a Woman be endowed, and after her Dower is evicted by an elder Title, (a) ſhe ſhall have a new Writ of Dower, and ſhall be endowed of the other two Parts. 43 Aſſ. 32. admitted.

(a) This muſt be intended where ſhe is endowed of the immediate Eſtate deſcended to the Heir of her Husband, and not by the Alienee of her Husband, or of the Heir. 9 Co. 17. b.

2. If

2. If a Woman brings a Writ of Dower against the Tenant of the Land, who vouches the Heir in the same County, (b) and the Woman recovers against the Heir, if he hath, and if not, against the Tenant, and the Woman sues Execution against the Heir, and after this is evicted by an elder Title, she shall have a Scire Facias upon the first Recovery against the Tenant to be endowed of the two Parts. 43 Ass. 32.

3. The same Law if the first Endowment was in Chancery. 43 Ass. 32. adjudged.

(b) In this Case the Demandant may shew, that the Heir hath Lands descended to him in the same County, (for to another County the Original does not extend) and pray, that she be endowed of his Estate for the Benefit of the Voucher, to be newly endowed 9 Co. 17. b. 18. a. And vid Moor 25. Pl. 86. Dyer 202. Pl. 71. 2 Rol. Abr. 751. and the Notes there. —Otherways if the Tenant vouch one, who vouches the Heir of the Husband, for in that Case there is no immediate Privity between the Demandant and the Heir, and the Demandant shall recover against the Heir only when the Tenant in Demesne vouches him. 9 Co. 17. b. 18. a. —And how and what Judgment shall be given where the Heir is vouched in such Case, vid. Goldingham and Some, Cro. Jac. 688. Hut. 71, 72. Winch. 80, 88.

4. Upon an *Habere facias Seisinam* in Dower, the Sheriff returned, that he had delivered to the Demandant 84 Acres of the Land mention'd in the Writ, and the Demandant afterwards brought a *Scire Facias* against the Tenant, suggesting that the Sheriff had assigned to her 60 Acres, Part of the 84 of the Land of a Stranger, not comprized in the Record, and prayed a new Division; and the Tenant pleaded, that the 24 Acres were Parcel of the Land recovered, and that she had entered upon and accepted the 24 Acres. *Mich.* 44 & 45 *El. Moor* 679. *Pl.* 928. adjudged upon Demurrer, that she was barr'd by her Entry and Acceptance of the 24 Acres, though it be less in Quantity than the Third of the Whole in the Record.

(D) What Charges made by the Husband, or other, and upon what Thing, the Wife shall avoid.

1. D. 8 Eliz. 251. a Man takes a Wife, having a Manor, in which is a Custom, that the Lord, Supervisor, or Deputy, may demise by Copy, and devises, that two should make customary Estates for the Payment of his Debts, and dies, the two hold Courts in their own Name, and grant Copies in Reversion according to the Custom, the Wife hath one of the Copyholds assigned to her for her Dower, & per Curiam she shall avoid this Grant.

2. Co. 4. 26 El. 24. (a) the Lord of a Copyhold Manor, within which there were many Copyholders for Life, took Wife, the Copyholder died, and the Lord granted it to another, and died, and adjudged, that the Wife should not avoid this Grant in a Writ of Dower, (b) because the Custom was before the Title of Dower, and the said Opinion of 8 El. cited contra.

(a) For this, vid. the Division under Title Copyhold, Where a Copyhold shall be subject to the Lord's Incumbrances. (b) Where the Husband during the Coverture makes a Lease of a Copyhold, which is good by Custom, it shall not be avoided by the Feme, who is after endowed by the Custom. Holder and Foxly, Moor 758. Pl. 1047. adjudged. Cro. Jac. 36. S. C. adjudged, unless there be a special Custom to avoid it, for the Lessee comes under the Custom, and by the Lord's Licence, as well as the Feme.

3. If

3. If the Wife accepts Dower of the Heir againſt common Right, ſhe ſhall hold it ſubject to the Charges of her Husband. 18 H. 6. 27.

(c) The Endowment by Metes and Bounds, according to common Right, is more beneficial to the Wife than to be endowed againſt common Right, for there ſhe ſhall hold the Land charged, in reſpect of a Charge made after her Title of Dower. Co. Lit. 32. b.

4. But otherwiſe it is if ſhe be endowed (c) againſt common Right by the Sheriff. 18 H. 6. 27.

Fol. 685.

5. If the Husband grants a Rent out of four Manors, and dies, and his Wife is endowed by the Heir of one Manor in lieu of all, ſhe ſhall hold it diſcharged. 19 Ed. 3. Quare impedit 154. per Thorpe.

6. If A. ſeiſed in Tail of a Manor to which an Advowſon is appendant, grants the next Preſentation to the Church to B. and after takes C. to Wife, and dies, and the Wife is endowed of this Manor, with the Appurtenances, in lieu of all her Dower, and after the Church is void, quære whether ſhe may preſent, and avoid the Grant made before the Coverture.

(d) I ſuppoſe it muſt be intended that the Husband became indebted to the King after her Title of her Dower accrued. Vid. F. N. B. 150.

7. Tenant in Dower (d) ſhall not be diſtrained in the Lands which ſhe holds in Dower for a Debt due to the King by her Husband in his Life-time. *Co. Lit.* 31. a.

8. If a Man ſeiſed in Fee marries, and then grants a Rent-charge, and after makes a Feoffment in Fee, and takes back an Eſtate in Tail, and dies, and his Wife recovers Dower againſt the Iſſue in Tail by Reddition, and the Wife makes a Surmiſe that her Husband died ſeiſed, and prays a Writ to enquire of the Damages, which is granted her, ſhe ſhall hold the Land charged with the Rent, for ſhe accepts her ſelf dowable of the ſecond Eſtate; for of the firſt Eſtate, whereof ſhe was dowable, her Husband died not ſeiſed; ſo that if the Rent be more to her Detriment than the Damages are beneficial to her, it is good for her in ſuch Caſe to make no ſuch Prayer. *Co. Lit.* 33. a.

9. If a Man be ſeiſed of Three Manors of equal Value, and takes Wife, and charges one of the Manors with a Rent-Charge, and dies, ſhe may, by the Proviſion of Law, take a third Part of all the Manors, and hold them diſcharged; but if ſhe will accept the entire Manor charged, it is holden that ſhe ſhall hold it charged. *Co. Lit.* 173. a.

(e) For this, vid. 1 Rol. Abr. 727. Pl. 19.

10. (e) If the Husband ſows the Land, and dies, and his Heir aſſigns the Land ſown to the Widow for her Dower, ſhe ſhall have the Corn, for ſhe ſhall be in *de optimis Poſſeſſionis Viri ſui*, above the Title of the Execurs. 2 *Inſt.* 81.

(E) (a) Attendancy.

1. (b) TEnant in Dower of a Meſnalty ſhall be Attendant to the Heir for the third Part of that which the Rent is over. 1 H. 4. 3.

2. If a Woman be endowed of a Meſnalty, the Heir cannot diſtrain the Woman for the third Part which ſhe ought to pay him. 1 H. 4. 3.

(a) For ſhe continues the Eſtate of her Husband; and if the Meſn grants to the Tenant to acquit him againſt the Lord and his Heirs; and the Lord dies, and the Seigniory is aſſigned to his Wife in Dower, and ſhe diſtrains, tho' the Grant was to acquit againſt the Lord and his Heirs only, yet it extends to the Wife. Co. Lit. 241. a. (b) For this, vid. Kelw. 129. a, b.

3. A Man holds by Homage Fealty, and 10 *s.* Rent, and makes a Gift in Frankmarriage, and the Donee in the 4th Degree marries, has Iſſue, and dies, and the Iſſue enters, and endows his Mother; and whether the Mother ſhould pay the third Part of the Rent to the Heir, *Kelw.* 124. *dubitatur.*

What Act of the Baron will bar the Feme of her Dower.

Alienation.

1. IF a Man takes a Wife of the Age of 7 Years, and then aliens his Land, and after ſhe attains the Age of 9 Years, and he dies, ſhe ſhall be endowed; for though ſhe was not abſolutely dowable at the Time of the Marriage, yet ſhe was conditionally ſo if ſhe attained the Age of 9 Years before the Death of her Husband. *Co. Lit.* 33. a.

2. So if the Husband aliens his Land, and the Wife is attainted of Felony, now ſhe is diſabled; but if pardon'd before the Death of her Husband, ſhe ſhall be endowed. *Co. Lit.* 33. a.

3. But if a Man marries an Alien, and then ſells his Land, and after, before the Death of her Husband, ſhe is made a Denizen, yet ſhe ſhall not be endowed, becauſe ſhe had an original abſolute Diſabillty, and her Capacity and Poſſibility to be endowed came by Denization. *Co. Lit.* 33. a.

4. Otherways if ſhe were naturalized by Act of Parliament. *Co. Lit.* 33. a.

What Act of the Baron will bar the Feme of her Dower.

Attainder.

1. IF the Husband had committed Treaſon or (a) Felony, the Wife by the Common Law had been barr'd both of her Dower (b) *ad Oſtium Eccleſiæ* and *ex Aſſenſu Patris*, as well as of the Dower which the (c) Common Law gave her. *Co Lit.* 37. a. 41. a.

2. (d) So if the Husband had made a Feoffment in Fee, and (e) after committed (f) Treaſon or Felony, *&c.* *Co. Lit.* 41. a.

(a) This is not intended of Petit-Larceny. Co Lit. 41 a.

(b) Though the Felony was done after the Dower aſſigned. Co. Lit. 41. a.

(c) So of Dower by Cuſtom. Co. Lit. 41. a. Winch. 27.

(d) Manvill's Caſe, S. P. appears. Moor 639. Pl. 879. 13 Co. 19. Sav 54, 55.

(e) Dyer. 140 b. adjudged; though objected, that the Lands being ſold before the Treaſon committed, were not ſubject to any Forfeiture.

(f) So though pardoned, for that extends to the Life of the Offender only, but takes not away the Attainder, by which ſhe is barr'd from demanding Dower. 1 Leon. 3.

3. If before the 1 *Ed.* 6. a Man ſeiſed of Lands in general Tail had taken Wife, and been attainted of Felony, his Iſſue ſhould have inherited, and yet his Wife ſhould not have been endowed, for the Statute of *Weſtminſter* 2 relieved the Iſſue in Tail, but not the Wife in that Caſe. *Co. Lit.* 40. b.

(g) Co. Lit. 31. a 40. b.

4. (g) By 1 *Ed* 6. *cap.* 12. the Wife ſhall be endowed, though her Husband was attainted, convicted, or outlawed of Treaſon, Petit-Treaſon, Miſpriſion of Treaſon, Murder, or Felony.

(h) Co. Lit. 31. a. 37. a. 392 b.

5. (h) But by 5 *&* 6 *Ed.* 6. *cap.* 11. the Wife of one attainted of (i) any Treaſons, (k) whatſoever it be, ſhall not be endowed ſo long as the Attainder is in Force.

(i) But as to Treaſons within the 1 El. cap. 1. 18 El. cap. 1. &c. 'tis expreſly provided, the Wife notwithſtanding may be endowed. —So where provided only that the Felony ſhall make no Corruption of Blood, the Dower of the Wife is implicitly ſaved. 3 Inſ. 90. b.

(k) High-Treaſon or Petit-Treaſon, Co. Lit. 37. a. 392 b. Dyer. 140. b.

(a) (b) (c) Dower (d) ex (e) Aſſenſu (f) Patris.

Of what Things (g) he may endow her.

1. IF there be Tenant for Life of Land, the Reverſion to the Father in Fee, the Son and (h) Heir apparent of the Father cannot endow his Wife of this Land by the Aſſent of the Father, becauſe the Fa-

(a) Though Dower ad Oſtium Eccleſiæ, &c. are certain, yet the Woman may have a Writ of Dower for it as for the third Part at Common Law. Co. Lit. 35. b.

(b) If the Wife is endowed ex Aſſenſu Patris, and the Husband dies, the Wife may take that, or have her Dower at the Common Law; but if ſhe brings a Writ of Dower at Common Law, and counts, ſhe ſhall never after claim her Dower ex Aſſenſu Patris. Co. Lit. 145. a.

(c) Lit. Sect. 40. 6. Co. 57. b.

(d) An Infant may endow his Wife ex Aſſenſu Patris. Co. Lit. 35. b. Lit. Sect. 47. —Otherwiſe if ad Oſtium Eccleſiæ, & non ex Aſſenſu Patris. Lit. Sect. 47.

(e) This Aſſent ought to appear by Deed, becauſe his Eſtate is thereby charged with a future Freehold. Co. Lit. 36. a.

(f) So ex Aſſenſu Matris, but not Fratris, or Conſanguinei, becauſe he that endows poſſibly may not continue Heir apparent. Co. Lit. 35. b. —And it is ſaid by ſome, that if the Father after his Aſſent be attainted of Treaſon or Felony, ſo that the Husband does not continue Heir, the Wife loſes her Dower. Co. Lit. 35. b.

(g) The Son endows, and the Father only aſſents, and where the Father endowed it was held void. Co. Lit. 35. b.

(h) It muſt be ſuch a Son as muſt continue Heir apparent, ſo that the youngeſt Son and Heir apparent of Lands in Borough-Engliſh cannot endow his Wife ex aſſenſu Patris, becauſe the Father may have another Son, and then the Husband is not Heir apparent: And it is in reſpect of the conſtant and perpetual Apparance that the Son and Heir apparent may endow his Wife of his Father's Land. Co. Lit. 35. b. 3 Co. 38. a.

ther at the Time of the Aſſent had only a Reverſion expectant upon an Eſtate of Freehold, whereof he could not have endowed his own Wife; and though the Tenant for Life dies, living the Husband, yet *quod ab Initio non valet, &c.* *Co. Lit.* 35. a.

2. If a Man endows his Wife *ex Aſſenſu Patris*, and the Husband dies, the Wife may enter or have a Writ of Dower, though the Father be living. *Co. Lit.* 35. a.

(a) Dower de la pluis Beale.

(a) For this, vid. Co. Lit. 38. b. 39. a.

1. IF a Man was ſeiſed of 40 Acres of Land, and held 20 Acres of the 40 of one by Knight-Service, and the other 20 of another in Socage, and married, had Iſſue, and died, and the Lord entered into the 20 Acres holden by Knight-Service as Guardian in Chivalry, (b) and the Mother entered into the other 20 as Guardian in Socage, and the Wife brought a Writ of Dower againſt Guardian in Chivalry, he might plead the whole Matter, and pray that the Wife might endow her ſelf *de la pluis Beale, viz.* of the faireſt of the Tenements held in Socage, *&c.* *Lit Sect.* 48.

(b) But a Woman being Guardian by Wrong, cannot endow her ſelf de la pluis Beale. 5 Co. 30. b.

What ſhall be a Bar of Dower.

(a) Jointure.

(a) A Jointure is a competent Livelihood of Freehold for the Wife, of Lands, &c. to take Effect preſently, in Poſſeſſion or Profit, after the Death of the Husband, for the Life of the Wife, at leaſt if ſhe her ſelf be not the Cauſe of the Determination or Forfeiture thereof. Co. Lit. 36 b. 4 Co. 2. b. —If limited to the Wife for her Jointure, upon Condition that ſhe ſhall perform the Will of her Husband, &c. this is a good Jointure within the Words and Intention of the Act, for that her Eſtate cannot determine without her Default. 4 Co. 2. b. 3. a. Et vid. Moor 31. Pl. 103. 1 Leon. 311. N. Bendl. Pl. 247.—So if limited to the Uſe of the Feme durante Viduitate for her Jointure, for this is an Eſtate for Life, which cannot determine without her own Act. 4 Co. 3. a a. Et vid. Moor 31. Pl. 103.

1. IF a Woman is endowed *ad Oſtium Eccleſiæ*, or *ex Aſſenſu Patris*, and after the Death of her Husband ſhe enters into the Lands allotted her in Dower, and agrees therto, ſhe is concluded to claim any Dower by the Common Law. *Lit. Sect.* 41.

2. (b) But a Jointure or (c) Eſtate made to a Woman in Satisfaction of her Dower was no Bar of her Dower by the Common Law, for a Right or Title that one hath to Freehold cannot be barr'd by Acceptance of a collateral Satisfaction. *Co. Lit.* 36. b.

(b) 4 Rep. 1. a, b. S. P.

(c) But if ſhe had Dower ad Oſtium Eccleſiæ, or ex Aſſenſu Patris, and after the Death of her Husband entered into it, ſhe was concluded from claiming other Dower. 4 Rep. 1. b.

3. But by 27 *Hen* 8 *cap.* 10. *par.* 6: it is enacted, That where a Perſon (d) hath (e) conveyed Lands, *&c.* (f) upon or to the Uſe of himſelf

(d) A enfeoffs ſeveral, upon Condition that they ſhall enfeoff the Son of A. and his Wife in Tail, Remainder to the Heirs of A. and the Feoffees make the Eſtate accordingly, this is a Jointure within the Statute, tho' ſhe claims not by the Anceſtor, but Feoffees. Moor. 28. Pl 91. (e) But if a Man deviſes Lands to his Wife for Life, this imports a Conſideration, and cannot be averred to be for her Jointure, for the whole Will ought to be in Writing. 4 Rep. 4. a. adjudged. Co. Lit. 35. b. —But if deviſed for her Jointure 'tis a good Bar of Dower. 4 Co. 4. a. Winch. 100. Co. Lit. 36. b. (f) Theſe particular Forms are put for Example only, and though all of a joint Eſtate, and the Word Junctura implies as much; yet where an Eſtate is limited to the Husband for Life, Remainder to the Wife for Life, this being to the ſame Effect, and as beneficial to the Wife, is a good Jointure within the Act. 4. Co. 2. a.

(g) A Jointure within this Act by the firſt Limitation muſt take Effect for Life, in Poſſeſſion, or Profit, preſently after the Death of the Husband. Co. Lit. 36. b. 4 Co. 2. a, b. Cro. Jac. 489. Sherwell's Caſe, Hut. 51. Winch. 33. —It muſt be for Term of her own Life, or greater Eſtate. Co. Lit. 36. b. Gouldſ. 27. Hob. 151, 153. —It muſt be made to her ſelf, and not to another in Truſt for her. Co. Lit. 36 b. —It muſt be made in Satisfaction of her whole Dower, and not of Part only. Co Lit. 36 b. —It muſt be expreſſed or averred to be in Satisfaction of her Dower. Co Lit. 36. b. —And ſuch Averment is not traverſable. Ow. 33 per Curiam.

ſelf (g) and his Wife, and the Heirs of the Husband, or to the Huſband and Wife, and the Heirs of their two Bodies, or to the Heirs of one of their Bodies, or to the Husband and Wife for their Lives, or for the Life of the Wife, ſuch Woman ſhall not be endowed of the Reſidue of the Lands of her Husband by whom ſhe had ſuch Jointure.

(h) The Husband after Marriage ſettled Lands to the Uſe of himſelf and Wife in Tail for her Jointure, and during the Coverture Part of the Lands were evicted, and the Husband died, and the Wife entered into the Reſidue. Gervois, Moor 717. Pl. 1002. upon a Reference out of the Court of Wards to the Two Chief Juſtices, reſolved that ſhe ſhould have a Recompence for the Part evicted. (i) But though her Jointure was limited to her in Tail, &c. yet ſhe ſhall have it but for Life. 4 Rep. 3. b.

4 Provided that if (h) any ſuch Woman be evicted from her Jointure, or any Part thereof, by Entry, *&c.* then ſhe ſhall be endowed of (i) as much of the Reſidue of her Husband's Tenements whereof ſhe was before dowable.

(k) If made before Coverture, and the Husband and Wife alien the ſame by Fine, ſhe ſhall not be endowed of other the Lands of the Husband. Co. Lit. 36. b. —Secus if the Jointure made after Marriage, for her Eſtate being originally waivable, and the Time of her Election not come till after the Death of her Husband, ſhe may claim her Dower in the reſt of the Lands. Co. Lit. 35. b. (l) What ſhall be ſaid an Agreement or Refuſal. 3 Co. 26. a. 3 Leon. 272. 1 And. 352. Poph. 88. Gouldſ. 4, 84, 85.

5. Provided that if Manors, Lands, *&c.* be after Marriage aſſured to the Wife for Life or otherways in Jointure, unleſs by Act of Parliament, the Wife (k) after the Death of her Husband may (l) refuſe the ſame, and take her Dower according to the Common Law.

Dower.

(a) Againſt whom a Writ of Dower lies.

(a) Whether it lay againſt the King's Committee of a Ward, or ſhe ought to have ſued by Petition in Chancery. Kelw. 112. b. Et vid. 1 Brownl. 126. This muſt be intended after he is entered into the Land. Co Lit. 38. b. where ſaid, the Law had truſted the Guardian to plead for the Heir. 2 Inſ. 262. 6 Co. 57. b. 9 Co. 17. a. —But not againſt the Guardian in Chivalry that holds over for the Value of the Marriage. 9 Co. 16. b. (c) 2 Inſ. 262. S. P. 6 Co. 57. b. S. P.

1. A Writ of Dower lies againſt (b) Guardian in Chivalry. *Co. Lit.* 35. a.

2. (c) But not againſt Guardian in Socage. *Co. Lit.* 35. a.

3. If Guardian in Chivalry die, a Writ of Dower lies againſt his Executors. *Co. Lit.* 38. b.

4. And if there be Two Executors, and one of them alone takes the Profits, a Writ of Dower lies againſt him only. *Co. Lit.* 38. b.

5. If a Man be poſſeſſed of a Wardſhip of certain Land, either jointly with his Wife, or in her Right, the Writ of Dower lies againſt the Husband only. *Co. Lit.* 38. b.

6. A Rent was granted to a Man and his Heirs, provided that if the Grantee died, his Heir being within Age, that then the Rent ſhould ceaſe during the Minority of the Heir, and the Grante died, his Heir being within Age, and the Wife of the Grantee during the Minority of the Heir brought a Writ of Dower againſt the Tertenant, 1 *Co.* 87. and held it lay; and for this was cited *Fitz. Dower* 143. which *vide.*

Dower.

(a) Admeaſurement thereof.

1. (b) IF the Guardian in Chivalry had aſſigned a Woman too much for her Dower, the (c) Heir by the Common Law might have had a Writ of Admeaſurement. *Co. Lit.* a.

(a) Though the Words of the Writ be in the preſent Tenſe, plus habet in Dotem, &c. yet it muſt be taken that ſhe had more in Value at the Time of the Aſſignment of Dower, for if by her Induſtry, &c. it is made of greater Value afterwards, no Writ of Admeaſurement lies for this Improvement. 2 Inſ. 368. For this Writ, vid. F. N. B. 148. (b) 2 Inſ. 367. S. P. (c) And if he had died, his Heir might. Co. Lit. 39. a. 2 Inſ. 368. —But if the Anceſtor, being Tenant in Fee-Simple, and of full Age, aſſigns more Dower than he ought, his Heir ſhall never avoid it, becauſe he had Power to aſſign as much as he would. 2 Inſ. 368.

2. But if the Heir within Age, before the Guardian in Chivalry enter'd into the Land, had aſſigned Dower to the Wife more than ſhe ought, the (d) Guardian had been without Remedy by the Common Law, for no Writ of Admeaſurement of Dower being a real Action lay for the Guardian. 2 *Inſ.* 367.

(d) But by the Statute of Weſtminſter 2. made 13 Ed. 1. cap. 7. it is enacted, That from henceforth a Writ of Admeaſurement of Dower ſhould be granted to a Guardian: For the Expoſition of which Act, vid. 1 Inſ. 39. a.

3. If the Heir within Age before the Guardian enter'd into the Land had aſſign'd too much in Dower, he himſelf ſhould have had a Writ of Admeaſurement (e) at his full Age. *Co. Lit.* 39. a.

(e) But if the Heir, being within Age, and out of Ward, had aſſigned more Dower than he ought, he might have had an Admeaſurement of Dower within Age, for he could not enter. 2 Inſ. 368.

4. A Writ of Admeaſurement lies upon an Aſſignment in *Chancery.* *Co. Lit.* 39. a.

Dower.

By Cuſtom.

1. BY the Cuſtom of Gavelkind the Wife (a) ſhall have the (b) Moiety of the (c) Lands of her Husband ſo long as ſhe continues unmarried. *Co. Lit.* 111. a.

(a) And ſhe cannot waive this, and claim Dower by the Common Law. Hunt and Gibbons, 1 Leon. 133. adjudged. Moor 260. Pl. 408. adjudged. Cro. Eliz. 121. adjudged. Goulſ. 108. adjudged. Cro. Eliz. 825. cited. Davis and Selby. Cro. Eliz. 825. adjudged. Moor 260. cited to be adjudged. Et vid. 1 Leon. 62. (b) By Aſſignment in Severalty, and cannot hold in Common. Cro. El. 825. (c) But where by Cuſtom ſhe ſhall be endowed of a Moiety of the Lands, ſhe ſhall not be endowed of the Moiety of the Fair kept thereupon. 2 Sid. 139.

2. And in ſome Places the Widow ſhall have the whole or half *dum ſola & caſta vixerit*, and the like. *Co. Lit.* 111. a.

(a) (b) Quarentine.

1. BY the Statute of *Magna Charta*, *cap.* 7. a (c) Widow after the Death of her Husband ſhall give nothing for her Dower, (d) but ſhall (e) tarry in the chief Houſe of her Husband (f) by 40 Days after the Death of her Husband, (g) within which Days Dower ſhall be aſſigned her, (if not aſſigned before) or that the Houſe be a (h) Caſtle; and if ſhe depart from the Caſtle, then a (i) competent Houſe ſhall be aſſigned her, wherein ſhe may honeſtly dwell till her Dower be aſſigned her, and ſhe ſhall have in the mean time her reaſonable (k) Eſtovers of the Common.

(a) Quid eſt, Co. Lit. 32. b. (b) By the ancient Law of England, a Woman ſhould have continued a whole Year in her Huſband's Houſe, within which Time, if Dower was not aſſigned her, ſhe might have recover'd it. Co. Lit. 32. b. (c) If ſhe marries within the 40 Days ſhe loſes her Quarentine. Co. Lit. 32. b. 2 Inſ. 17. (d) If withholden from her, ſhe may have a Writ de Quarentina habend' to the Sheriff, which reciting this Act, is in Nature of a Commiſſion to him, &c. and thereupon the Sheriff may make Proceſs againſt the Defendant, returnable in two or three Days, &c. and if no juſt Cauſe be ſhewed to the contrary, ought ſpeedily to put her in Poſſeſſion. 2 Inſ. 17. (e) But if upon her Husband's Death ſhe departs from the Houſe, ſhe cannot return again within the 40 Days. Hob. 153. Et vid. Dyer. 76. b. (f) Per quadraginta Dies; ſo that the Day on which the Husband died ſhall be accounted the firſt Day; ſo that ſhe ſhall have but 39 after. 2 Inſ. 17. (g) But this Act was of little Force, becauſe no Penalty was provided if not done. Co. Lit. 32. b. (h) For the Defence of the Realm. 2 Inſ. 17. (i) But this muſt be ſuch an one of which ſhe is dowable. 2 Inſ. 17. (k) That is, Suſtenance. 2 Inſ. 17. and ſaid, that there was an Opinion in the Books, that the Widow during this Time could not kill any of the Oxen of her Husband; but that the Regiſter ſaid, quod interim habeant rationabilia Eſtoveria de Bonis Maritorum, which ſeems to be an Expoſition of this Branch.

Dama=

Damages.

Where and what to be recovered in a Writ of Dower.

1. BY the Statute of *Merton*, made 20 *Hen.* 3. *cap.* 1. (a) of Widows which are deforced of their Dower, and cannot have their Dowers or Quarentine (b) without Plea, it is enacted, That where (c) by Plea they recover Dower or Quarentine of (d) Lands whereof their Husbands (e) died ſeiſed, thoſe who are (f) convict of the Deforcement ſhall yield Damages, *viz.* the (g) Value of the (h) whole Dower, (i) from the Death of the Husband to the (k) Day of the Recovery of the Dower.

(a) This by Bracton is call'd Nova Conſtitutio; cited, Co. Lit. 32. b.

(b) But in a Writ of Dower ad Oſtium Eccleſiæ, or ex Aſſenſu Patris, they ſhall recover no Damages, becauſe ſhe might enter. Co. Lit. 32. b. —Nor in other Writ of Dower, if no Demand thereof hath been made, and the Tenant comes the firſt Day, and pleads that he was always ready, &c. Co. Lit. 32. b. Et vid. in Title Damages, Where Damages ſhall be ſaved by Confeſſal. —But a Demand in Pais is ſufficient, Co. Lit. 32. b. (c) No Damages where aſſigned in Chancery. Co. Lit. 33. a. —So if the Heir or Feoffee aſſigns Dower, and the Wife accepts it, ſhe loſes her Damages. Co. Lit. 33. a. (d) It extends to Copyholds. Co. Lit. 33. a. Cro. Car. 43. Shaw and Thompſon, 4 Co. 30. b. adjudged. Moor 410. Pl. 559. adjudged. Cro. Eliz. 426. adjudged. (e) Viz. of the Freehold and Inheritance. Co. Lit. 32. b. Dyer 284. Pl. 33. Yelv. 112. —Viz. of ſuch an Eſtate whereof ſhe is dowable. 3 Bulſ. 278. And vid. Winch 80. Lit. Rep. 341. Styl. 101. —If the Jury aſſeſs Damages, without finding the Husband died ſeiſed, the Demandant may pray Judgment of the Land and releaſe her Damages, or aver that her Husband died ſeiſed, and have a Writ to enquire of the Damages. Et vid. Godb. 212. —That ſuch Suggeſtion may be made after Judgment, and a Writ of Seiſin executed, 1 Levin. 38. —Where the Suggeſtion was, that he died ſeiſed in Fee, and it was found he died ſeiſed of Part in Tail, and held immaterial. Styl. 69. (f) After Judgment in Dower, and a Writ of Seiſin executed, the Tenant brought Error, and pending that aliened the Land, and died, and the Judgment was affirmed, and the Demandant brought a Scire Facias againſt the Heir of the Tenant and the Alienee to have Damages, ſuggeſting that her Husband died ſeiſed. Aleworth and Roberts, 1 Levin. 38. adjudged, that the Damages being given againſt the Deforceors only by the Death of the Heir, they were loſt, and are not as a Lien upon the Land paſſing therewith; and the Heir againſt whom the Judgment was had was the Deforceor. 1 Sid. 188. (the firſt Judgment being by Default, and a Writ of Enquiry awarded) adjudged; and ſaid, that the Judgment as to the Land was compleat at the Time of the Death of the Tenant, though not as to the Damages, which were not aſcertained. 1 Keb. 85, 171, 646, 711. adjudged. Yet vid. Styl. 470. And vid. 3 Mod. 281. (g) But where the yearly Value of the third Part of the Land was found to be 8 l. and Damages were aſſeſſed for eight Years to 80 l. which was beyond the Yearly Revenue, and Judgment was given for thoſe Damages, it was held not erroneous, for that it might be, that by the long Detaining of the Dower, the Demandant might have ſuſtained more Damage than the bare Revenue. 1 Leon. 56. Styl. 69. (h) In Co. Lit. 32. my Lord Coke ſays, That he hath read in an ancient and learned Reading upon this Act, that it extends only to a Writ of Dower unde nihil habet, and not to a Writ of Right of Dower, for in no Writ of Right Damages are to be recovered. (i) In Co. Lit. 33. it is ſaid, That the mean Values and Damages are to be recovered againſt the Tenant, as appears by a notable Record betwen Belfield and Rous, where in Dower as to Parcel the Tenant pleaded Nontenure, and for the Reſidue Detainment of Charters, and thereupon Iſſue being joined, and both found againſt the Tenant, it was further found, that the Husband died ſeiſed ſuch a Day and Year, leaving Iſſue a Son, and that the Demandant and the Son for ſix Years after the Death of the Husband togethrr took the Profits of the Land, and that the Son ſuch a Day and Year died without Iſſue, and the Land deſcended to the Tenant as Uncle and Heir to him, by Force whereof he entered, and took the Profits till, &c. and found the yearly Value of the Land, and aſſeſſed Damages for detaining the Dower, and Coſts, and upon this Verdict, after often debating, the Demandant had Judgment to recover her Damages for all the Time from the Death of her Husband, without Defalcation; and thereupon my Lord Coke makes this Remark, Let the Tenant take Heed how he pleads Falſe Pleas. N. Benl. 153. Pl. 215. adjudged. And vid. there the Record at large. 4 Leon. 198. adjudged. Moor 80. Pl. 213. adjudged. And vid. 2 Brownl. 41. —But where the Tenant may ſhew, that the Wife after the Death of her Husband abated, and took the Profits, and the ſame ſhall be recouped in Damages, vid. Dal. 100. (k) 1 Leon. 56.

2. If

2. If a Man ſeiſed in Fee marries, and then grants a Rent-Charge, and after makes a Feoffment in Fee, and takes back an Eſtate Tail, and dies, and his Wife recovers Dower againſt the Iſſue in Tail by Reddition, and the Wife makes a Surmiſe that her Husband died ſeiſed, and prays a Writ to enquire of the Damages, which is granted her, ſhe ſhall hold the Land charged with the Rent, for ſhe accepts her ſelf dowable of the ſecond Eſtate; for of the firſt Eſtate, whereof ſhe was dowable, her Husband died not ſeiſed; ſo that if the Rent be more to her Detriment than the Damages are beneficial to her, it is good for her in ſuch Caſe to make no ſuch Prayer. *Co. Lit.* 33. a.

The Writ.

1. BY the Common Law, if a Woman had accepted Part of her Dower from any Perſon, ſhe could not recover the Reſidue unleſs by Writ of Right of Dower. 2 *Inſ.* 262.

2. But by the Statute of *Weſtminſter* 2. made 13 *Edw.* 1. *cap.* 49. a Writ of Dower, *unde nihil habet*, ſhall not be abated, unleſs the Tenant can ſhew that the Demandant hath received Part of her Dower of (a) himſelf, and in the ſame (b) Town, before the Writ purchaſed.

(a) If the Husband of A. enfeoffs B. of one Acre, and the Wife of B. of another in D. and dies, and B. aſſigns Dower of his Acre, yet a Writ of Dower unde nihil habet lies againſt B. and his Wife, for they are not the ſame Tenants. 2 Inſ. 262. And for the further Expoſition of this Act, vide there.

(b) Dower unde nihil habet lies in an Hamlet; but if ſhe hath received Dower out of the Hamlet, and in the ſame Town, it ſhall abate. 2 Inſ. 262.

The Form thereof.

1. A Writ of Dower was, *Præcipe A. quod reddat B. F. rationabilem Dotem ſuam de Terris, &c. dudum C. F. quondam Viri ſui*, and the Court inclined, that the Writ was naught, becauſe in the Beginning thereof ſhe was not named his Wife, *viz. Præcipe A. quod reddat B. F. quæ fuit Uxor C. F. &c. Hill.* 6 *Jac.* between (a) *Fulliam* and *Harris*. *Cro. Jac.* 217. *adjornatur.*

(a) 2 Brownl. 300. S. C. adjudged.

Certainty therein.

1. A Writ of Dower *de Rectoria &* (a) *omnimodis Decimis*, without ſhewing the Particulars, is good, (b) for the Demand in a Writ of Dower need not be ſo particular as in other Writs; for the Deman-

(a) De Decimis Garbarum, without ſaying Granorum. Styl. 236, 238. Will not. Styl. 194.

(b) A Writ of Dower will lie de uno Croſto, though a Formedon

dant has not the Charters ſo as to be enabled to make a preciſe Demand; and as Dower is favoured in Law, ſo are the Proceeding therein. *Hill.* 23 *Car.* 1. between *Thyn* and *Thyn*, *Styl.* 68, 92, 99.

Aſſignment of Dower.

How to be pleaded.

1. IN Dower the Tenant pleaded, That before the Purchaſe of the Writ he (a) aſſigned a Rent of 10 *l. per Ann.* to the Demandant, in Recompence of her Dower. *Hill.* 20 *Eliz.* between *Beamont* and *Dean*, 2 *Leon.* 10. adjudged upon Demurrer that the Plea was not good, becauſe the Tenant had not ſhewed what Eſtate he had in the Land at the Time of the granting the Rent, ſo that upon the Pleading it might appear that the Tenant had a lawful Power to grant ſuch Rent.

(a) Though the Rent in lieu of Dower is granted by the Words dedi & conceſſi, yet it must be pleaded as an Aſſignment, and not as a Grant, elſe it is no Bar of Dower. Cro. Eliz. 452.

(a) The Judgment.

(a) Againſt an Infant by Default, vid. 1 Rol. Abr. 796. Pl. 30. and the Notes there.

1. THE Judgment in a Writ of Dower to recover the third Part of the Land is a compleat Judgment at the Common Law, though no Judgment is given for the Damages, for thoſe were added by the Statute of *Merton*. *Trin.* 13 *Car.* 2. between (b) *Aleworth* and *Roberts*, 1 *Levin.* 38. *per Curiam.*

(b) 1 Sid. 188. S. C. & S. P. per Curiam; and ſaid, That the Judgment to recover the Land, and to recover the Damages, are diſtinct Judgments: But for this, vid. 1 Rol. Abr. 750. Pl. 9. with the Notes there.

Fol. 686.

(a) Droit de Recto:

Or, *Writ of Right.*

(a) This is the higheſt Writ of all other real Writs whatſoever, and hath the greateſt Reſpect, &c. and the moſt aſſured and final Judgment, and therefore call'd a Writ of Right, and in old Books, Dreit Droit. Co. Lit. 158. F. N. B. 1. a. &c. vide —Where in this Writ it muſt be expreſſed by what Services the Lands are held, F. N. B. 1. b. Et vid. Cro. El. 232. 1 Leon. 153. —For the Proceedings therein, vid. Lit. Sect. 514. Co. Lit. 293. 2 Inſ. 247. F. N. B. 1, 2, &c. Dyer 98. Pl. 52. 103. b. 112. Pl. 47, 247. Pl. 75, 302. b. N. Benl. 200. Pl. 238. Goulſ. 90. Moor 67. Pl. 181. 762. Pl. 1057. —The Tenant ſhall ſhew his Evidence firſt, becauſe the Miſe is joined and prayed by him. Dyer 247. Pl. 75. Moor 762. —Cro. Car. 310, 311. ſaid arguendo, That in a Writ of Right there ought to be a double Defence, viz. againſt the Plaintiff's Right, and in Maintainance of his own. —The Tenant pleaded, That he had majus Jus tenendi Tenementa pred' than the Plaintiff; but ſaid not, ſibi & Hæredibus, according to the uſual Courſe; and the Court would not intend that he had a leſs Eſtate than a Fee; and if he was only Tenant for Life, and pleaded ſo, it was at his Peril, for it was a Forfeiture. Cro. Car. 179. (b) Co. Lit. 341. b. S. P.

(A) Who ſhall have it.

1. (b) A Parſon ſhall not have it, becauſe he has not an abſolute Fee. 33 Edw 3. Aid del Roy 103.

2. A Prebend ſhall not have a Writ of Right, for he has not an higher Eſtate than a Parſon. Contra, 33 Ed. 3. Aid del Roy 103.

(c) Co. Lit. 341. b S. P. and ſaid, that it muſt be intended where the Dean, Maſter of an Hoſpital, &c. are ſolely ſeiſed of diſtinct Poſſeſſions.

3. (c) A Dean of a free Chapel ſhall have a Writ of Right, though he hath no College or Common Seal, for he has an abſolute Fee. 33 Ed. 3. Aid del Roy 103.

4. An Abbot ſhall have this Writ, for he hath the meer Right. 10 Ed. 4. 16. 8 H. 6. 24. b.

5. Tenant in Fee determinable, who has but a baſe Fee, as where he has an Eſtate to him and his Heirs ſo long as J S. ſhall have Iſſue of his Body, may maintain a Writ of Right Patent, for he cannot have other Writ in the Right as Tenant in Tail, or a Parſon may.

(B) Againſt

(B) Againſt whom it lies.

1. A Leſſee for Life cannot join the Miſe upon the meer Right. 20 H. 6. 46.

2. A Parſon cannot join the Miſe upon the meer Right, for the Weakneſs of his Eſtate. 20 H. 6. 46.

(C) Of what (a) Things and Eſtates it lies, and at what Time.

(a) That ſome have ſaid, that it lies of a Rent-Seck, or of a Rent-Charge, tho' they be againſt common Right, Co. Lit. 160. a. But vid. N. Benl. 194. Pl. 231. 1 And. 16.

(b) Of (c) what Seiſin it lies.

1. If Tenant for Life ſurrenders to the Remainder-man in Fee, (as it ſeems to be intended not in Tail) this is a ſufficient Seiſin to have a Writ of Right. 42 Ed. 3. 9. b.

(b) The Demandant in his Count muſt alledge a Seiſin in himſelf, or his Anceſtors, for the Seiſin of him from whom the Demandant purchaſed availeth not. Co. Lit. 293. a. —What Seiſin to be alledged in ſuch Writ brought by a Corporation, 1 Leon. 153.

(c) A more actual Seiſin required to make a Poſſeſſio Fratris than to maintain a Writ of Right. Co. Lit. 281. a. —But a Seiſin in Law is not ſufficient. 4 Co. 9. a. b.

2. (d) If an Eſtate be to two, and the Heirs of one, and he that has the Fee (it ſeems that it ſhould be he that has not the Fee) ſurvives, and dies, and a Stranger abates, (e) the Heir may have Right. 42 Ed. 3. 9. b.

(d) Co. Lit. 184. a. S. P. Dyer 9. Pl. 23.

(e) He ſhall have a Writ of Right of the whole, for every Jointenant is ſeiſed per my & per tout. Co. Lit. 281. a.

3. If Tenant for Life grants his Eſtate to the Remainder-man in Fee, he may have a Writ of Right. 44 Ed. 3. 31. b.

4. If the Remainder-man in Fee enters upon the Tenant for Life, and diſſeiſes him, and the Tenant for Life re-enters, and dies, though his Seiſin as to the Tenant for Life was defeated by his Entry, yet this Seiſin is ſufficient to enable him to maintain a Writ of Right againſt a Stranger, for the Law is propenſe to give Remedy to him that has Right. *Lit Sect.* 482.

5. If Lands are let to *A.* for Life, Remainder to *B.* for Life, the Remainder to the Heirs of *A. A.* dies, and *B.* enters, and dies, and a Stranger intrudes, the Heir of *A.* ſhall have a Writ of Right of the Seiſin which *A.* had. *Co. Lit.* 281. a.

6. If Lands are given to *A.* in Tail, the Remainder to *B.* in Fee, and the Donee dies without Iſſue, his Wife *privement enſeint*, and *B.* enters, and the Iſſue is born, and enters upon him, and dies without Iſſue, *B.* ſhall have a Writ of Right of this Seiſin which he had. *Co. Lit.* 281. a.

7. If

7. If Lands are given to *A.* in Tail, the Remainder to his right Heirs, and *A.* dies without Iſſue, the collateral Heir of *A.* ſhall have a Writ of Right of the Seiſin of *A. Co. Lit.* 281. a.

(a) (b) Judgment.

The Form thereof.

(a) Where all Perſons are bound by a Judgment in a Writ of Right, if no Claim within an Year and Day, Co. Lit. 254. b. 262. a. (b) Though by the Statute of Rutland, made 12 Edw. 1. it is provided, That Trials in Wales in a Writ of Right ſhall be by common Jurors, ſo that the Manner and Dignity of the Trial is altered, yet the Judgment remains as before. 5 Co. 85. b. (c) 5 Co. 85. b. Cro. Car. 310.

1. (c) QUOD *Tenens teneat Terram illam ſibi & Hæredibus ſuis in Pace verſus Petentem & Hæredes ſuos in perpetuum.* Co. Lit. 295. b.

Where final Judgment ſhall be given.

1. WHere the Miſe is joined upon the meer Right, though the Verdict of the Grand Aſſiſe be given upon another Point, yet Judgment final ſhall be given. *Co. Lit.* 295. b.

2. So if after the Miſe joined the Tenant makes (a) Default, or confeſſes the Action, or (b) if the Demandant be nonſuit, *Co. Lit.* 295. b.

(a) 5 Co. 86. a. S. P. reſolved con. and that a Petit Cape ſhall iſſue: But for this, vid. ante 477. Pl. 6. 17. and the Caſes and Notes there. — And how Proclamation ſhall be made before ſuch Judgment given, vid. Pl. Com. 357. b. 358. a. (b) Penryn's Caſe, 5 Co. 85. Moor 403. Pl. 537. Et vid. Gouldſ. 90. N. Benl. 201. Pl. 238. Dyer 302. b.

Dureſs of (a) Impriſonment.

Fol. 687.

(a) Menace, vid. 2 Rol. Abr. 124.

(A) What (b) Thing may (c) be avoided by Dureſs.

(b) Where a Marriage ſhall be avoided by reaſon of Dureſs, 1 Part 698. Pl. 5. —Where a Will ſhall be avoided by Dureſs or Menace of Impriſonment, Dyer 143. b. (c) A Feoffment made by Dureſs is not void, but voidable only. 2 Inſ. 483. (d) 1 Part 638. Pl. 13. S. C. which vid. with the Notes there.

1. A **Statute-Merchant may be avoided by Audita Querela because it was made by Dureſs of Impriſonment.** (d) 20 E. 3. Audita Querela 27.

2. In Debt for the Arrears of an Account the Defendant may ſhew, that the Plaintiff of his own Wrong impriſoned the Defendant, and aſſigned Auditors to him, being in Priſon, and that ſo the Account was by Dureſs. *Hill.* 25 *Eliz.* the Earl of *Northumberland*'s Caſe, 1 *Leon.* 13. adjudged a good Plea by all the Juſtices of both Benches.

3. A Man by Deed inroll'd in *Chancery* bargained and ſold an Houſe, and certain Goods; and whether this by reaſon of the Inrolment on Record could be avoided by Dureſs of Impriſonment, *Hill.* 30 *Eliz.* between *Hammond* and *Barker*, *Cro. Eliz.* 88. it was ſaid *per Curiam*, that it was doubtful, and that they would adviſe; and afterwards they conceived it would be hard to avoid the Deed by Dureſs; (e) but no Judgment was given, becauſe the Parties agreed.

(e) But vid. 1 Rol. Abr. 862. Pl. 3. that no Averment ſhall be taken that a Deed inroll'd was made per Dureſs.

(B) What ſhall be Dureſs to avoid a Thing.

1. If a Man be lawfully in Priſon, (a) yet if he makes an Obligation againſt his Agreement and Will, he may avoid it by Dureſs. 43 E. 3. 10. b. 6.

(a) Where after Judgment the Defendant having no good Cauſe of Action, cauſed the Plaintiff to be arreſted, and detained in Priſon, threatening him, that if he would not ſeal a Releaſe to him, he ſhould lie there and rot, and thereupon he ſealed one, and was diſcharged, 1 Levin. 69. it was ruled at Guildhall before Bridgman Chief Juſtice, that this Releaſe could not be avoided by Dureſs, becauſe he was in Cuſtody in the Courſe of Law by the King's Writ when he ſealed, but offered it ſhould be found ſpecially if Baldwin would pray it, which he did not.

2. Otherwiſe if he does it of his good Will. 43 E. 3. 10. b. 11 H. 4. 6. b.

3. If a Man makes a Deed by Dureſs done to him by taking of his Cattle, though there be no Dureſs done to his Perſon, yet this ſhall avoid the Deed. 20 Aſſ. 14. adjudged.

4. A (b) Servant ſhall not avoid a Deed made by Dureſs to his Maſter. M. 7 Ja. B. per Coke.

(b) That the Maſter ſhall not avoid a Deed ſealed by Dureſs of his Servant, 2 Brownl. 276.

5. But a (c) Son ſhall avoid his Deed by Dureſs to his Father. M. 7 Ja. B. per Coke.

(c) That the Father ſhall avoid a Deed ſealed by Dureſs of the Son, 2 Brownl. 276.

6. The Baron ſhall avoid a Deed made by Dureſs to his Wife. (d) M. 7 Ja. B. per Coke.

(d) 2 Brownl. 276. S. P. and ſeems to be ſame Caſe, for the Husband and Wife are the ſame Perſon. 1 Sid. 123. cited to be adjudged. —For Dureſs of Impriſonment of the Plaintiff's Commoign, Kelw. 154.

(e) 6. A Man ſhall not avoid a Deed by Dureſs to a Stranger. (f) M. 7 Ja. B. per Curiam. M. 13 Ja. B. where the Obligation is joint and ſeveral.

(e) This ſhould have been 7, but is printed here as in the Original.

(f) 1 Brownl. 66 S. P. and ſeems to be S. C.

7. (g) If A. and B. make an Obligation by reaſon of Dureſs done to A. B. ſhall not avoid this Obligation, though A. may, becauſe he ſhall not avoid it by Dureſs to a Stranger. M. 7 Ja. B. per Curiam, between (h) Montall and Woollington.

(g) Cro. Jac. 187. S. P. adjudged; and that the Bond may ſtand good as to one, and be avoided as to the other.

(h) 1 Brownl. 66. S. C. adjudged.

8. If a Purſuivant of the High Commiſſion, upon a Suit, and by their Command, impriſons a Man until he enters into Bond to appear in the Court of Audience, this Obligation may be avoided by Dureſs, becauſe the Suit there was upon a Contract, of which they had not original Conuſance, and therefore the Impriſonment wrongful. H. 8 J. B. between Clifford and Huntly, per Curiam reſolved.

9. (i) Dureſs of Impriſonment is intended only where the Party is wrongfully impriſoned till he makes a Bond, and not where a Man is lawfully impriſoned for another Cauſe, and for his Delivery makes a Bond. *Mich.* 32 *Eliz.* between *Knight* and *Norton*, 3 *Leon.* 239. *per Curiam.* And in the laſt Caſe, if Dureſs be pleaded, the Plaintiff may ſay of his own Accord, *ſine Duritia Impriſonamenti, abſq; hoc* that it was *per Duritiam Impriſonamenti.*

(i) 2 Inſ. 482. S. P. and that it is not accounted Dureſs of Impriſonment, but either where the Dureſs offered in Priſon or at large is tortious and unlawful.

10. If a Man is taken by Vertue of a Proceſs iſſuing out of a Court that hath no Power to grant ſuch Proceſs, and for his Enlargement gives Bond to appear in the ſaid Court, this may be avoided, becauſe taken by Dureſs. *Trin.* 40 *Eliz.* between (k) *Stepny* and *Lloyd*, *Cro. El.* 646. adjudged in an Action upon ſuch Bond given by one who was taken upon an Attachment under the Privy Seal of the Court of Requeſt, for that Court had no Power to grant ſuch Proceſs, and therefore it was no Warrant for the Sheriff to take his Body.

(k) 4 Inſ. 97. S. C. Cro. Car. 596. S. C. cited.

11. If *A.* falſely charges *B.* with Felony for ſtealing his Horſe, and procures a Warrant from a Juſtice of Peace to a Conſtable, whereby he is taken, and being in Cuſtody, upon *A.*'s Promiſe to diſcharge him, ſeals a Bond for 10 *l.* to *A.* and is thereupon immediately diſcharged, this Bond may be avoided by Dureſs. *Mich.* 24 *Car. Al.* 92. upon Trial of an Iſſue upon the Dureſs, ruled by *Rolle* accordingly, it appearing that the Horſe was *B.*'s own Horſe, and that thoſe Proceedings were only to cover the Deceipt.

(C) By whom being made.

Fol. 688.

A Stranger.

1. Dureſs by (a) a Stranger by Procurement of the Party that ſhall have the Benefit, is a good Cauſe to avoid, &c. 43 E. 3. 6.

(a) But Dureſs by a Stranger, without making the Obligee Party thereto, is no Cauſe to avoid, &c. Kelw. 154. a

2. Dureſs

2. Dureſs of Impriſonment by the Maſter to his Servant, to make an Obligation to the Obligee, is good Cauſe to avoid the Deed. 6 H. 4. 5. adjudged.

Pleading.

How.

(a) 2 Inſt. 483. S. P. (b) For this, vid. the Pleadings after Title Fait.

1. (a) IF a Man executes a Deed by Dureſs, he cannot plead (b) *Non eſt factum*, for it is his Deed; though he may avoid it by ſpecial Pleading, Judgment *ſi Actio.* 5 Co. 119. reſolved *per Curiam.*

Ejectment.

(a) (b) Ejectment.

For what Things it lies.

1. AN Ejectment lies of a Cole-Mine, becauſe it is a Profit well known, of which the Law takes Conuſance. *Hill.* 4 *Jac.* between (c) *Commyn* and *Kincto*, *Cro. Jac.* 150. adjudged.

(a) Where the Leſſee at Will of Leſſee for Years was ejected, and it was held the Leſſee for Years could not maintain an Ejectment, becauſe this Action could not be maintained upon an Ejectment in Law, 1 Rol. Rep. 3.

(b) Where a Servant that continues to dwell in an Houſe with the pretended Owner, after an Entry made, is a ſufficient Ejector, againſt whom an Action may be brought, Wilſon and Weddal, Yelv. 144, 145. 1 Brownl. 143. Et vid. Lat. 82. (c) Comyn and Wheatly, Noy 121. ſeems to be S. C. adjudged. 1 Rol. Rep. 483. S. C. cited. Hard. 57. S. C. cited to be adjudged.

2. (d) An Ejectment lies of a Boilary of Salt. *Hill.* 4 *Jac. Cro. Jac.* 150. ſaid to have been adjudged.

(d) Smith and Barret, S. P. admitted. 1 Sid. 161. 1 Lev. 114.

3. An Ejectment lies not *de quodam Rivulo &* (e) *Aquæ Curſu* call'd *Locar*, in *L.* for *Rivulus ſive Aquæ Curſus* lies not in Demand, for *non moratur*, but is always flowing; nor can an Execution by *Habere facias Seiſinam* be made thereof. *Mich.* 6 *Jac.* between (f) *Challenor* and *Thomas*, *Yelv.* 143. adjudged; and that the Action ought to have been of ſo many Acres of Land *aqua coopert'*; but if the Land under the River does not belong to the Plaintiff, but the River only, then upon a Diſturbance the Remedy is by Action upon the Caſe only.

(e) Godb. 157. S. P. adjudged con.

(f) 1 Brownl. 142, 143. S. C. and ſeems to be only a Tranſlation from Yelver. Poph. 167. S. C. cited. —An Ejectment does not lie de Piſcaria in ſuch a River more than of a Common appender or Rent. Cro. Car. 492. adjudged upon a Writ of Error upon a Judgment out of Ireland, and the Judgment for this Reaſon reverſed. But Jones ſaid, perhaps an Aſſize would lie for it, becauſe it is Proficuum in certo Loco capiend' Et vid. Cro. Jac. 146. But by Dal. 95. by Wray and Southcot, an Ejectment lies pro Paſtura pro centum Ovibus, for a Precipe lies thereof: But Q for in Hard. 58. a Caſe is cited to have been adjudged, That an Ejectment lay not de Paſtura.

4. An Ejectment lies for Tithes belonging to a Chapel. *Hill* 8 *Car.* between (g) *Prieſt* and *Wood*, *Cro. Car.* 301. adjudged; though objected, that an Ejectment lay not of Tithes only, but muſt be of a Rectory or Chapel, and the Tithes thereto belonging, *viz.* of ſuch a Thing from which he might be ejected, and of which an *Habere facias Poſſeſſionem* will lie.

(g) Baldwin and Wine, 1 Jon. 321. ſeems to be S. C. by the State of which Caſe, as reported in Jones, the Ejectment was brought for Tithes belonging to a Rectory, and after a Verdict for the Plaintiff, Judgment was arreſted, becauſe it did not appear the Tithes did belong to the Rectory. But for this, vid. 32 H. 8. cap. 7. Ante, under Title Diſmes.

5. An Ejectment lies not *de Pannagio*, which is but a Privilege to take Pannage. *Hill.* 16 & 17 *Car.* 2. between (h) *Pemble* and *Stern*, 1 *Levin.* 212. adjudged.

(h) 1 Sid. 416. S. C. adjudged.

(a) By what (b) Name or Deſcription.

(a) That it is not ſafe to bring an Ejectment of a Manor only, without ſetting out the Quantity and Quality of the ſeveral Lands, vid. Hetl. 146. Lit. Rep. 301. Palm. 413. Lat. 61. It is not formal to bring an Ejectment de Capella, but it ought to be by the Name of a Meſſuage. 11 Co. 25. b.

1. AN Ejectment lies for a Garden by the Name of Three Roods of Land, for it may be ſometimes uſed as a Garden, and at other times ploughed. *Hill.* 23 *Eliz. Anonymus. Godb.* 6. adjudged; though it was ſaid, it might more properly have been demanded by the Name of a Garden.

(c) Noy 109. S. P. cited to have been adjudged. Hard. 57. S. P. arguendo.

2. (c) An Ejectment lies *de uno Cubiculo. Trin.* 30 *Eliz. Anonymus.* 3 *Leon.* 210. adjudged, the Declaration being of a Leaſe *unius Cubiculi* in the ſecond Story of ſuch an Houſe; and it was ſaid by *Wray* Chief Juſtice, That *Cubiculum* was a more apt Word than *Camera*; and it was ſaid, That an Ejectment *de una Romea* had been adjudged good.

(d) 1 Rol. Rep. 55. ſeems to be S. C. cited.

3. An Ejectment lies not *de Coquina*, (Anglice, *a Kitchin*) becauſe of the Uncertainty, for any Room by Uſage may be made a Kitchin. (d) *Ford* and *Lerk*, *Noy* 109. adjudged; though a Caſe in 2 *Jac.* was cited, where it was adjudged, that it lay *pro Coquina*.

4. (e) An Ejectment lies not *de uno* (f) *Meſſuagio ſive* (g) *Tenemento*, becauſe of the Uncertainty. *Trin.* 22 *Eliz.* between (h) *Wood* and *Pain*, *Cro. Eliz.* 186. adjudged; but the Ejectment being brought for 4 Acres of Land alſo, and a Verdict for the Plaintiff, he (i) releaſed his Damages, and took Judgment for the 4 Acres only.

(e) Poph. 197 S. P. moved in Arreſt of Judgment. 203. S. P. arguendo.

Noy. 89. S. P. adjudged. Cro Jac. 125. S. P. cited to have been adjudged. Styl. 364. S. P. per Curiam. 1 Sid. 295. S. P. adjudged; but it ſeemed to the Reporter, that it would have been good if it had been found for the Plaintiff, as to the Meſſuage, and Not guilty as to the Tenement; but it was ſaid, That Hale Chief Baron refuſed to allow of ſuch Finding; and Twyſden ſaid, That if it had been de uno Meſſuagio ſive Tenemento vocat' the Black Swan, it had been good. 3 Mod 238. S. P. adjudged, becauſe of the Uncertainty of the Word Tenementum; but per Curiam, Meſſuagium ſive Tenementum vocat' the Black Swan is well enough, becauſe the Addition makes it certain that the Tenement intended is an Houſe. And vid. Cro. Car. 125. (f) De Burg' ſive Tenemento, Poph. 203. adjudged naught; but Hard. 173 de Meſſuagio ſive Burgagio was adjudged well enough, for that Meſſuagium & Burgagium ſignify the ſame Thing in a Borough. (g) Cro. El. 116. March 96. And vid. 2 Rol. Abr. 80. Pl. 5. and the Notes there. (h) 3 Leon. 228. S C. adjudged. (i) For this, vid. 1 Rol. Abr. 784. Pl. 4. and the Notes there.

5. (k) An Ejectment lies of a Cloſe (l) call'd *D.* (m) without ſhewing the Quantity or Quality of the Land *Paſch.* 33 *Eliz.* between *Jones* and *Hoell. Cro. Eliz.* 235. adjudged; and *Popham* Attorney General ſaid, he had (n) known it three times adjudged.

(k) Cro. El. 339. S. P. debated. 458. S. P. ſaid by Poph.

to have been adjudged. Godb. 53. S. P. adjudged con. 71. S. P. adjudged. Cro. Jac. 654. S. P. ſaid to have been adjudged. Savil's Caſe S. P. 11 Co. 55. adjudged con. 1 Rol. Rep 55. adjudged con. Bridg. 56. cited to be adjudged con. Cro. Jac. 435. S. P. adjudged by Three Judges againſt One, the Plaintiff declaring for a Cloſe called C. containing three Acres of Land, and ſaid, though the Cloſe contained more, the Plaintiff ſhould recover the whole Cloſe. (l) Of a Piece of Land called D. without ſhewing the Contents. Palmer's Caſe, Ow. 18. the Court was divided, but after adjudged that it was well enough, becauſe it was but an Action of Treſpaſs, and Damages were the Principal; though it would be otherways in a Precipe: But upon a Writ of Error in the Exchequer-Chamber this Judgment was reverſed. Hetl. 176. Moor 422. Pl. 587. 702. Pl. 976. Cro. El. 339. cited to have been adjudged. (m) If an Ejectment is brought of a Cloſe, the Plaintiff muſt either give it a Name, or declare of what Nature the Land is. Styl. 194. And vid. Palm. 338. Hard 57. (n) Vid. Palm. 102. 1 Rol. Rep. 167. Cro. Car. 555. Hard. 57. 3 Levin. 97.

6. (o) An Ejectment lies *de Pomario*, becauſe it is but a perſonal Action, wherein Damages are the Principal. *Mich.* 43 *Eliz.* between (p) *Wright* and *Wheatly*, *Cro. Eliz.* 854. adjudged, though objected it lay no more thereof than a *Precipe quod Reddat.*

(o) Hard. 55. S. P. by Baldwin, arguendo. 1 Levin. 58.

S. P. per Twyſden. (p) Noy 37. S. C. adjudged, and that it need not be demanded by the Name of a Garden, as it ought to be in a Precipe, 1 Rol. Rep. 55. S. C. cited to have been adjudged. Royſton and Eccleſton. S. P. Cro Jac. 654. adjudged, though objected, it ought to have been demanded by the Name of a Garden. Palm. 337, 338. adjudged: And in this Caſe it was ſaid by Noy, arguend', That at the Time when the Regiſter was made, the Term was not recoverable in an Ejectment, and that of late Time Art had added many Things which ſhould be recovered in an Ejectment, which are not named in the Regiſter, as an Hop-yard, &c.

7. An Ejectment lies not *de omnibus & omnimodis Decimis in W.* without ſaying, *Garbarum, Fœni, Lanæ, Agnellorum,* or ſome other Certainty of the Nature or Quality of the Tithes, ſo that a certain Judgment may be given, or Execution by *Habere facias Poſſeſſionem* be had thereof: And though the certain Number thereof ſhall not be expreſſed, (for the Fruitfulneſs or Barrenneſs may be more or leſs) yet the certain Kinds ought to be ſhewed; and all the Tithing may conſiſt *in Modo decimandi*, by Payment of an annual Sum in Satisfaction thereof, (q) of which no Ejectment lies, for the Statute of 32 *H.* 8. *c.* 7. which gives the Action for Tithes, gives it as they ſhould or might do for Land; and in an Action for Lands, the Plaintiff ought to ſhew the Quality or Nature thereof, as Arable Land, Meadow, Paſture, *&c. Trin.* 12 *Jac.* (r) *Harpin's* Caſe, 11 *Co.* 25. b. adjudged.

(q) Yet vid. 1 Leon. 19. but for this Act, vid. ante under Title Diſmes.

(r) Moor 837. Pl. 1130. S. C. adjudged. 1 Rol. Rep. 68. S. C. adjudged, another Exception being taken alſo, viz. That the Ejectment was ſuppoſed in May, when there was no Tithe. Palm. 101. S. C. cited.

8. (s) An Ejectment lies not of a Cloſe containing 3 Acres, without ſhewing of what Nature the Acres are, as Land, Meadow, Paſture, Wood, *&c.* becauſe the Poſſeſſion is to be recovered by *Habere facias Poſſeſſionem*, and muſt follow the Form of other Writs of like Nature, as a Writ of Right, of Ward, Ejectment de Gard, *&c. Mich.* 12 *Jac.* (t) *Savil's* Caſe, 11 *Co.* 55. adjudged, and Judgment arreſted accordingly, (u) though the Name of the Cloſe was inſerted in the Declaration.

(s) 1 Sid. 229. S. P. cited to have been adjudged. And vid. Styl. 194. 1 Levin. 212.

(t) 1 Rol. Rep. 55. S. C. adjudged. Bridg. 56. cited to be adjudged. Hard. 133. cited.

(u) Vid. ſupra, Pl. 5. and the Notes there.

9. An Ejectment will not lie *de* 50 *Acris* (w) *Montani*, becauſe (x) that may contain Arable, Wood, Paſture, or other Species. *Paſch.* 17 *Jac.* between (y) *Stafford* and *Macdonnough*, *Palm.* 100. upon a Writ of Error upon a Judgment out of *Ireland*, it was for this Reaſon reverſed.

(w) But an Ejectment lies in Ireland of 100 Acres of Bog, for it is a Word there well known. Mulcarry and Eyres, Cro. Car. 512. Palm. 100.

(x) An Ejectment lies not de Caſtro, Villa, & Terris in R. without expreſſing the Number or Certainty of Acres, for upon ſuch general Demand no Habere facias Poſſeſſionem can be awarded, Yelv. 118, 119. adjudged upon a Writ of Error out of Ireland. —An Ejectment does not lie de Virgata Terræ. Cro. El. 339. cited to be adjudged.

(y) 1 Rol. Rep. 166, 189. adjudged upon a Writ of Error upon a Judgment in Ireland, and that Judgment reverſed here accordingly, Hard. 58. S. C. cited.

10. An Ejectment lies *de Domo*, becauſe but an Action of Treſpaſs in its Nature, and here is a convenient Certainty, ſo that the Sheriff may deliver Poſſeſſion. *Hill.* 20 *Jac.* between (z) *Royſton* and *Eccliſton*, *Cro. Jac.* 654. adjudged, though objected it ought to have been as certain as a *Præcipe*, and according thereto.

(z) Palm. Rep. 337, 338 S. C. adjudged.

And vid. 3 Levin. 97. Hard. 76.

11. An Ejectment lies of Underwood, though a *Præcipe* does not. *Mich.* 22 *Jac.* between *Warren* and *Wakely*, 2 *Rol. Rep.* 482, 483.

12. Whether an Ejectment lay *de Repoſitorio*, *Trin.* 15 *Car.* between (a) *Sprig* and *Rawlinſon*, *Cro. Car.* 555. upon a Writ of Error, the Court divided; though it was argued, That *Repoſitorium* ſignifying a Warehouſe as well as Cupboard, it ſhould rather be intended of a real Thing, of which a Demiſe might be made, than otherways, and the Defendant in Error for Expedition brought a new Action.

(a) 1 Jon. 454. S. C. and ſaid, the better Opinion of the Judges at Serjeants-Inn being, That it was naught, Berkly retracting his firſt Opinion, the Judgment was reverſed.

13. (b) An Ejectment does not lie for a Meſſuage and 40 Acres of Land, Meadow, and Paſture thereto belonging, without diſtinguiſhing (c) how much of one Sort, and how much of the other. *Hill.* 15 *Car.* between (d) *Martin* and *Nichols*, *Cro. Car.* 573. adjudged.

(b) Cro. Car. 471. S. P. admitted.

(c) But an Ejectment of 20 Acres Jamnorum & Bruer' is well enough, becauſe intended of Lands of the ſame Nature, viz. Heath on which Gorſe and Furze grow. Cro. Car. 179. 1 Mod. 90.

(d) Hard. 59. S. C. cited.

14. (e) An Ejectment lies of a Cottage, becauſe the Deſcription of the Thing by that Name is ſufficient and certain enough to ſhew the Sheriff of what to deliver Poſſeſſion; yet it was ſaid, That a Recovery lay not of a Cottage. *Paſch.* 1649. between *Hammond* and *Ireland*, *Styl.* 215. adjudged.

(e) Cro. El. 818. S. P. adjudged. Cro. Car. 555. S. P. by Two Judges arguend'. Hard. 57. S. P. arguend'. Et vid. 1 Levin. 58.

15. An Ejectment lies not of 3000 Acres of Waſte, becauſe the Word Waſte is uncertain, and may contain Land of any Quality, and the Sheriff will be at a Loſs what Land to deliver. *Paſch.* between *Hancock* and *Price*, *Hard.* 57, 58. adjudged.

16. An Ejectment lies *de Stabulo*. *Hill.* 13 & 14 *Car.* Lady *Dacres*, 1 *Levin.* 58. adjudged upon View of ſeveral Precedents of Recoveries *de Stabulo*.

17. An Ejectment lies not *de uno Crofto*, (f) becauſe of the uncertain Signification of the Word. *Trin.* 23 *Car. Styl.* 30. the Ejectment being brought for other Things alſo; (and *Rolle* doubting whether it would lie for the Croft, for that a Formedon would not lie thereof, though (g) an Aſſiſe might, becauſe put in View to the Recognitors) the Plaintiff (h) releaſed his Damages, and took Judgment for the Reſidue.

(f) But an Ejectment will lie de uno Crofto vocat' B. 1 Lev. 58. b. per Twyſden.

(g) Styl. 194. ſaid, that a Writ of Dower or Aſſize would lie de Crofto, and ſo that an Ejectment would lie, though a Formedon would not. Et vid. Styl. 203. 1 Rol. Rep. 166. 1 Rol. Abr. 775. Pl. 1.

(h) For this, vid. 1 Rol. Abr. 784. Pl. 4. and the Notes there.

18. An Ejectment lies *de quodam Loco vocat'* the *Veſtry* in *D.* for this is a ſufficient Deſcription, ſo that Execution may be had thereof. *Hill.* 34 *Car.* 2. between *Hutchinſon* and *Puller*, 3 *Levin.* 96, 97. adjudged.

(a) Declaration.

(a) Where the Declaration was not, quod a Firma ſua ejecit, but a Poſſeſſione inde, and held well enough, Godb. 71. (b) 1 Brownl. 145. S. C. and ſeems to be only a Tranſlation of Yelv. Day and Fyn, Ow. 133. ſeems to be S. C. and ſaid by Yelv. That the Words, ſive plus ſive minus, muſt be intended of a reaſonable Quantity.

1. IN an Ejectment the Plaintiff declared upon a Leaſe of a Meſſuage, 10 Acres of Land, 20 Acres of Meadow, and 20 Acres of Paſture, *per Nomen unius Meſſuagii, & decem Acrar' Prati*, be it more or leſs. (b) *Mich.* 7 *Jac. Yelv.* 166. after a Verdict for the Plaintiff the Judgment was arreſted, for upon the Matter diſcloſed by the Plaintiff himſelf he could not have Execution of the Quantity found by the Verdict, for by the Leaſe but 20 Acres were demiſed, and the Words, more or leſs, cannot by common Intendment be taken to extend to 30 or 40 Acres, and there is Land demanded by the Declaration which is of another Nature than what is mentioned in the *Per Nomen.*

Decla=

Declaration.

As to the Entry.

1. IN Ejectment the Plaintiff declared upon a Leaſe for Years, *habend'* (a) *a Die datus, Virtute cujus Dimiſſion'* he entered, and was poſſeſſed until ejected by the Defendant. *Trin.* 42 *Eliz.* between *Douglas* and *Shank*, *Cro. Eliz.* 766. after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Day of the Entry was not alledged; and if he entered on the Day of the Date, he was a Diſſeiſor, and (b) the *Virtute cujus* helps not, upon which the Court was at firſt divided, but Judgment was after arreſted.

(a) Otherwiſe where the Habendum was a dat'. Cro. Jac. 145. per totam Curiam, for that the Date is the Time of the Delivery, and it differs from the Day of the Date; ſo that it being alledged that the Defendant poſtea the ſame Day ejected the Plaintiff, it was held to be well enough: but for the Commencement of ſuch Leaſe, vid. the Diviſions under Title Eſtate, When a Leaſe ſhall be ſaid to commence. Et vid. Cro. Jac. 258. 3 Mod. 199. (b) Lat. 199.

2. In Ejectment the Plaintiff declared upon a Leaſe made 12 *Jun. habend' a dicto duodecimo Die Jun'*, *Virtute cujus* he entered, and that *poſtea, ſcilicet, ead'* 120 *Die Jun'* the Defendant ejected him, and becauſe the Plaintiff by his own Shewing entered (c) as a Diſſeiſor, and the Defendant ejected him (d) before he had Title. *Paſch.* 4 *Jac.* between *Evans* and *Croker*, 3 *Mod.* 198. after a Verdict and Judgment for the Plaintiff in *Ireland*, upon a Writ of Error here it was reverſed.

(c) 1 Sid. 8. Dyer 89. a.

(d) If he entered before his Leaſe commenced, though he continued in Poſſeſſion after, he was a Diſſeiſor. 1 Lev. 46. 1 Sid. 8. Cart. 160.

Declaration.

As to the (a) Ejectment.

(a) In a Declaration in Ejectment it need not appear, that the Defendant extratenet the Plaintiff. Godb. 60. and by Kemp Secondary, ſo are all the ancient Precedents, tho' of late it hath been uſed to ſay, quod extratenet. —And though the Term is expired, an Action lies for Damages only, Co. Lit. 285. (b) 2 Bulſ. 29. S. C. (c) Where being alledged poſtea, though the ſcilicet is repugnant, and in Time precedent, yet it will be well enough, vid. Cro. Jac. 96. 1 Sid. 8. Cro. Jac. 154, 429.

1. IN a Declaration of Ejectment, if it appears that the Defendant was ejected after the Leaſe made, it is ſufficient, though no certain Day is alledged in which he was ejected, for the Day is not material, being before the Action brought. *Mich.* 10 *Jac.* between (b) *Merrel* and *Smith*, *Cro. Jac.* 311. adjudged upon a Writ of Error, and that Judgment affirmed accordingly, the Plaintiff declaring upon a Leaſe made 25 *Mar.* 6 *Jac.* by Vertue whereof he entered, and was poſſeſſed till the Defendant (c) *poſtea, ſcilicet, Anno ſexto ſupradict'*, entered and ejected him, and it appeared the Action was not brought till 7 *Jac.*

2. If in Ejectment the Plaintiff declares on a Leaſe the 22 *May*, 20 *Jac. habend' a primo* Die *Maii* for three Years, *Virtute cujus* he entered, and was poſſeſſed *quouſque poſtea, ſcilicet, eiſd' Die & Anno* the Defendant ejected him, this is well enough, for his Entry being laid to be *Virtute Dimiſſion'*, the *poſtea eiſd' Die &c.* refers to the Day of the Leaſe made. *Hill.* 20 *Jac.* between *Rutter* and *Mills*, *Cro. Jac.* 662. adjudged, and that Judgment affirmed upon a Writ of Error accordingly; though it was objected, that the *eiſd' Die, &c.* referred to the laſt Antecedent, and ſo the Ejectment was laid before the Leaſe commenced.

Election.

Election.

Fol. 725.

(A) In what (a) Caſes an Election is given by Law.

(a) If one being ſeiſed of a great Waſte, grants the Moiety of a Yard-Land lying in the Waſte, without aſcertaining what Part, or the ſpecial Name of the Land, or how bounded, this may be reduced to a Certainty by the Election of the Grantee; but otherways in caſe of the King's Grant, for in ſuch Caſe there is no Election given againſt the King. 1 Leon. 30. b. Noy 29. 12 Co. 86. (c) Bullock and Burdet S. C. ſeems to be adjudged, becauſe the Heir could not elect. Moor 181. Pl. 215. adjudged. N. Benl. 148. Pl. 206. adjudged. 1 And. 11. adjudged. Hob. 174. cited. Et vid. 2 Rol. Abr. 11. Pl. 6. S. C.

1. IF A. ſeiſed in Fee of 100 Acres, enfeoffs B. of 18 of the 100 Acres, (without aſſigning of which of the 100 Acres he enfeoff'd him) to hold to B. and his Heirs, at Election of B. and his Heirs when they pleaſe; this is a void Feoffment, ſo that this cannot be made good by any Election, becauſe a Livery cannot operate in Futuro, but ought to paſs the Freehold preſently or never, and therefore the Feoffment void. (c) Dy. 11, 281, 19. adjudged.

2. If *A.* being ſeiſed in Fee of a Manor, Part in Demeſn, and Part in Leaſe for Years, rendring Rent, and Part in Copyhold, in Conſideration of a Sum of Money, by Indenture grants, bargains, and ſells it to *B.* to hold for 17 Years from the Death of *A.* and after *A.* covenants to ſtand ſeiſed thereof to the Uſe of himſelf and the Heirs of his Body, and dies, and *B.* enters, (d) he may elect whether he will take by the Common Law, or by Bargain and Sale, for *A.* had Power to paſs it either Way; and if he ſhould be obliged to take by Demiſe at Common Law, then *B.* would loſe the Rents reſerved upon the Leaſes for Years for Want of an Attornment. *Paſch.* 37 *Eliz.* (e) Sir *Rowland Heyword's* Caſe, 2 *Co.* 35. adjudged; and that this Election remained, notwithſtanding the Alteration of the Eſtate by the ſecond Indenture and the Death of the Leſſor.

(d) A Bargain and Sale is inroll'd Quind' Paſch', and at the ſame Time the Bargainor levies a Fine to the Bargainee,

he may elect to take by one or the other. 4 Co. 72. a. And for this, vid. 3 Leon. 16. 2 And. 161. But where a Man ſhall take by the Common Law or by way of Uſe at his Election, vid. 2 Rol. Abr. 787. and the Notes thereupon. (e) 2 And. 202. S. C. adjudged: And though by the Death of A. the Power to take by Attornment was determined, yet now he ſhould take it as he might. Poph. 95. S. C. reſolved by the Chief Juſtices upon a Reference to them out of the Court of Wards; and ſaid, That all the Judges in England were of the ſame Opinion, upon their Meeting at Serjeants-Inn upon another great Cauſe. Hob. 159. S. C. cited; and ſaid, where a Man's Act may work two Ways, both ariſing out of his Intereſt, the Election is given to the Patient to uſe it either Way. 2 Rol. Abr. 787. S. C. which vid. with the Notes there.

(B) Who ſhall have it.

1. If a Man leaſes Land for Years, reſerving weekly 9 Quarters of Wheat, or the Value thereof as it ſhall then be ſold in the Market of W. if the Leſſee pays neither of theſe at the Time appointed, the Leſſor may have his Action at his Election for the Wheat only, or for the Value only; for tho' the Leſſee might have paid any of them at his Election at the Day, yet after the Day the Law gives the Election to the Leſſor. Tr. 3 Ja. B. R. between Lord Denny and Parnell adjudged.

(a) Hob. 174. like Point.

2. (a) If a Man bargains and ſells 300 Cords of Wood out of his Woods to another and his Aſſigns, to be perceived by the Appointment of the Bargainor, if the Bargainor does not aſſign it within a convenient Time after Requeſt made by the Bargainee or his Grantee, they may take it without Appointment. Co. (b) 5. (c) Palmer 24. b. reſolved: P. 43 El. B. R.

(b) This is miſprinted in the Original, for there 'tis 4.

(c) Ballet and Maynard S. C. Cro. Eliz. 819, 820. adjudged, for that the Bargainee before Appointment had an Intereſt which was aſſignable. Noy 32. obſcurely reported. Moor 691. Pl. 955. S. C. but S. P. does not appear. 1 Jon. 276. S. C. cited.

(d) 2 Co 37. a. Moor 85. Kelw. 78.

3. (d) Where the Things granted are annual, and to have Continuance, the Election (where the Law gives it him) remains to the Grantor, as well after the Day as before: Otherways when to be performed *unica Vice*. *Co. Lit.* 145. a.

4. As if I grant to another for Life an Annuity or Robe at *Eaſter*, and both are behind, the Grantee ought to bring his Writ of Annuity in the Disjunctive; for if he ſhould bring it for the one only, and recover, this Judgment would determine the Election for ever, for he ſhould never have a Writ of Annuity afterwards, but a *Scire Facias* upon the Judgment; which Reaſon *Fitz.* (e) in his *Natura Brev'* not obſerving, held an Opinion to the contrary. *Co. Lit.* 145. a.

(e) Fol. 152. h.

5. But if I contract with you to pay you a Robe or 20 s. at *Eaſter*, you may after the Feaſt bring Debt for the one or the other. *Co. Lit.* 145. a

(f) 2 Co. 37. b. S. P.

6. (f) If one enfeoffs another of two Acres, to hold the one for Life, and the other in Tail, and he before Election makes a Feoffment of both, in this Caſe the Feoffor ſhall enter into which of them he will, for the Feoffee by this wrongful Act hath loſt his Election. *Co. Lit.* 145. a.

7. If *A.* covenants with *B.* that *B.* ſhall elect 20 of his beſt Trees out of his Wood, to be taken within 11 Years, though by that Covenant *B.* hath 11 Years to elect, yet *A.* cannot cut any Trees till *B.* hath elected, for by cutting any Trees in the mean Time, the Latitude of his Election would be abridged. *Trin.* 27 *Car.* 2. between (g) *Motteram* and *Folly*, 1 *Vent.* 271. adjudged; and *Hale* ſaid, it was not like Sir *Tho. Palmer*'s Caſe, in (h) 5 *Co.* where one ſold 2000 Cords of Wood, to be taken at the Election of the Vendee; and it was held, if the Vendor cut any Wood before the Vendee elected, the Vendee could not meddle with it, but muſt ſupply his Bargain out of the Reſidue.

(g) 2 Levin. 142. S. C. by the Report of which A. granted 20 of his beſt Trees, &c.

and adjudged, the Grantor could not take any in the mean Time, at leaſt, without Requeſt to the Grantee to make his Election; and ſo it was not like Palmer's Caſe, for that being only of ſo many Loads of Wood, it was ſufficient if ſo many were left for the Grantee. For this, vid. 1 Part 807. Pl. 9. S. C. (b) Supra, Pl. 2. S. C.

(C) Who

(C) Who may elect.

1. If a Man levies a Fine Come ceo que il ad de ſon done of an House and 100 Acres of Land in D. where he hath there an House and 118 Acres, (a) the Conuſee may elect which 100 Acres he will have, (b) for the Election is given to him by the Fine. M. 37 El. B. R. between Morris and Leveſay, agreed.

(a) Moor 84, 102. S. P. N. Dyer 280. b. margine S. P.

(b) That the Ceſtuy que uſe ſhall have it. Moor 102. Pl. 247. 602. Pl. 832. adjudged. —Where the Deviſee of two Acres not aſcertained ſhall have the Election, N. Dyer 280. b. margine. —Upon a Covenant, in Conſideration of Marriage, to ſtand ſeiſed of ſo much Land as ſhall be of the yearly Value of 40 Marks, it hath been a Queſtion, Whether they to whom the Aſſurance was made might enter into any Part of the Land of the Value of 40 Marks at their Election, and hold the ſame in Severalty, or if they ſhall be only Tenants in Common with the other? And whether they may chuſe one Acre in one Place, and one Acre in another, and ſo through the whole Land where they pleaſe. 3 Leon. 27. Et vid. Kelw. 84. b. N. Dyer 280. margine. 281. margine. 1 Rol. Rep. 187. Lit. Rep. 218.

2. But in the ſaid Caſe, if the Conuſee renders it back to the Conuſor for certain Years, the Conuſor hath the Election given him which 100 Acres he will have, and he may elect. M. 37 El. B. R. between Morris and Leveſay, per Curiam.

3. If a Man gives two Acres to one, to hold one for Life, the other in Fee, the Donee hath Election. Com. Reneger & Fol. 6. b.

4. If a Man levies a Fine Come ceo, &c. of an House and 100 Acres of Land in D. (where he hath there 118 Acres) and the Conuſee renders to the Conuſor for 100 Years, and after the Conuſor dies, his Executor may elect which of the 100 Acres he will have, becauſe this was a Thing in Intereſt in the Teſtator. M. 37 El. B. between Morris and Leveſay, agreed per Curiam.

5. If a Man gives one of his Horſes to A. and B. and after A. dies, yet B may elect, becauſe this was a Thing in Intereſt in them, and no expreſs Election limited. Mich. 37 El. B. between Morris and Leveſay, per Curiam.

Fol. 726.

6. But if a Man gives one of his Horſes to be elected by A. and B. if A. dies before Election, B. cannot elect. M. 37 El. B. between Morris and Leveſay, per Curiam.

6. (c) When nothing paſſes to the Feoffee or Grantee (d) before Election to have the one Thing or the other, there the Election ought to be made in the Life of the Parties, and (e) the Heir or Executor cannot make the Election. *Co. Lit.* 145. a.

(c) 2 Co. 36. a, b. 37. a. ſame Rule.

(d) When Election creates the Intereſt, nothing paſſes till Election. Hob. 174. But where the Intereſt veſts before Election, vide 2 Rol. Abr. 147. L. and the Notes there.

(e) For if he ſhould, he ſhould take as a Purchaſer, where named only by Way of Limitation. 1 Leon. 154.

7. (f) But where an Eſtate or Intereſt paſſes immediately to the Feoffee, Donee, or Grantee, there Election may be made by them or their Heirs or Executors. *Co. Lit.* 145. a.

(f) 2 Co. 36. a. 37. a. ſame Rule.

8. When one and the ſame Thing paſſeth to the Donee or Grantee, and the Donee or Grantee hath Election in what Manner or Degree he will take this, there the Intereſt paſſeth immediately, and the Party, his Heirs or Executors, may make Election when they will. *Co. Lit.* 145. a.

9. (g) In caſe an Election is given of two ſeveral Things, always he that is the firſt Agent, and which ought to do the firſt Act, ſhall have the Election. *Co. Lit.* 145. a.

(g) 2 Co 37. a. ſame Rule.

10. As if a Man granteth a Rent of 20 *s* or a Robe to one, and his Heirs, the Grantor ſhall have the Election, for he is the firſt Agent, by Payment of one, or Delivery of the other. *Co. Lit.* 145. a.

11. So.

(h) Diverſity between Things in Pender and Render. 2 Co. 83, 85. (i) Moor 82. Dyer 91. Pl. 11.

11. So if a Man makes a Leaſe, (h) rendring a Rent or Robe, the Leſſee ſhall have the Election. *Co. Lit.* 145. a.

12. (i) But if I give to you one of my Horſes in my Stable, there you ſhall have the Election, for you ſhall be the firſt Agent, by Taking or Seizure of one of them. *Co. Lit.* 145. a.

13. If one grants to another 20 Load of Maple, to be taken in his Wood of *D.* there the Grantee ſhall have the Election, for he ought to do the firſt Act, *viz.* ſell and take the ſame. *Co. Lit.* 145. a.

(k) Who ſhall have the Election upon a Condition or Covenant, vid. ante 76, 77, 78. (l) Dal. 73. S. C. adjudged.

14. If (k) I have three Daughters, and I covenant that *J. S.* ſhall diſpoſe of one of them in Marriage, it is at my Election of which, and after Requeſt I am bound to deliver her to him, *&c.* *Trin.* 6 *Eliz.* (l) *Moor* 72. *Pl.* 197. adjudged.

15. If one ſeiſed in Fee of a Manor aliens the Manor, except one Cloſe call'd *N.* Part of the Manor, and there are two Cloſes call'd *N.* which are Part of the Manor, and one contains 9 Acres, and the other but 3 Acres, the Alienee ſhall not chuſe which of the ſaid Cloſes he will have, but the Alienor ſhall have the Election which of the ſaid Cloſes ſhall paſs. 20 *Eliz.* Sir *Thomas Lee*'s Caſe, 1 *Leon.* 268. adjudged.

16. There was a Compoſition between the Prebend of *A.* and the Abbot and Convent of *B.* that the Prebend of *A.* and his Succeſſors for all Time to come ſhould have their Election yearly, either to receive Tithes in Kind of Corn or Grain ariſing within certain Lands of the Abbey, or elſe to receive 5 Marks, to be paid by the ſaid Abbot and Convent, in lieu thereof, ſo as ſuch Election was notified to the Abbot, or any of the Monks or Porter of the Abbey, *&c.* and the Lands came to the King by the 31ſt of *H.* 8. and from him to the Defendant, and the Prebendary came to the King by the 1ſt of *Edw.* 6. of Chanteries, *&c.* and from him to the Plaintiff. *Mich.* 16 *Car.* 2. *Hard.* 381. between Sir *William Ingolby & Wivel & al'*, admitting the Compoſition good, it was adjudged that the Power of Election was gone, becauſe it cannot now be made according to the Compoſition: But in this Caſe it was ſaid by *Hale* Chief Baron, that in one (m) *Southwell*'s Caſe, in 44 *El.* where an Abbot had a Quantity of Wood to be taken yearly in ſuch a Wood, or a Sum of Money at his Election, it was held the Election was transferr'd to the King by the Statute of Diſſolution of Monaſteries.

(m) But vid. this Caſe in Poph. 91, 92.

(a) Whether Annuity or Rent-Charge, vid. 1 Part 486. (b) How to be made by a Corporation. 1 Leon. 30.

(D) (a) What ſhall (b) be ſaid an Election.

1. If a Man gives two Acres to another, to hold the one for Life, and the other in Fee, and the Donee after makes a Feoffment of one Acre, this is an Election to have the Fee in that. Com. 6. b.

2. If a Man leaſes two Acres for Life, the Remainder of one Acre in Fee, and after Licenſes the Leſſee to cut Trees in one Acre, this is an Election that he ſhall have the Fee in the other Acre. Com. 6. b.

(E) Where

(E) Where the Election ſhall be perpetual.

1. (a) IF a Man delivers an Obligation to A. to the Uſe of B. and B. when he hears of it refuſes it, he cannot after by Agreement make this a good Deed, for the Refuſal is peremptory. H. 5 Ja. B. per Curiam. (a) 3 Co. 26. b. S. P.

Where in ſeveral Perſons.

1. (a) WHen the Election is given to ſeveral Perſons, there the (b) firſt Election made by any of the Perſons ſhall ſtand. *Co Lit.* 145. a. (a) 2 Co 37. a. ſame Rule. (b) Where an Election made by Tenant for Life ſhall bind him in Remainder, Moor 102.

2. As if a Man leaſes two Acres to *A.* for Life, the Remainder of one Acre to *B.* and of the other Acre to *C. B.* or *C.* may elect which of the Acres he will have, and the firſt Election by one binds the other. 2 *Co.* 36. b.

Emblements.

(A) Who ſhall have them.

1. IF Leſſee at Will ſows the Land, and after determines his Will, the Leſſor ſhall have the Corn. Co. 5. (a) Oland 116. agreed. Co. Lit. 55. b. becauſe he loſes his Rent. (a) Cro. El. 460. S. C. & S. P. by Popham.

2. If a Copyholder durante Viduitate ſows the Land, and after before Severance takes Husband, the Lord ſhall have the Corn, becauſe her Eſtate determines by her own Act. P. 38 El. B. R. between (b) Oland and Burdwick, adjudged. Co. 5. 116. ſame Caſe. Co. Lit. 55. b. (b) Cro. El. 460. S. C. adjudged by Popham and Clinch, Con. Fenner, Gaudy abſente. Moor 394. Pl. 512. S. C. adjudged. Goulſ. 189, 190. S. C. adjudged. 2 Inſ. 81. S. C. cited.

3, If there be Leſſee for Years, upon Condition that if he does Waſte or ſuch like, &c. that his Eſtate ſhall ceaſe, if he ſows the Land, and after does Waſte, the Leſſor ſhall have the Corn. (c) P. 38 El. B. R. held by Clinch. Co. 5. 116. b. Co. Lit. 55. b. (c) Cro. Eliz. 461. S. P. per Clinch.

4. If there be Leſſee for Life, upon Condition, that if he doth ſuch an Act, that he ſhall have it but for two Years, and he ſows the Land, and after forfeits the Condition, by which his Eſtate for two Years is ended before the Severance of the Corn, (d) he ſhall not have the Corn, but the Leſſor. P. 38 El. B. R. by two againſt one.

(d) Leaſe for 7 Years, upon Condition at the End of the 7 Years, to be performed by the Leſſee, to have it for Life, the Leſſee the laſt Years ſow the Land, but performs not the Condition, he ſhall not have the Corn. Cro. Eliz. 461. by two Judges againſt one.

5. So if Leſſee for Years or Life ſows the Land, and after ſurrenders before Severance, the Feoffor ſhall have the Corn. P. 38 El. B. R. by Popham.

6. So if Leſſee for Life or Years ſows the Land, and after aliens in Fee before Severance, the Leſſor entring for a Forfeiture, ſhall have the Corn. (e) P. 38 El. B. R. per Popham.

(e) Cro. El. 461. S. C. & S. P. by three Judges, for the Leſſor enters by Title Paramount. Goulſ. 189. S. P. agreed per Curiam. Moor 5. Co. Lit. 55 b.

7. If a Leaſe be made to a Baron and Feme during the Coverture, and the Baron ſows, and after they are divorced Cauſa Precontractus, the Baron ſhall have the Corn, becauſe the Judgment is the Act of Law. Co. 5. (f) Oland 116. b.

(f) Cro. Eliz. 461. S. C. & S. P. agreed by three Judges. Moor 395. S. C. & S. P. per Curiam.

8. And in this Caſe, if the Divorce be at the Suit of the Baron, yet he ſhall have the Corn, becauſe the Judgment is the Act of Law. (g) Co. 5. 116. b. But ſee the Caſe in the Report, and there Popham doubted thereof.

(g) Cro. Eliz. 461. S. C. & S. P. by two Judges.

9. If Tenant for Life, or (h) for the Life of another, ſows and after his Eſtate determines by the Death of Ceſtuy que vie before Severance, the Leſſee or his Executors ſhall have the Corn. Co. Lit. 55. b. for the Corn is Fructus induſtrialis, and this is given to encourage Induſtry and Charge for the publick Good, Hobert's Reports (i) 178.

(h) Or at Will. Co. Lit. 55. b.

(i) Hob. Fol 132.

Fol. 727.

10. If a Copyholder durante Viduitate leaſes for one Year, and the Leſſee ſows the Land, and after the Copyholder takes Husband, yet the Leſſee ſhall have the Corn, for her Act ſhall not prejudice a third Perſon. P. 38 El. B. R. between (k) Oland and Burdwick agreed.

(k) 5 Co. 116. a. S. C. & S. P. con. for as to the firſt Leſſor, he ſhall not be in better Caſe than his Leſſor was. Cro. El 461. S. C. & S. P. by Clinch, becauſe his Eſtate was determined by the Act of another. Goulſ. 189, 190. S. C. & S. P. by two Judges.

11. If Tenant at Will ſows the Land, and after ſurrenders the Land to the Leſſor before Severance, and the Leſſor accepts it, the Leſſor ſhall have the Corn, and not the Tenant at Will, though this is not properly a Surrender for the Weakneſs of the Eſtate, yet this is a Relinquiſhment of his Eſtate, and (l) ſo it is determined by his own Act. M. 31, 32 El. B. R. between Weeper and Handall, admitted.

(l) The Diverſity is where the Eſtate is determined by his own Act, and where by the Act of Law, or of a Stranger. Co. Lit. 55. 5 Co. 116. Cro. Eliz. 461. Goulſ. 189. Hob. 132. Dyer 316. Ow. 102. —Vid. Hob. 132. margine, where Leſſee for Years held over, and ſowed, &c.

12. If Tenant for Years, si tam diu vixerit, sows, and dies before Severance, yet the Executor of the Lessee shall have the Corn for the Uncertainty of the Determination of his Estate; and it would be inconvenient that the Land should not be manured.

13. If Lessee for Life leases for Years, and the Lessee for Years sows, and after the Lessee for Life dies before Severance, yet the Executor of the Lessee for Years shall have the Corn, for the Uncertainty of the Determination of his Estate. Co. 5. Oland 106.

14. If A. seised in Fee, has Issue a Daughter, his Wife priviment enseint with a Son, and dies, and the Daughter enters, and sows the Lands, and before Severance a Son is born, yet the Daughter shall have the Corn, because her Estate was lawful, and defeated by the Act of God, and it is for the Good of the Commonwealth that the Land be sowed. Co. Lit. 55. b.

15. If the Baron be seised in Fee or for Life in the Right of his Feme, and sows the Land, and dies, or his Wife dies before Severance, yet he or his Executor shall have the Corn. Co. Lit. 55. b.

16. If there be Baron and Feme Jointenants for Life, and the Baron sows the Land, and dies before Severance, his Executor shall have the Emblements, and not the Feme, for it seems there is no Diversity between this and where the Baron is seised in the Right of the Feme. Dubitatur, M. 5. Jo. B. between (m) Skele and Arnold. Dy. 15 El. 316. 2. Contra, Co. Lit. 55. b.

(m) Noy 149. S. C. dubitatur;

and the Court divided thereupon. N. Dyer 316. a. S. C. cited in margine to be adjudged accordingly. Cro. Eliz. 61. S. P. cited to be adjudged as in Co. Lit. Et vid. Ow. 102.

17. If a Feme seised in Fee or for Life of Land sows it, and after takes Husband, who dies before Severance, it seems the Wife shall have them, and not the Executor or Administrator of the Baron, because the Baron did not sow them.

18. If the Baron seised of a Copyhold in Fee sows it, and after surrenders to the Use of his Feme, who is admitted accordingly, and after the Baron dies before Severance, it seems that the Wife shall have the Emblements, and not the Executor or Administrator of the Baron, because the Baron passed the Emblements with the Land to the Feme, as annexed to the Land, and therefore the Privilege which the Law gave to him which sowed is taken away by the Surrender, and so all one as if the Feme had sowed it, or purchased the Land sowed of a Stranger.

19. (n) If the Baron sows the Land, and dies before Severance, and his Wife is endowed of this Land so sowed for her third Part, she shall have the Emblements, and not the Heir nor Executor, for she is to have the Land, fuerit culta sive inculta cum Fructibus & Redditibus. Bracton, Lib. 2. Fol. 96. S. 2.

(n) 2 Inst. 81. Et vid. Dyer 316. a. 1 Brownl. 44.

20. If Tenant by Statute-Merchant sows the Land, and before Severance a casual Profit happens, by which he is satisfied, yet he shall have the Corn. Co. Lit. 55. b.

21. (o) If A. seised in Fee of Land sows it with Grain, and after (p) grants it to B. for Life, the Remainder to C. and after B. dies before Severance, C. shall have the Corn, and not the Executors of B. for the Reason of Industry and Charge in B. is wanting. (q) Hobert's Reports 178. per Curiam.

(o) Cro. El. 464. S. P. arguend'. Godb. 259. S. P. adjudged.

(p) So if he devises. Cro. El. 62. 464. Gouldf. 44. Winch 51, 52. —But in Cro. Eliz. 61. it is said, That if B. had granted them to another it had been otherways, for by the Grant they had been quasi Chattels severed from the Land. (q) Hob. Rep. Fol. 132. S. C. & S. P. per Curiam.

22. If

Fol 728.

22. If Leſſee at Will ſows the Land with Grain, Roots, Flax, Hemp, or other annual Profit, and the Leſſor enters before Severance, yet he ſhall have it. Co. Lit. 55. b.

23. But if the Leſſee plants young Fruit-Trees, or young Oaks, Aſhes, or Elms, &c. or ſows the Land with Acorns, and after before Severance the Leſſee at Will is put out of the Land by the Leſſor, yet the Leſſee ſhall not have theſe, becauſe they render not any annual or preſent Profit. Co. Lit. 55. b.

24. If Leſſee at Will, by good Husbandry or Induſtry, either by overflowing or making of Trenches, or compaſſing of Meadows, or by digging up of Buſhes or ſuch like, makes the Graſs to grow in greater Abundance, yet if the Leſſor enters and ejects him, the Leſſee ſhall not have the Graſs, becauſe the Graſs is the natural Profit of the Land. Co. Lit. 56.

25. So if Leſſee at Will ſows the Land with Hay-Seed, and by this encreaſes the Graſs, and the Leſſor enters and ejects him, yet the Leſſee ſhall not have it. Co. Lit. 56.

(r) 11 Co. 51. b. S. P. and that the Carrying them off the Land cannot alter the Property of the Diſſeiſee: But for this, vid. Dyer 31. b. Moor 24. Pl. 84. Dal. 30. Cro. El. 464. 1 Rol. Rep. 101.

26. (r) If a Diſſeiſor ſows the Ground, and ſevers the Corn, and the Diſſeiſee re-enters, he ſhall have the Corn, becauſe he enters by a former Title, and the Severance or Removing the Corn alters not the Caſe, for the Regreſs is a Re-continuance of the Freehold in him, in Judgment of Law, from the Beginning. *Co. Lit.* 55. b.

27. Before the Statute of *Merton*, made the 20th of *Hen.* 3. it was a Doubt, whether Tenant in Dower might deviſe the Corn ſhe had ſowed? Or if ſhe did not, Whether her Executors ſhould have it, or he in Reverſion? For by ſome, her Eſtate being created by Law, as when her Dower was aſſigned, ſhe ſhould have the Land ſowed or unſowed, ſo at the Time of her Death he in the Reverſion ſhould have it ſowed or unſowed; but the better Opinion was otherways: And to clear this Doubt, that Statute was made, *Quod Viduæ poſſint legare* (s) *Blada ſua tam de Dotibus quam de aliis Terris ſuis, &c.* 2 *Inſ.* 80, 81.

(s) Vid. 2 Inſ. 81. Kelw. 125. a, b.

28. If *A.* is bound in a Statute to *B.* and *A.* ſows his Land, and after (t) *B.* extends it, and it is delivered to him in Execution, *B.* ſhall have the Corn ſowed. *Trin.* 29 *Eliz.* between *Burden* and *Withington*, 2 *Leon.* 54. adjudged.

(t) Judgment was given againſt A. and he ſowed the Land, and brought a Writ of Error to reverſe the Judgment, but it was affirmed, &c. 2 Bulſ. 213. adjudged the Recoveror ſhould have the Corn.

29. So in caſe of a Recognizance. *Trin.* 29 *Eliz.* 2 *Leon.* 54. *per Curiam.*

30. If there be Tenant for Life, the Remainder in Fee, and Tenant for Life leaſes for Years, and the Leſſee for Years is ouſted, and he in Remainder for Life diſſeiſed, and the Diſſeiſor leaſes for Years, and his Leſſee ſows the Land, and Tenant for Life dies, the Leſſee of the Tenant for Life of the Land having the Right to the Land, by Conſequence had a Right to the Emblements, as Things annexed thereto; and though the Death of the Tenant for Life determined his Intereſt in the Land, yet his Right to the Emblements remains. *Paſch.* 38 *Eliz.* (u) Sir *Hen. Knivet's* Caſe, 5 *Co.* 85. a. adjudged.

(u) Cro. Eliz. 463, 464. S. C. adjudged, for if he had enter'd in the Life of Tenant for Life, 'tis clear he ſhould have had the Corn; and when by the Death of the Tenant for Life he cannot enter, the Law ſupplies his Entry. Gouldſ. 143, 144. S. C. adjudged.

31. There were Hops growing out of ancient Roots in Land of which a Woman was Tenant for Life, and ſhe married, and died before Severance, and becauſe they grew by Manurance and Induſtry, *Mich.* 11 *Car.* between *Latham* and *Atwood*, *Cro. Car.* 515. it was held, that they were like Emblements, which ſhould go to the Baron, or Executor of the Tenant for Life, and not to him in Remainder, and are not to be compared to Apples or Nuts, that grow of themſelves.

32. By the 28 *H.* 8. *cap.* 11. *par.* 6. it is enacted, That an Incumbent having ſowed his Glebe, may by Will diſpoſe thereof.

Enfants.

(A) What Infants, in reſpect of their Office, &c. or for other collateral Reſpect, cannot avoid their own Acts.

1. IF the King conſent to an Act of Parliament during his Minority, yet he cannot after avoid (a) this Act, becauſe the King as King cannot be a Minor, for as King he is a Body (b) Politick. Co. Lit. 43.

(a) So if the King makes any Leaſe or Grant, he ſhall never avoid them in reſpect of Infancy. 5 Co. 27. a. 7 Co. 12. Pl. Com. 213. a. (b) The Acts of a Mayor and Commonalty ſhall not be avoided by reaſon of the Nonage of the Mayor. Cro. Car. 557. 5 Co. 27. a, b.

(B) What Acts of an Infant are void, and what voidable.

1. IF an Infant in Ward to Guardian in Soccage enfeoffs the Guardian, this is void, (a) for the Deceit that the Law intends in him that hath the Command of him, and the Breach of Truſt which the Law repoſes in him. (b) 35 Aſſ. 8. adjudged.

(a) Where his Continuance in Poſſeſſion after the full Age of the Ward is a Diſſeiſin, 1 Rol. Abr. 659. Pl. 13. (b) Fitz. Aſſize 322. S. C.

2. If an Infant ſurrenders a Leaſe for Years to him in Reverſion, this is void, and cannot be made good by any Agreement at full Age. Mich. 13 Car. B. R. between (c) Fludd and Gregory, per Curiam, reſolved upon a Trial at Bar.

(c) Lloyd and Gregory, Cro. Car. 502.

S. C. & S P. ſeems to be admitted, though in that Caſe the Queſtion aroſe upon the Surrender of a future Intereſt. 1 Jon. 405. S. C. but it appears the Queſtion in the Caſe was upon the Surrender of a future Intereſt. 3 Mod. 310. S. P. per Curiam agreed, and ſaid, there are expreſs Authorities for it.

3. But if an Infant being a Leſſee for Years, to begin at a Day to come, (d) accepts a new future Intereſt for the ſame Term, and at full Age when the Term begins enters into the Land, and accepts the new Leaſe, and claims in by it, this Agreement to the new Term ſhall be a Surrender in Law of the firſt Eſtate. M. 13 Car B. R. between (e) Fludd and Gregory, per Curiam, upon a Trial at Bar; but a ſpecial Verdict was found of this among other Things, and after, Tr. 14 Car. B. R. upon Argument at the Bar, adjudged per Curiam upon this Point, becauſe it could not be for the Benefit of the Infant, and therefore the Law adjudged it void ab Initio. Intratur, Tr. 13 Car. Rotulo 1154.

(d) Where the new Leaſe was accepted, purſuant to a Covenant in the old one, 2 Rol. Rep. 403, 404, 407, 408, &c.

(e) Lloyd and Gregory, Cro. Car. 402.

S. C. adjudged, becauſe the new Leaſe was made without Increaſe of his Term, or Decreaſe of his Rent; and where there is no apparent Benefit, or Semblance of a Benefit, the Acts of an Infant are void. 1 Jon. 405, 406, S. C. adjudged, becauſe, as it is there ſaid, the new Leaſe being made by a Dean and Chapter for 99 Years, was abſolutely void.

(C) What Acts done by an Infant (a) ſhall bind him.

(a) Where an Infant is bound to do any thing by Law, the ſame ſhall * Fol. 729. bind him, though done without Suit of Law. Co. Lit. 172. a.

1. If an Infant in Reverſion accepts a Leaſe for Life of Tenant in Dower, but never takes the Profits, and at full Age diſagrees to the Leaſe, * this ſhall not bar him of his Action of Waſte for Waſte done in the mean Time. 30 E. 3. 16.

2. If a Man lends an Infant 10 l. to pay at a certain Day, this Contract ſhall not bind him. 39 E. 3. 20. b. admitted by the Iſſue.

3. If an Infant makes a Contract pro Victu & Veſtitu, this ſhall bind him.

4. If an Infant makes a Contract for his Table, he may be charged in an Action upon this Contract. 18 Ed. 4. 2. (b) 10 H. 6. 14.

(b) Fitz. Arbitrament 4. S. C.

5. So if he buys a (c) Coat or Cloth for Apparel, this ſhall bind him, for he cannot live without Meat, Drink, and Clothes. 18 E. 4. 2. (d) 10 H. 6. 14.

(c) In the Original 'tis Veſture.

(d) Fitz. Arbitrament 4. S. C.

6. If an Infant be a Mercer, and hath a Shop in a Town, and there buys and ſells, and he contracts to pay a certain Sum to J. S. for certain Wares ſold to him by J. S. to re-ſell, yet he is not chargeable upon this Contract, for this Trading is not immediately neceſſary ad Victum & Veſtitum. Trin. 10 Ja. B R. between (e) Hill and Whittingham, in a Writ of Error per Curiam, and the Judgment given before econtra reverſed; for if he ſhall be bound thereby, Infants might be infinitely prejudiced, and buy and ſell, and live by the Loſs.

(e) Cro. Jac. 494. S. C. adjudged, and the firſt Judgment reverſed accordingly.

2 Rol. Rep. 45. S. C. adjudged, and the firſt Judgment reverſed accordingly.

(f) 1 Levin. 86 S. P. adjudged.

7. If an Infant makes a Contract pro Victu or Veſtitu, and enters into a ſingle Bill for Payment thereof, this ſhall bind him, though he be ouſted of his Law thereby.

8. (g) But if the Infant enters into an Obligation with a Penalty for (h) Payment thereof, this Obligation shall not bind him. Pasch. 32 Eliz. B. R. by three Justices. Mich. 11 Ja. B. Cupworth's Case, per Curiam.

(g) Co. Lit. 172. a. S. P.

(h) A Man laid out Money for the necessary Meat and Drink of an Infant, and took an Obligation in double the Sum for Payment thereof, Aylif and Archdale, Cro. Eliz. 920. adjudged void per totam Curiam. Moor 679. Pl 929. adjudged. —But if he had taken an Obligation of the very Sum laid out for his necessary Maintainance, it had been otherways. Cro. E. 910. per Curiam.

9. But an Infant may bind himself in an Assumpsit for Payment thereof, and an Action upon the Case lies against him upon the Promise, for this is but in nature of an Action of Debt, and therefore where Debt lies, an Action upon the Case lies against him, (but perhaps it would be otherways upon a collateral Promise) for Wager of Law is not to be regarded, for a Man of full Age shall by such Action be ousted thereof. Trin. 15 Ja. B. C. between (i) Tillet and Buckstone, Rot. 1374. adjudged, that an Action upon the Case lay against an Infant upon Promise of Payment for Beer and Billets. Mich. 2 Car. Regis, between (k) Delaval and Clare, agreed per Curiam. Contra, Mich. 11 Ja. B. per Curiam.

(i) Noy 85. S. C. cited. Lat. 157. S. C. cited.

(k) Lat. 156, 157. S. C. Et vid. 3 Bulst. 188. 1 Rol. Rep. 382.

10. If an Infant promises another, that if he will find him Meat, Drink, and Washing, and pay for his Schooling, that he will pay him 7 l. yearly, an Action upon the Case lies upon this Promise, (l) for Learning is as necessary as other Things; and though it is not mentioned what Learning this was, yet it shall be intended what was fit for him, till it be shewn to the contrary on the other Part; and though he to whom the Promise was made does not instruct him, but pays another for it, the Promise of Repayment thereof is good; and it appears that the Learning, Meat, Drink, and Washing, could not be afforded for a less Sum than 7 l. Mich. 4 Car. B. C. between (m) Pickering and Gunning adjudged, this being moved in Arrest of Judgment; which intratur, Trin. 3 Car. Rot. 918.

(l) Co. Lit. 172. a.

(m) Palm. 528. S. C. adjudged. 1 Jon. 182. S. C. adjudged.

11. An Infant may bind himself to pay for his necessary Meat, Drink, (n) Apparel, necessary Physick, and such other Necessaries, and likewise for his good Teaching and Instruction, whereby he may profit himself afterwards. *Co. Lit.* 172. a.

(n) That it must appear it was necessary, and suitable to his Degree, and how, Ive and Chester, Cro. Jac. 560. 2 Rol. Rep. 144. Poph. 151. Palm. 361. Et vid. Cro. Eliz 583. Gouldf. 168. Godb. 219. 1 Leon. 114. Cart. 215. 1 Part 46. Pl. 1. — Where Part appears to be necessary, and Part not, whether the Plaintiff shall have Judgment for so much as was necessary, Mackarel and Bachelor, Cro. Eliz. 583. dubitatur. Gouldf. 168. dubitatur, the Plaintiff acknowledging the Receipt of 4 l. in Part, without shewing of which Part. Cart. 216.

12. An Infant under the Age of 21 shall not be charged in any (o) Account. *Co. Lit.* 172.

(o) Not in an Indebitatus upon an Insimul computasset, for in this Action no Evidence shall be given of the Value or Necessity of the Things, but of the Account only, in which the Infant may be mistaken. Wood and Witherich, Lat. 169. adjudged. Noy 87. adjudged. Et vid. Palm. 528. 2 Rol. Rep. 271.

13. If an Infant (p) be a Gaoler, and suffers an Escape, an Action lies against him. 8 *Co.* 44. b.

(p) But an Action lies not against an Infant Innkeeper for Goods lost. 1 Part 14. Pl. 3. — Suit in Admiralty against an Infant Master of a Ship, Ante 266. Pl. 3.

14. If

14. If an Infant affirming himſelf to be of Age, borrows 100 *l.* and gives his Bond for it, and being ſued upon the Bond, avoids it by reaſon of his Nonage, yet no Action lies againſt him for the Deceit; for though Infants ſhall be bound by actual Torts, (q) as Treſpaſs, *&c.* which are *Vi & Armis*, yet they ſhall not for thoſe which ſound in Deceit, (r) for if they ſhould, all the Infants in *England* might be ruined. *Trin.* 17 *Car.* 2. between (s) *Johnſon* and *Pie*, 1 *Sid.* 258. Judgment arreſted after a Verdict for the Plaintiff in an Action upon the Caſe for the Deceit.

(q) That an Action for Words lies againſt an Infant of the Age of 17, for Malitia ſupplet Ætatem, Noy 129

(r) If one delivers Goods to an Infant upon a Contract, &c. knowing him to be an Infant, the Infant ſhall not be charged in a Trover and Converſion for them, for thus all the Infants in England might be ruined. 1 Sid. 129. per Curiam. — Otherways if delivered to him, not knowing him to be an Infant. 1 Sid. 129. per Curiam. (s) 1 Levin. 169. S. C. adjornatur. 1 Keb. 905, 913. and Judgment arreſted accordingly.

15. But if an Infant judicially perjure himſelf in Point of Age or otherways, he ſhall be puniſhed for the Perjury. *Trin.* 17 *Car.* 2. 1 *Sid.* 258. agreed *per Curiam.*

(D) Acts done by an Infant.

What Acts are void.

1. If an Infant (a) leaſes for Years, and the Leſſee enters, the Infant may have Treſpaſs againſt him. 18 E. 4. 1. b. 4. b.

(a) Whether a Leaſe made by an Infant upon the Land to try his Title is not good, though no Rent reſerved, vid. Moor 105. Pl. 248. 2 Leon. 216. &c. Noy 130.

2. If (b) he (c) leaſes for Years, rendring Rent, it is at (d) his Election (e) to * affirm the Leaſe, or to have Treſpaſs againſt the Leſſee for the Occupation. (f) 18 E. 4. 2.

* Fol. 730.

(b) Aſhfield and Aſhfield ſame Point, where the Leaſe was made by an Infant Copyholder, 1 Jon. 157. adjudged. Godb. 364. adjudged. Noy 92. adjudged. Et vid. 4 Leon. 4. Co. Lit. 308. a. 1 Mod. 263. — But ſuch Leaſe made by Infant without reſerving a Rent is void. Moor 105. Pl. 248. — So if Triſle only reſerved as a Pepper-Corn, Roſe, &c. 1 Mod. 263. Ante 629. Pl. 6. (c) So if a Leaſe be made to an Infant, rendring Rent, 1 Brownl 120. (d) But not at the Election of the Leſſee. 1 Sid. 42. (e) He may bring an Aſſiſe for the Diſſeiſin, or Debt for the Rent. Cro. Car. 303, 306. (f) Br. Treſpaſs 338. S. C.

3. If an Infant exchanges with another, if the other enters, the Infant may have an Aſſiſe. 18 E. 4. 2.

4. If he ſells Goods, it is at his Election to make it void, for he may have Treſpaſs, or Debt for the Money, (g) 18 E. 4. 2.

5. If a Treſpaſs be done to an Infant, and he ſubmits to an Award, (h) the Award made by them ſhall not bind but at his Election. Contra, (i) 10 H. 6. 14.

(g) Br. Treſpaſs 338. S. C.

(h) For this, vid. 1 Part 549. Pl. 1. and the Notes there.

(i) Fitz. Arbitrament 4. S. C. Br. 43. S. C.

6. If a Man makes a Deed of Feoffment to an Infant, and the Infant makes a Letter of Attorney to another (k) to take Livery for him, this is good, becauſe it is for his Benefit. Dubitatur, (l) 21 H. 6. 31. But Brook in abridging it, Title Faits 31. ſeems that it is good. Mich. 11 Car. B. R. between Palfryman and Groby, per Curiam, upon Evidence at the Bar, reſolved, upon a Trial which concerned Sir Sidny Montague and Dame Gorges,

(k) But if an Infant makes Livery by Attorney, it is void. 2 Rol. Abr. 2. Pl 4. which vid. with the Notes there. — And the Attorney that executes it is a Diſſeiſor. 1 Rol. Rep. 242. (l) Noy 130. S. C. cited. Palm. 237. S. C. cited.

the being but of the Age of 11 Years at the making of the Letter of Attorney.

7. If an Infant grants a Rent-Charge out of his Lands, 'tis not voidable, but *ipso Facto* void, for if the Grantee distrain for the Rent, the Infant may have an Action of Trespass against him. *Trin.* 2 *Will. & Mar.* 3 *Mod.* 310. *per Curiam.*

(E) What voidable.

1. AN Infant (a) delivers Goods to his own Use, this is only voidable, for he shall not have (b) Trespass against the Bailee. 18 H. 6 2.

(a) If an Infant delivers Money with his own Hands, it is only voidable to be recovered back in an Action of Account. Hob. 77. —There is a Diversity where the Acts of an Infant take Effect by the Delivery of his own Hand or not. Vid. Perkins, Sect. 12. 2 Rol. Rep. 408. Lat. 10. —The Deeds of Infants have the Form, tho' not the Operation of Deeds, so that Non est factum cannot be pleaded thereto without shewing some special Matter to make them of no Efficacy. 3 Mod. 310 per Curiam. (b) Diversity where an Infant sells Goods, and delivers them with his own Hand, and where the Vendee takes them without such Delivery. 1 Mod. 137.

(F) What shall bind him.

1. IF an Infant Administrator, being above 17 Years of Age, by the Assent of his Friends, sells a Lease for Years that he hath of Lands as Administrator, to the intent with the Money (a) to pay the Debts of the Testator, and discharge the Debts of the Infant himself which were for his Apparel and Diet, this shall bind the Infant. Mich. 14 Ja. in Camera Stellata, resolved by Hobert and Tanfield, and decreed by the Court between Two Snows Plaintiffs, and Barraden and Watkins Defendants: But it would have been otherways, as they agreed, if the Infant had been under 17 Years of Age, for before this Age he cannot administer by the Civil Law.

(a) An Infant Executor, or other Person by his Order, may sell Goods to pay Debts, &c. Cro. Eliz. 254. —Though sold for less than Worth, yet the Sale is good. 3 Leon. 143. Et vid. Kelw. 51. a.

2. If A. be bound to B. in 100 l. for Payment of 52 l. at the End of one half Year after, and after B. dies, making Three Executors, and after the Obligation is forfeited, one of the Executors comes to the Age of 18, and then accepts the 52 l. in full Satisfaction of the said Obligation, and makes a Release of the said Obligation, yet this does not discharge the Obligation, because the Release is made by an Infant, and by the Forfeiture the 100 l. was a Debt of the Testator, and the 52 l. cannot be a Satisfaction of the 100 l. and in Equity there may be a good Cause to take the Forfeiture, and in an Action of Debt against his Executor he may plead a Judgment upon an Obligation forfeited in Bar, ultra quæ he hath not Assets, which shews that the

Sum forfeited is the Debt, and (b) an Infant Executor cannot releaſe the Debt of the Teſtator without a Satisfaction. Mich. 13 Car. B. R. between (c) Knyveton and Statham, adjudged upon a Demurrer. Intratur Trin. 13 Car. Rot. 962. but this was againſt the Opinion of Croke.

(b) An Infant Executor upon Payment of a Debt due to the Teſtator, may make an Acquittance for it; but in that Caſe a Releaſe without Payment is void. Co. Lit. 172. a. But for this, vid. Ruſſel's Caſe, 5 Co. 27. 1 And. 177. where it is held by ſome, that if an Infant hath a ſingle Obligation made to him, and he receives the Money, he may make an Acquittance for it. Moor 146. Pl. 289. Et vid. 4 Leon. 103, 104 Godb. 29, 30. Poph. 130. Cro. El. 43, 671. —Where the Court will not order a Guardian or Infant Executor to acknowledge Satisfaction of more, than they actually receive, Moor 852. Pl. 1163. —An Infant Executor cannot aſſent to a Legacy, unleſs he hath Aſſets to pay Debts. 1 Chan. Caſ. 257. (c) Cro. Car. 490. S. C. adjudged. 1 Jon. 400. S. C. adjudged niſi.

3. If an Infant covenants by Indenture to levy a Fine, and that it ſhall be to certain Uſes, and after he levies the Fine, and dies within Age, the Limitation of the Uſes ſhall bind the Heir of the Infant, as well as the Infant himſelf, (d) ſo long as the Fine continues not reverſed. Trin. 13 Car. B. R. between (e) Spring and Sir Julius Cæſar Maſter of the Rolls and others in a Writ of Error upon a Judgment in Banco in a Quare impedit, adjudged per Curiam, without Queſtion as to this. Intratur Mich. 11 Car.

(d) 2 Co. 58. a. 10 Co. 42. b. Et vid. Moor 22. Pl. 73. Dal. 47. 2 Leon. 159. Hob. 224.

the Uſes declared by Deed being Part of the Operation of the Fine. Mod. 252. for the Fine, and Deed to declare the Uſes, make but one Aſſurance. And Goulſ. 13. S. P. arguend. con. 4 Leon. S. P. arguend. con. (e) 1 Jon. 390. S. C. & S. P. adjudged. Winch. 103, 104. S. C. debated in Common Pleas.

Fol. 731.

(G) What judicial Acts done by an Infant ſhall bind him.

1. If (a) an Infant by his Guardians ſuffers a common Recovery, he being Tenant to the Precipe, this ſhall bind him, ſo that he ſhall not avoid it in a Writ of Error, for by Intendment he ſhall have Recompence in Value; and if this be not for the Good of the Infant, he may have his Recompence over againſt his Guardians. Paſch. 9 Car. B. R. between (b) the Earl of Newport and G. Duke of Buckingham, adjudged in a Writ of Error to reverſe ſuch a common Recovery ſuffered in Banco, and then ſeveral Precedents were cited of ſuch common Recoveries ſuffered by Infants, and then ſaid, that much Land depended upon ſuch Recoveries, and all the ſaid Precedents are in nature of Judgments.

(a) 2 Rol. Abr. 395. Pl. 4. is cited. 10 Co. 43. a. con. Et vid. Noy 140. (b) Hob. 196. Hetl. 171. & Ley 82, 83. the ſame Recovery ſuffered after the King had ſignified his Pleaſure by his Privy Signet and Sign Manual, and the Reaſons for the Recovery had been enquired into. Cro. Car. 307. S. C. adjudged without open Argument, notwithſtanding the Opinion, 10 Co. 43. 1 Jon. 318. S. C. adjudged by all the Judges. 1 Rol. Abr. 571. Pl. 18. S. C. Hob. 197. Hetl. 171. and Ley 82, 83. ſeveral Precedents of ſuch Recoveries. 1 Leon. 211. 1 Mod. 48, 49. 2 San. 94, 95. 1 Sid. 447. —May be ſuffered by Guardian, but not by Attorney. Cro. El. 323. Godb. 161. 1 Sid. 321. 1 Levin. 142.

2. If an Infant ſuffers a common Recovery, in which he comes in as Vouchee in proper Perſon, and not by Guardian or Attorney, this is erroneous, and may be reverſed for this Cauſe in a Writ of Error, for this is (c) more ſtrongly an Error than if it had been by Attorney, inaſmuch as he cannot have any Remedy againſt any if he be deceived. Hill. 1650. (d) between Aylet and Walker, per Curiam reſolved, yet this ſhall not bind the Infant, and that he may reverſe it for this Cauſe in a Writ of Error; but it was adjudged that he could not avoid it himſelf by Entry without a Writ of Error. Intratur Trin. 1649. Rot. 200. upon a ſpecial Verdict in Eſſex.

(c) In the Original it is plus fortement.

(d) Styl. 246. S. C. adjudged niſi.

(H) What (a) judicial Privileges an Infant ſhall have.

(a) Vid. the Caſe of Holford and Plat, Cro. Jac. 464. 2 Rol. Rep. 14, 22. Hob. 266. —Where an Infant may waive his

1. IN an Aſſiſe againſt two, of which one is an Infant, if they make Default, by which the Aſſiſe is awarded, and after the Aſſiſe remains for Default of Jurors, yet the Infant ſhall be received to plead afterwards. (b) 29 Aſſ. 36.

Demurrer, 2 Bulſ. 69. (b) Br. Aſſiſe 298. S. C. Br. Reſceit 126. S. C.

2. In an Aſſiſe by an Infant, if the Tenant pleads an ill Bar, and the Infant replies, by which he makes the Bar good, if the Plaintiff had been of full Age, yet this ſhall not make the Bar good againſt the Infant, but if the Judgment be for the Tenant thereupon, this is Error, for the Court ought to plead for the Infant for the Tenderneſs of his Age. (c) 37 Aſſ. 5. adjudged.

(c) Br. Error 128. S. C.

3. If in a Formedon in Remainder Tenant pleads Infancy, and that the Remainder deſcended to him and prays his Age, and the Demandant pleads, that the Remainder did not deſcend to him, and thereupon Iſſue is joined, and found for the Demandant, a final Judgment ſhall be given, notwithſtanding the Infancy of the Tenant. *Paſch.* 17 *Car.* 2. between (d) *Amcot* and *Amcot*, 1 *Levin.* 163. adjudged, and that Judgment affirmed upon a Writ of Error *niſi.*

(d) 1 Sid. 118. S. C. adjornatur; 1 Sid. 252.

but ſaid, there was no Difference where Tenant was an Infant, and where of full Age. S. C. & S. P. appears.

(I) Of

(I) Of what (a) Things an Infant is capable.

(a) Cannot be an Attorney, becauſe he cannot be ſworn. March 92. Cro. Eliz. 637.

1. AN Infant is not capable of the Stewardſhip of the (b) Courts of a Biſhop, becauſe by Intendment of Law he hath not ſufficient Knowledge, Experience, and Judgment, to uſe the (c) Office, and alſo becauſe he cannot make a Deputy. Mich. 40, 41 Eliz. B. R. between (d) Scambler and Waters, adjudged per Curiam.

(b) Either in Poſſeſſion or Reverſion. Co. Lit. 3. b. March 43.

ſaid, this Point was adjudged contrary in Scambler's Caſe, viz. That an Infant was capable of the Grant of a Stewardſhip in Reverſion. (c) As to an Infant's Capacity to take an Office, vid. 2 Rol. Abr. 153. To what Perſons an Office may by granted. (d) 2 Rol. Abr. 153. S. C. which vid. and the Notes there. Cro. Eliz. 636. S. C. upon a Grant of a Stewardſhip of a Court Leet, adjornatur. Cro. Car. 556. S. C. cited, and denied to be Law, if intended where granted exercend' per ſe, vel ſufficient' Deputatum. March 41, 43. S. C. cited.

(K) What Things ſhall bind an Infant by Agreement at his full Age.

1. IF a Leaſe for Years be made to an Infant, rendring Rent, the Rent is Arrear, and after the Infant comes of full Age, and afterwards continues the Occupation of the Land, this will make him chargeable with the Arrears incurred during his Infancy. Paſch. 11 Ja. B. R. between (a) Kettle and Elliot, adjudged.

(a) Cro. Jac. 320. S. C. adjudged.

Godb. 120, S. C. adjudged. 2 Bulſ. 69. S. C. adjudged. Et vid. Dal. 64.

2. If an Infant poſſeſſed of a Term for Years ſells it for Money, and after he comes of full Age receives Part of the Money for it, he ſhall avoid the Grant notwithſtanding, for the Contract being void in the Commencement, it cannot be made good by any ſubſequent Act. *6 El. Dal.* 64. *per totam Curiam.*

At what Time it muſt be avoided.

1. THere is a Diverſity between Matters of Record done or ſuffered by an Infant, and Matters in Fait, for he may avoid Matters in Fait either within Age or at full Age, (a) but Matters of Record, as Statutes Merchant, and of the Staple, Recognizances acknowledged by him, or a Fine levied by him, (b) Recovery againſt him by Default in a real Action, (ſaving in Dower) muſt be avoided, *viz.* the Statute, *&c.* by *Audita Querela*, and the Fine and Recovery during his Minority, for being judicial Acts taken by a Court or Judge, the Nonage of the Party to avoid the ſame ſhall be (c) tried by Inſpection, and not by the Country. *Co. Lit.* 308.

(a) 2 Inſ. 483. S. P. 673. S. P. But for this, vid. 1 Part 630. Pl. 12, 13. and the Notes there. And Godb. 149. Winch 114. Yelv. 155. 12 Co. 121, 122. 3 Mod. 229. (b) 2 Inſ. 483, 484. S. P. (c) For this, vid. 2 Rol. Abr. 572. Pl. 7. and the Notes there.

2. But if an Infant bargain and ſell Lands by Deed indented and inroll'd, he may avoid it at any Time. 2 *Inſ.* 673.

Who ſhall take Advantage of Infancy.

1. (a) PRivies in Blood, as the Heir general or ſpecial, may avoid a Conveyance made by their Anceſtor during his Nonage. 8 *Co.* 42 b.

(a) 1 Rol. Rep. 401.

2. As if an Infant ſeiſed in Fee makes a Feoffment, and dies, his Heir ſhall enter. 8 *Co.* 42. b.

3. So if ſeiſed in Tail Male, and he makes a Feoffment, and (b) dies, the Son being Heir general and ſpecial, may enter. 8 *Co.* 43. a.

(b) So tho' attainted of Felony.

8 Co. 47. a. —But by Co. Lit. 337. a. 'tis otherways in ſuch Caſe, becauſe his Entry is not lawful in reſpect of his Eſtate only, but of his Blood alſo, which is corrupted.

4. And if he hath no Sons, but only Daughters, his Brother being his ſpecial Heir *per Formam Doni* made to his Father, may avoid the Feoffment, becauſe he is privy in Blood, and has the Land by Deſcent. 8 *Co.* 43.

5. But Privies in Eſtate cannot avoid a (c) Conveyance made by an Infant. 8 *Co.* 43. a.

(c) But where Privies in Eſtate may have a Writ of Error to reverſe a common Recovery ſuffered by an Infant appearing by Attorney, vid. 1 Rol. Abr. 755. Pl. 6. and the Notes there.

6. As if Tenant in Tail, being within Age, makes a Feoffment, and dies without Iſſue, the Donor ſhall not enter, becauſe he was privy only in Eſtate, and no Right accrued to him by the Death of the Donee. (d) 8 *Co.* 43. a.

(d) Palm. 254. S. C. cited, and denied by Houghton Juſtice, who ſaid, the Feoffment by an Infant could not put him to his Formedon by a Diſcontinuance, and then if he could not enter, he ſhould be without Remedy.

7. (e) So if there be two Jointenants within Age, and one of them makes a Feoffment in Fee of his Moiety, and dies, the Survivor cannot enter, for by the Feoffment the Jointure was ſevered ſo long as the Feoffment continued in Force, and therefore the Heir of the Feoffor may have a *Dum fuit infra Ætatem*, or enter into the Moiety. 8 *Co.* 43. a.

(e) Co. Lit. 337. b. S. P.

8. But if both had joined in the Feoffment, and one had died, the Right had ſurvived to the other, and he ſhould have had the Land from the firſt Feoffor. 8 *Co.* 43. a.

9. If a Man within Age, ſeiſed in the Right of his Wife, makes a Feoffment, and dies, his Heir cannot enter, becauſe no Right deſcends to him, (f) but inaſmuch as the Baron, if he had lived, might have enter'd in the Right of his Wife only, and not in reſpect of any Right which he himſelf had, the Wife (even before the 32 *H.* 8.) might in ſuch Caſe have enter'd in her own Right. 8 *Co.* 43. b.

(f) Lit. Sect. 633. S. P.

10. But if the Feme, being only Tenant in Tail, and the Baron within Age, had made a Gift in Tail to another, by which the Baron gain'd a new Reverſion in Fee, and died, the Wife might enter, or the Heir of the Baron, who had a new Reverſion deſcended to him; but if the Heir had enter'd, and defeated the Tail given by the Infant, his Eſtate vaniſhed, and by Operation of Law the Feme was immediately ſeiſed of her old Eſtate. 8 *Co.* 43. b. *Co. Lit.* 337. a.

11. Privies in Law, as the Lord by Eſcheat, ſhall not avoid a Conveyance made by an Infant. 8 *Co.* 44. a.

12. As if an Infant makes a Feoffment, and dies without Heir, (g) the Lord ſhall not avoid it. 8 *Co.* 42, 45. (h) *Whittingham's* Caſe, *per Curiam* agreed; but becauſe it appear'd the Feoffment was executed (i) by Letter of Attorney made by the Infant, it was reſolved to be void, and that the Land ſhould eſcheat to the Queen.

(g) For he hath a Tenant by Title. Dyer 10. b.

(h) 3 Mod. 306. S. C. cited. (i) For this, vid. 2 Rol. Abr. 2. Pl. 4.

(a) Dum fuit infra Ætatem.

In what Caſes and by whom it lies.

(a) For this Writ, vid. F. N. B. 192.

1. IF an Infant makes a (b) Feoffment he may enter (c) either within Age or at full Age; and if he dies, his Heir may enter, or have a *Dum fuit infra Ætatem, &c. Co. Lit.* 247. b. 248. a.

(b) So in caſe of a Surrender of Copyhold Lands. Knight and Footman, 1 Leon. 95. adjudged. Cro. El. 90. adjudged. (c) But he cannot bring a Dum fuit infra, &c. till he is at full Age, for the Writ ſuppoſes it. F. N. B. 192.

(d) F. N. B. 192. L. S. P.

2. (d) If Husband and Wife are both within Age, and they by Indenture join in a Feoffment, and the Husband dies, the Wife may enter, or have a *Dum fuit infra Ætatem. Co. Lit.* 337. a.

(e) Quære if ſhe was within Age, and the Baron of full Age. F. N. B. 192. L.

3. But (e) if ſhe was of full Age, ſhe ſhall not have a *Dum fuit infra Ætatem* for the Nonage of her Husband, though they be but one Perſon in Law. *Co. Lit.* 337. a.

(f) F. N. B. 192. K. 1. S. P.

4. (f) If Two Jointenants, being within Age, make a Feoffment, though they may join in a Writ of Right, yet they cannot in a *Dum fuit infra Ætatem*, for the Nonage of one is not the Nonage of the other. *Co. Lit.* 337. a.

Enfant.

The ſeveral Ages of a Man for ſeveral Purpoſes.

1. A Man by the Law for ſeveral Purpoſes hath ſeveral Ages aſſigned to him, *viz.* at 12 to take the Oath of Allegiance in Tourn or Leet; (a) 14 to (b) conſent to a Marriage, (c) to be out of Ward of Guardian in Socage, to chuſe a Guardian, and (d) this alſo is accounted his Age of Diſcretion; 15 to have *Aid pur fair Fitz Chivalier*; (e) 21 to be out of Ward of Guardian in Chivalry, and to alien his Lands, Goods and Chattels. *Co. Lit.* 78. b.

(a) Lit. Sect. 104. S. P. Hob. 225. S. P. 1 Part 700. Pl. 1. S. P.

(b) But 12. is the Age for a Woman to give her Aſſent. Lit. Sect. 104. Hob 225. at the Top, S. P. 1 Part 700. Pl. 3. S. P. (c) Lit. Sect. 123. S. P. Hob. 225. at the Top, S. P. (d) Lit. Sect. 104. S. P. (e) This is the full Age of Male or Female, according to common Speech. Lit. Sect. 104. Sect. 259. —At what Age an Infant may make a Will, vid. ante 513. Pl. 2.

Enterpleder.

Fol. 732.

Garniſhment.

(A) Of the Plaintiff and Garniſhee.

1. IF a Statute be acknowledged to a Dean and Chapter, and delivered to B. till certain Conditions perfozmed, though this B. is one of the Chapter, yet if the Comiſoz bzings Detinue againſt him, he may ſay that it was delivered upon Condition, and Garniſhment ſhall be granted againſt the Dean and Chapter. 13 H. 4. 8.

(B) How it is to be prayed.

1. IN Detinue, if the Defendant ſays it was delivered by the Plaintiff and another upon certain Conditions, &c. this is good, without ſhewing what the Conditions were. (a) 3 H. 4. 18. b. adjudged. (a) Br. 18. S. C. cited. and the Reaſon ſaid to be, becauſe the Defendant and one of the Parties ſhall not try the Conditions in the Abſence of the other. Fitz. 43. Pl. 19. S. C.

(C) What ſhall be a good Counterplea of Garniſhment.

1. IN Detinue upon a Delivery to re-deliver, if the Defendant ſays it was delivered by the Plaintiff and another, &c. it is a good Counterplea to the Garniſhment, that the Delivery was by himſelf alone, abſque hoc that it was delivered by him and the other, &c. (a) 3 H. 6. 50. (a) Br. Garniſhment 6. S. C.

(D) Garniſhment.

1. THE Garniſhee ſhall not plead other Plea but Conditions perfozmed. (a) 20 H. 6. 29. b. (a) Br. Garniſhee 9. S. C. Fitz. Garniſhee 9. S. C.

2. The Garniſhee ſhall not ſay that he hath perfozmed the Condition contained in the Obligation foz which the Wzit is bzought. (b) 20 H. 6. 29. b. (b) Fitz. Garniſhee 9. S. C.

(E) What

(E) What Pleas the Garnishee may plead.

1. IN Detinue the Defendant says, it was delivered by the Plaintiff and B. upon Condition, and prays Garnishment, B. comes and says that he solely delivered it, and it is not a Plea, for he is warned to answer whether the Conditions are performed or not, and therefore the Plea varies. (a) 12 E. 4. 13. b. Curia. Dubitatur, (b) 3 H. 6. 50. (c) 14 H. 6. 11.

(a) This is misprinted in the Original as here, and I suppose should be 20 Ed. 4. 13. b. (b) Fitz. Garnishment 4. S. C. Br. 6. S. C. (c) Fitz. Garnishment 7 S. C. Br Enterpleder 15. S. C.

2. The Garnishee shall not say they were delivered upon other Conditions than the Defendant hath said, for the Garnishment is only to know whether the Conditions are performed, and if the Defendant hath mistaken the Conditions, he shall be charged by both, and so the Garnishee at no Mischief. (d) 40 E. 3. 11. b. 3 H. 6. 50. (e) 21 H. 6. 35. (f) 13 H. 6. 11. b. Contra, 43 E. 3. 28. b.

(d) Br. Garnishment 12. S. C. Fitz 28. S. C. (e) Fitz. Garnishment 16 S. C. Br. 30. S. C. (f) Fitz. Garnishment 7. S. C. Br. Enterpleder 15. S. C.

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3. The Garnishee cannot plead that they were delivered to the Defendant and a Stranger not named. 3 H. 4. 7. b.

(g) There is no Pl. 4. in the Original. (h) Fitz. Garnishment 6. S. C. Br. 27. S. C.

(g) 5. But vid. (h) 7 H. 6. 34. b. 40. b. that the Defendant says, that it was delivered upon Condition, without shewing any Condition, and when the Garnishee comes he shall shew the Conditions, and the Plaintiff may say it was delivered upon other Conditions in certain, and traverse the other Conditions alledged.

6. In Detinue upon a Bailment in one County, the Defendant says it was bailed by him in another, &c. the Garnishee cannot traverse the Bailment in this County, for it is admitted by the Defendant. (i) 21 H. 6. 35. adjudged.

(i) Fitz. Garnishment 16. S. C. Br. 30. S. C. Br. Traverse sans ceo 92. S. C.

7. The Garnishee shall not plead a Grant of the Plaintiff by Deed after the Delivery, that he should have the Deed upon certain Conditions performed, which he had performed. Contra, (k) 20 H. 6. 29.

(k) Br. Garnishee 9. S. C.

8. The Garnishee cannot plead an Accord between himself and the Plaintiff after the Delivery to do other Things, &c. without Writing. (l) 40 E. 3. 12.

(l) Br. Garnishment 12. S. C. Fitz. 28. S. C.

9. The Garnishee may plead the Release of the Plaintiff after the Delivery of all Debts and Claims, and bar him. (m) 49 E. 3. 13. b. Dubitatur, 39 E. 3. 23. adjudged of all Actions Release. Contra, (n) 20 H. 6. 28. b.

(m) Br. Garnishment 16. S. C. Fitz. 32. S. C.

10. The Garnishee may plead a Release of the Plaintiff made to him. 3. H. 6. 18.

(n) Br. Garnishee 9. S. C. Fitz. 9. S. C.

11. So he may plead his Release of all Actions personal after the Conditions broke. Dubitatur, 14 H. 6. 11.

12. But not such Release made of Actions personal before the Conditions broke. 14 H. 6. 11.

13. The Garnishee cannot plead that the Writing is not his Deed generally or specially, for though it be an Escrow, yet if the Condition be performed, the Plaintiff shall have it. 9 H. 6. 59. b. 11 H. 6. 6.

14. As he cannot plead that he was under Age at the making the Obligation, for this is in Bar of the Thing. 14 H. 6. 11.

(F) Judgment.

1. IF the Garnishee comes at the Day, and the Plaintiff and Defendant makes Default, the Garnishee shall recover. (a) 40 E. 3. 39.

2. If there be an Enterpleder in Ravishment of Ward, he that is not Party to the Writ may plead the Release of the Plaintiff. (b) 20 H. 6. 29.

3. If the Garnishee be returned warned, and does not appear, no Damages shall be recovered. 20 E. 4. 13. b.

(a) Br. Garnishment 13. S. C. Fitz 29. S. C.
(b) Fitz. Garnishment 9. S. C.

(G) In what Actions.

1. (a) IF one brings Detinue upon a Bailment, and the other upon a Trover, there shall be an Enterpleder. (b) 39 H. 6. 36. b.

(a) 1 Rol. Rep. 130. S. P. con.
(b) Fitz. Enterpleder 9. S. C. Br. 17. S. C.

(H) For what Causes.

1. THE Cause of Enterpleder is for that the Defendant shall not be charged to two severally where no Default is in him. (a) 39 H. 6. 36. b.

(a) Fitz Enterpleder 17. S. C.

(I) Upon what Delivery.

1. ENterpleder shall be upon a joint Delivery, or several. (a) 39 H. 6. 36. b.

(a) 1 Rol. Rep. 130. S. C. cited.

(K) At what Time it shall be made.

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(a) IF the Goods are not returned at one Time, but one declares the last Term, and the Defendant imparls, and now the other brings an Action, yet they shall enterplead. (b) 39 H. 6. 36. b.

(a) This Pl. is not number'd in the Original.
(b) Fitz Enterpleder 17. S. C.

(L) In what Caſes there ſhall be an Enterpleder.

(a) If Two bring ſeveral Detinues againſt J. S. for the ſame Thing, if the Defendant will acknowledge the Action of one without a Prayer of Enterpleder, they ſhall not interplead upon the Requeſt of the other, for the Enterpleder is given for the Security of the Defendant, that he be not twice charged, and he hath waived that Benefit. (b) 18 E. 3. 22. b.

(a) This Pl. is not numberd in the Original.

(b) Fitz. Enterpleder 14. S. C.

(M) In what Caſes for a collateral Cauſe.

1. If Two bring ſeveral Detinues, they ſhall not enterplead if their Writs be not returnable at one and the ſame Day. 9 H. 6. 18. Curia.

2. If Two bring ſeveral Detinues, and the Defendant prays that they may enterplead, they may enterplead if they are preſent in proper Perſon. 17 E. 3. 70. b.

3. But not if they or any of them are not preſent in proper Perſon. 17 E. 3. 70. b.

4. But a Writ ſhall iſſue to warn them to come in proper Perſon at a Day. 17 E. 3. 70 b.

5. If ſeveral Perſons bring ſeveral Writs of Right of Ward, returnable at the ſame Day, and the Defendant pleads, &c. and prays, that they may enterplead, yet they ſhall not enterplead without ſuing a Scire Facias againſt them to whom the Plea is not pleaded, to be in Court at a certain Day. (a) 30 E. 3. 4. b. adjudged.

(a) I find no ſuch Opinion in this Leaf, therefore I ſuppoſe the Original miſprinted.

In what Caſes.

(N) Privity upon Actions.

1. If Two bring ſeveral Detinues of Charters, and the one counts of a Bailment to re-deliver, and the other demands them by Title to the Land, they ſhall not interplead becauſe there is not any Privity of Bailment between them, and the Defendant is not chargeable to him who makes Title to the Land, but for the Land, but to the other for the Bailment, and if he re-delivers to his Bailor, he is not chargeable to the other, and ſo he is at no Miſchief. (a) 19 H. 6. 3. Contra, (b) 9 H. 6. 17.

(a) Fitz. Enterpleder 7. S. C. Br. 11. S. C.

(b) Fitz. Enterpleder 5. S. C. Br. 5. S. C.

2. In a Detinue one Plaintiff demands a Bag of Charters, and another plaintiff demands certain Charters in the Bag, as belonging to him, againſt an Executor, becauſe they were in his Hands, but not upon any Bailment, quære whether they ſhall interplead, 3 H. 6. 36.

3. If

3. If one brings Detinue against B. and counts upon a Deliverp to re-deliver to him, and another brings Detinue against him also, and counts so also, and if here be not anp Privity of Bailment between them, pet they shall enterplead to avoid the double Charge of the Defendant, and also because the Court cannot know to whom to deliver the Deed if both recover. (c) 3 H. 6. 44. Curia, for perhaps the Defendant found it. Dubitatur, 11 H. 6. 19. b.

(c) Br. Enterpleader 4. S. C. Fitz. 2.

4. Upon such several Detinues, if the Defendant saps that he found it, and traverses the Bailment, they shall enterplead, for then he is chargeable as well to the one as to the other. (d) 7 H. 6. 22. (e) 19 H. 6. 3. Curia.

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(d) Fitz. Enterpleder 3.

S. C. Br. 9. S. C. (e) Br. Enterpleader 11. S. C. Fitz. 7. S. C.

5. So if he saps that they deliver'd it jointly, absque hoc that they delivered it as they have counted. (f) 19 H. 6. 3. b.

(f) Br. Enterpleder 11.

S. C. Fitz. 27. S. C. 1 Rol. Rep. 130. S. C. cited.

6. But it is otherwaps if he does not traverse the Bailment, for if there was a Bailment, he is chargeable only to the Bailor, and may plead in Bar against the others. 7 H. 6. 22. (g) 19 H. 6.

(g) Br. Enterpleder 11. S. C. Fitz. 7. S. C.

7. If two Detinues are severally brought against one Executor, because of his Possession, they shall enterplead, because he is not more chargeable to one than the other. (h) 9 H. 6. 18.

(h) Br. Enterpleder 5. S. C.

8. So for the same Reason, if they are brought against a Man who found the Thing demanded, they shall enterplead. (i) 9 H. 6 18.

(i) Br. Enterpleder 5. S. C.

9. In Detinue, if they count of several Bailments, the Defendant may say it came to his Hands as Executor, absque hoc that he had it of their Delivery, and then the Plaintiffs shall interplead. (k) 19 H. 6. 3.

(k) Fitz Enterpleder 7. S. C.

10. If Two bring several Writs of Ward against me at the same Day, they shall enterplead. (l) 3 H. 6. 44. (m) 9 H. 6. 17. b. Curia. (n) 19 H. 6. 3. b.

(l) Br. Enterpleder 4. S. C.

(m) Br. Enterpleder 5. S. C.

(n) Fitz. Enterpleder 7. S. C.

11. But otherwaps if they bring Ravishments of Ward. 9 H. 6. 18. b.

12. In Detinue, if the Plaintiff counts of a Delivery to redeliver, the Defendant shall not have a Scire Facias against anp other but he that was privy to the Delivery. (o) 3 H. 6. 44.

13. If Two bring several Writs of Detinue, and each counts upon a Delivery at several Places in the same County to re-deliver, if the Defendant says the Delivery was by the Plaintiffs upon Condition, and does not acknowledge whether the Condition is perform'd, they shall enterplead, because the Defendant cannot traverse the Place of the Delivery, this being in the same County. (p) 8 H. 6. 30. b. adjudged.

(o) Br. Enterpleder 4. S. C. Br Garnishment 5. S C.

(p) Br Enterpleder 10. S. C. Fitz. 4. S. C.

14. But it had been otherwaps if the Deliveries had been in several Counties, for there the Defendant might have traversed the Place, (q) 8 H. 6. 31. (r) 14 H. 6. 2. adjudged.

(q) Br. Enterpleder 10. S. C. Fitz. 4. S. C.

15. If one brings Detinue, and counts of a Delivery by himself and one J. S. in equal Hands, upon Condition, &c. if J. S. brings Detinue also against the same Defendant, and counts of a Delivery by himself alone, they shall not enterplead upon this Matter. 14 H. 6. 11. b. quære.

(r) Br. Enterpleder 14. S. C.

(O) At what Time it ſhall be.

1. IN ſeveral Writs of Ward by divers againſt one Man, if they pray that they may enterplead, though all the Writs of the Plaintiffs are returnable at one Day, and ſo they have Day all to this Day, yet Proceſs ſhall iſſue to warn them, and they ſhall not enterplead before Garniſhment. 30 E. 3. 5. b.

(P) Upon what Writ it ſhall be.

1. THE Enterpleder ſhall be upon the Original. 22 E. 4. 49.

2. If Two bring ſeveral Detinues, the Enterpleder ſhall be upon the Original of the eldeſt Date, if the other hath not counted upon his Original.

3. So it ſhall be though he that is Plaintiff in the Original of lateſt Date had firſt counted. (a) 3 H. 6. 20. (b) 19 H 6. 4. b. Curia. (c) 39 H. 6. 37 b. (d) 12 H. 4. 18.

(a) Fitz Enterpleder 1. S. C. Br. 2. S. C.

(b) Fitz. Detinue 14. S. C. (c) Br. Enterpleder 17. S. C. Fitz. 9. S. C. (d) Br. Enterpleder 8. S. C.

4. If the Writs are of one and the ſame Date, he that firſt comes and demands an Anſwer, or counts, ſhall be Plaintiff, and the Enterpleder ſhall be upon his Original. (e) 19 H. 6. 4. b.

(e) Fitz. Detinue 14. S. C.

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5. Or otherways he ſhall be Plaintiff which the Court ſhall aſſign, in ſuch Caſe where the Writs are of one and the ſame Date. (f) 19 H. 6. 4. b.

(f) Fitz. Detinue 14. S. C.

(Q) Upon an Enterpleder, who ſhall keep the Thing demanded.

1. IN ancient Time, the Thing demanded ought to remain in Court. 12 H. 4. 6.

2. But now the Uſe is, that the Defendant ſhall keep it till it be tried, and not the Court. 12 H. 4. (a) 39 H. 6. 38.

(a) The Figure 6. ſeems to be wanting here, as in the Original. Vide Fitz. Garniſhment 22.

3. In ſeveral Rights of Ward, if the Parties are awarded to enterplead, they may pray that the Defendant find Sureties to keep the Infant, and to have him in Court at a Day, and it ſhall be granted. 30 E. 3 5. b.

4. But the Plaintiffs ſhall not find Sureties not to take the Ward in the mean time. 30 E. 3. 5. b.

5. Pending the Writ for the Thing, the Defendant cannot deliver it to any Party without Award of the Court. (b) 12 H. 4. 6. b. Curia.

(b) Fitz. Garniſhment 22. S. C.

6. If the Defendant prays Garniſhment, and the Garniſhee comes and pleads againſt the Plaintiff, the Defendant cannot after deliver the Writing to the Plaintiff. 39 E. 3. 23.

(R) Pleader

(R) Pleader by the Defendant after an Enterpleder.

1. When the Defendant hath prayed Garnishment, he is out of Court to plead any Plea. (a) 12 H. 4. 6. b.

2. But he hath a Day in Court to deliver the Writing to whom the Court shall award it. (b) 12 H. 4. 6. b.

3. The Defendant is not demandable before Judgment given, but then he is, because he is to deliver the Thing demanded. 11 H. 4. 7. b.

4. After the Garnishee comes in, and pleads against the Plaintiff, the Defendant cannot say the Conditions are broke on the Part of the Garnishee, and so the Plaintiff ought to have Judgment. 39 E. 3. 23. Curia.

(a) Br. Garnishment 20. S. C.

(b) Br. Garnishment 20. S. C.

(S) Judgment.

1. If an Enterpleder be prayed by the Defendant between the Plaintiff and J. S. upon the Count of the Plaintiff, which supposes it to be delivered to him or J. S. upon Condition, and the Plaintiff and J. S. appear at the Return, and the Defendant makes Default, yet they shall enterplead, and the Plaintiff shall not have Judgment. 39 E. 3. 22. b. because the Plaintiff himself hath supposed it to be upon Condition.

2. If Two bring several Detinues for one Thing, and the Defendant prays that they enterplead, and delivers the Thing to the Court, and before the Award of the Enterpleder one discontinues his Suit, the other shall not have Judgment to recover, because they were not awarded to enterplead. 11 H. 6. 19. b.

3. But otherways it had been if he had discontinued his Suit after the Enterpleder awarded. 11 H. 6. 19. b.

4. If a Recovery be had upon an Enterpleder, Judgment shall be given to recover the Thing demanded against the Defendant, and not against the Garnishee. (a) 3 H. 6. 18. (b) 7 H. 6. 45. b. 30 E. 3. 6. b. adjudged.

(a) Br. Detinue 8. S. C.

Fitz. Judgment 1. S. C. (b) Br. Garnishment 28. S. C.

5. So the Garnishee shall recover it against the Defendant. 3 H. 6 40. b.

6. If the Defendant prays Garnishment to know whether the Conditions are performed, and the Garnishee comes and says nothing, yet the Plaintiff shall not recover any Damage against the Defendant, because he was not bound to deliver it till very Notice of the Performance of the Condition. 9 H. 6. 39. b.

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7. If the Garnishee comes the first Day, and cannot deny the Conditions to be broke, or makes Default, the Plaintiff shall not recover any Damage against him, because he hath not delayed him, which is the Cause that Damages are given against a Garnishee. (c) 8 H. 6. 11.

8. If two bring Detinue against another, and they enterplead, he that recovers shall recover Damage against the other. (d) 8 H. 6. 5. (e) 9 H. 6. 18.

(c) Br. Damages 68. S. C. Fitz. 21. S. C.

(d) Br. Damages 68.

S. C. Fitz. 21. S. C. (e) Br. Enterpleder 5. S. C.

9. If the Garniſhee pleads with the Plaintiff, and it is found againſt him by Verdict, the Plaintiff ſhall recover Damages againſt him. 49 E. 3. 13. b. (f) 7 H. 6. 45. b. (g) 8 H. 6. 5. 10 H. 6. 8. (h) b. (i) 20 H. 6. 29. b.

(f) Br. Garniſhment 28. S. C.

(g) Br. Damages 68. S. C. Fitz. 21. S. C. (h) This is miſprinted in the Original as here, and ſhould be A. (i) Fitz. Garniſhment 9. S. C.

10. The ſame Law if he pleads with the Plaintiff, and it be adjudged againſt him by the Court. 49 E. 3. (k) 3. b. (l) 3 H 6. 18.

(k) I ſuppoſe this miſprinted in the Original as here, and that it ſhould be 13. (l) Br. Detinue 8. S. C. Fitz. Judgment 1. S. C.

11. So if it be adjudged againſt him upon Default. (m) 8 H. 6. 5. (n) But the Garniſhee, if it paſs with him, ſhall not recover Damages againſt the Defendant. Contra, 3 H. 6. 40. b.

(m) Br. Damages 68. S. C.

(n) This Pl. is not number'd in the Original, and therefore is omitted to be number'd here.

12. If the Inqueſt paſs for the Garniſhee, he ſhall recover Damages againſt the Plaintiff. (o) 8 H. 6. 5. 13 H. 4. Damage F. 131. 9 H. 6. 39. (p) 20 H. 6. 29. b.

(o) Br. Damages 68. S. C. Fitz. 21 S. C.

(p) Fitz. Garniſhment 9. S. C.

13. So if Two bring Detinue againſt another, and upon his Prayer they enterplead, if the Inqueſt paſs for him who enterpleads upon the Original of the other, he ſhall recover Damages againſt the other. (q) 8 H. 6. 5.

14. The Recovery againſt the Garniſhee is for the Delay after the Writ purchaſed. (r) 8 H. 6. 11.

(q) Br. Damages 68. S. C. Fitz. 21. S. C.

(r) Br. Damages 68. S. C. Fitz. 21. S. C.

(T) How much Damage.

1. If the Plaintiff counts but to the Damage of 20 l. yet more Damage may be given to him againſt the Garniſhee, for he does not declare this againſt the Garniſhee. (a) 8 H. 6. 5.

2. In ſeveral Writs of Ward brought by Two, if the Defendant prays that they enterplead, and after the Plaintiffs agree, and pray that it be delivered to them in common, yet the Court ſhall not ſuffer it. (b) 24 E. 3. 24. b.

(a) Br. Damages 68. S. C. Fitz. 21. S. C. Ante 461. Pl. 3. S. P.

(b) Fitz. Enterpleder 17. S. C.

(V) When

(V) When the Recovery is had, what Remedy there ſhall be againſt him that has the Thing.

1. A Scire Facias ſhall be awarded againſt the Defendant who has the Cuſtody of the Thing demanded. 39 H. 6. 38. (a) Fitz. Garniſhment 29. S. P. Br. 13. S. C.
2. A Diſtreſs ſhall iſſue againſt him to deliver the Thing. (a) 40 E. 3. 39.

Entry.

Congeable.

(A) (a) In what Caſes.

(a) Where a Judgment may be executed by Entry, 1 Rol. Abr. 884. Letter B.

1. If the Conuſee of the Statute ſues an Extent, by which the Lands of the Conuſor are ſeiſed into the Hands of the King, (b) and after a (c) Liberate is ſued, the Conuſee may after enter into the Land before the Liberate executed, for this Liberate is a ſufficient Warrant for his Entry. Dubitatur, P. 38 Eliz. B. R. between (d) Butler and Wallis. Intratur, 37 El. Rot. 206. M. 40, 41 El. B. R. * between Sir Thomas Gerrard and Candiſh, per Curiam, there the Entry was not good, becauſe the Liberate was void, being made to the Sheriff to deliver the Land to himſelf.

(b) After an Extent upon a Statute-Merchant, Staple, or Recognizance returned, the Conuſee may enter without any Delivery by the Sheriff, by Force of the Liberate. 2 Inſt. 678. — But by 1 Vent. 41. per Curiam, in an Execution upon a Statute Merchant, there is no need of a Liberate, as there is upon a Statute-Staple, for in caſe of a Statute-Staple, the Conuſee can bring no Ejectment before the Liberate. (c) Before the Liberate awarded, nihil operatur. Cro. El. 47. Hob. 82. Et vid. Cro. Car. 149. 2 Rol. Abr. 158. Pl. 2. (d) Cro. Eliz. 463. S. C. by Three Judges againſt One. Gouldſ. 108. ſeems to be the S. C. debated.

* Fol. 738.

2. If the King ſeizes certain Lands, upon which an Ouſter le Mayn is ſued to the Eſcheator to deliver this Land to the Party again, he may after enter into the Land before any Execution of the Writ. (e) P. 38 El. B. R. agreed, becauſe there is a Judgment given before that the Hands of the King ſhall be removed.

(e) Cro. Eliz. 463. S. C. & S. P. per Curiam.

3. Upon

3. Upon an Elegit, if the Sheriff takes an Inquiſition, though the Sheriff does not deliver the Land to the Party Plaintiff, yet the Plaintiff may enter preſently after the Inquiſition taken, (f) before the Return thereof to the Court, without any Liberate to him directed. Hill. 8 Car. B. R. between Liſter and Bromly, per Curiam. Intratur M. 8 Car. Rot. 68. where an Action upon the Caſe was brought againſt the Sheriff, for returning that he had delivered the Land to the Plaintiff upon the Inquiſition taken, where he refuſed to deliver it, and ſo the Return falſe; though it was objected he might have entered: But the Court ſaid, this was only in Mitigation of Damages, and his Return falſe, and therefore an Action upon the Caſe lay againſt him.

(f) But for what Execution is good before returned, vide the Diviſions under Title Execution.

(B) Where an Entry into Part ſhall be an Entry for the Whole.

1. (a) If a Diſſeiſor leaſes ſeveral Parcels of Land to ſeveral Men (b) for Years, and after the Diſſeiſee enters upon (c) one in the Name of all, this is a good Entry for the Whole, becauſe there is but one Tenant to the Precipe, who is the Diſſeiſor, who is only Tenant of the Freehold. P. 6 Ja. B. between Damport and Honour.

(a) Co. Lit. 252. b. S. P. for that the Diſſeiſee might have one Aſſiſe againſt the Diſſeiſor, becauſe he remained Tenant of the Freehold of all the Parcels. 4 Leon. 8. S. P. per Curiam: Yet vid. 1 Leon. 51. (b) Otherways if he leaſes them for Life, for in ſuch Caſe the Entry upon one Leſſee in the Name of the whole is good for no more than that Leſſee had in his Poſſeſſion. Co. Lit. 252. b. 1 And. 28. 4 Leon. 8. Mid. Godb. 72. Lady Argol and Theyny. Palm. 402. Lat. 71. and 1 Leon. 36. (c) But if his Entry was taken away in this Parcel, and not as to the others, then he gains no Poſſeſſion in the others, but in this Parcel only. Kelw. 20. b.

2. (d) If a Man be diſſeiſed of two ſeveral Acres by two ſeveral Perſons, and after enters into one Acre in the Name of both, this is not any Entry into the other Acre. M. 8 Ja. B. between Champernoon and Hall, per Curiam.

(d) Co. Lit. 252. b. S. P. tho' both Acres had lain in the ſame County, for the Entry of a Man to continue his Freehold or Inheritance muſt enſue his Action for Recovery of the ſame, and each Diſſeiſor is a ſeveral Tenant of the Freehold; and as he muſt have ſeveral Actions againſt them for the Recovery of the Land, ſo his Entry muſt be ſeveral. Co. Lit. 252. b. Kelw. 20. b. 1 And. 28. Dal. 88.

3. Where the Poſſeſſion is in no Man, but the Freehold in Law is in the Heir that enters, his general Entry into one Part (e) reduces all into his actual Poſſeſſion. *Co. Lit.* 15. b.

(e) But vid. 1 Leon, 265.

4. But if in this Caſe his Entry be ſpecial, *viz.* that he enters only into that Part and no more, this reduceth that Part only into actual Poſſeſſion. *Co. Lit.* 15. b.

5. Where the Entry is to diveſt an Eſtate, a general Entry into Parcel is good only for that Parcel. *Co. Lit.* 15. b.

6. As if the Lord enters into Parcel generally for a Mortmain, or the Feoffor for a Condition broken, (f) or the Diſſeiſee into Parcel, generally ſuch Entry in theſe and the like Caſes ſhall not veſt nor diveſt but for that Parcel. *Co. Lit.* 15. b.

(f) Co. Lit. 252. b.

7. If a Man diſſeiſe me of one Acre at one Time, and after at another Time diſſeiſe me of another Acre in the ſame County, in this Caſe my Entry into one of them in the Name of both is good, for that one Aſſiſe lay againſt him for both Diſſeiſins. *Co. Lit.* 252. b.

8. Otherways if the ſeveral Acres lay in ſeveral Counties, for then there muſt be ſeveral Actions, (f) and conſequently ſeveral Entries *Co. Lit.* 252. b.

(f) According to the ancient Courſe a Man had leaſed ſeveral Parcels of Land in a Town for the Trial of the Title in an Ejectment, he ought to have entered into every Part, ſeverally, and have left a Servant or other to have kept Poſſeſſion till he had entered into every Part, and then to have delivered the Leaſe of all. Win. 50. And with this agrees, Godb. 72. Vid. 1 Sid. 223.

9. If I enfeoff a Man of one Acre upon Condition, and at another Time I enfeoff him of another Acre in the ſame County, upon Condition alſo, and both Conditions are broken, an Entry into one Acre in the Name of both is not ſufficient, but ſeveral Entries muſt be made in reſpect of the ſeveral Conditions. *Co. Lit.* 252. b.

10. But an Entry into Part of the Land in the Name of all the Land, ſubject to one Condition, is good, though the Parcels be ſeveral, and in ſeveral Towns. *Co. Lit.* 252. b.

11. If *A.* diſſeiſes B. of Lands in three Towns, and levies a Fine with Proclamations of the Lands in one Town to C. in Fee, and the Diſſeiſee within 5 Years enters into the Lands in the other two Towns only, (being in the Poſſeſſion of the Diſſeiſor) in the Name of all the Lands in the three Towns, by this the Eſtate of the Conuſee in the third Town was not diveſted. *Mich.* 14 & 15 *Eliz.* between (g) *Brook* and *Meaſon*. *Kelw.* 213. b.

(g) 1 And. 28. S. C. adjudged that it was no Entry into the Lands of which the Fine was levied. Dyer 237. b. S. C. adjudged, it appearing that the Fine was levied to the Uſe of the Conuſee. N. Benl. 207. Pl. 243. S. C. adjudged.

Entry to the Uſe of another.

(C) In what Caſes the Entry of one to the Uſe of another ſhall ſettle the Poſſeſſion in him without Agreement, and in what not.

1. If the (a) Baron enters to the Uſe of his Feme, where the Entry of the Feme is lawful, (b) this ſettles the Poſſeſſion in the Feme preſently, without any Agreement. (c) 14 H. 6. 25. b.

(a) Where the Feme entered in the Name of the Baron, and it was held good, he agreeing to it afterwards, Cro. Eliz. 72. (b) Vid. 8 Co. 44. a. Co. Lit. 336, 337. (c) Br. Entry Congeable 41. S. C. Continual Claim 6. S. C.

2. (d) So if a Man enters to the Uſe of an Infant into Lands where his Entry is lawful, this ſettles the Poſſeſſion in him before Agreement by the Infant. (e) 14 H. 6. 25. b.

(d) Co. Lit. 245. a. S. P. 258. a. S. P. Et vid. Moor 60. b. (e) Br. Continual Claim 6. S. C. Br. Entry Congeable 41. S. C.

3. (f) So if the Entry be to the Uſe of one of full Age, where his Entry is lawful, this veſts the Poſſeſſion in him before Agreement. 34 E. 3. Entry Congeable 50.

(f) Co Lit. 245. a. S. P. 258. a. S. P. Moor 459. Pl. 613. S. P. ſeems to be admitted per Curiam. Et vid. Styl. 370. Cro. Car. 17...

4. If a Man enters to the Use of one of the Plaintiffs, where his Entry is not lawful, this vests nothing in him before Agreement, because he shall be a Disseisor by the Agreement. 34 E. 3. Entry Congeable 50.

5. So if a Man enters to the Use of an Infant, where his Entry is not lawful, this vests no Possession in the Infant. 14 H. 6. 25. b.

6. If a Man disseises me, and I make continual Claim, and after he dies, and this descends to two Coparceners, upon which I enter, by which the Coparcenary is defeated, if after one enters, claiming to the Use of her self and her Coparcener, yet nothing vests in the other before Agreement, for their Entry is not lawful. 14 H. 6. 26.

Fol. 739.

7. So if a Man enters upon two Jointenants, where his Entry is lawful, by which the Jointenancy is defeated, if after one enters to the Use of both, yet nothing vests in the other before Agreement. (g) 14 H. 6. 25. b.

(g) Br. Continual Claim 6. S. C. Br. Entry Congeable 41. S. C.

8. (h) If two Coparceners have a Right of Action to certain Land, but their Entry is not lawful, and the one enters claiming to the Use of both, yet nothing vests in the other till Agreement. (i) 27 Ass. 68. adjudged.

(h) Dal. 62. S. P. per Weston.

(i) Fitz. Assise 261. S. C.

9. If two Jointenants are disseised, and the Disseisor aliens, and one Jointenant enters upon the Alienee to the Use of both, this settles the Freehold in both. 27 Ass. 68.

10. If a Man commands J. S. to enter into certain Lands in his Name, if he hath Right, otherways not, if he enters accordingly, yet if the Commander had no Right, no Estate vests in him by this Entry, because his Command was conditional. (k) 34 E. 3. 12. adjudged.

(k) Viz. 34 Ass. Pl. 12. which vid. ante 631. Pl. 1.

11. A Stranger cannot enter upon the Bastard in the Name of the Mulier without his Command, for that the Bastard may gain the Estate, and bar the Mulier. *Co. Lit.* 245. a.

12. (l) A Stranger of his own Head cannot enter in the Name of him that hath Right to avoid a Fine. *Co. Lit.* 245. a.

(l) Co. Lit. 258. a. S. P. and said, this Resolution was grounded upon the Statute of the 4 H. 7. cap. 24. Lord Audly and Pollard, S. P. Cro. El. 561. adjudged, for that by the express Words of the 4 Hen. 7. a Fine shall bind, unless avoided by Entry, Claim, or Action of him who hath Right thereto within the 5 Years. Moor 450. Pl. 613. adjudged, for though he hath a Right of Entry, which naturally by the Common Law might have been reduced into Possession by the Entry of a Stranger in his Name, yet it is not so in case of a Claim to avoid a Fine, because by the Body of the Statute of Fines the Right is bound, unless the Party lays Claim within 5 Years, so that an Election is given to the Party who hath Right, whether he will be bound or not, which Election a Stranger without his Direction cannot make for him. Moor 457. Pl. 630. it was said by Popham and Gawdy to have been the Opinion of all the Justices, That the Agreement of the Disseisee to the Entry would not perfect it, so as to avoid the Fine: But Q. if the Agreement had been within the 2 Years, for it did not there appear at what Time the Disseisee agreed. Poph. 108. adjudged. 9 Co. 106. a. cited; and said, That the Resolution of all the Judges at Serjeants-Inn was accordingly.

13. But in these Cases, if the Mulier agree thereto before the Discent, and (m) he that hath Right do enter before the 5 Years are past, the Estate both of the Bastard and of the Conusee shall be avoided by such Entry. *Co. Lit.* 245. a.

(m) Cro. El. 561. S. P. per Gawdy. Poph. 108. S. P. seems to be admitted.

14. (n) But in the Caſe of Baſtard-Eigne, Guardian in Chivalry or Socage may enter, for they are no Strangers. *Co. Lit.* 245. a.

(n) 9 Co. 106. a. like Point. And vide ante 30. Pl. 5.

15. If an Infant makes a Feoffment in Fee, a Stranger of his own Head cannot enter to the Uſe of the Infant, for the Eſtate is voidable. *Co. Lit.* 245. a.

16. So if Tenant for Life makes a Feoffment in Fee, a Stranger may enter for a Forfeiture in the Name of him in Reverſion, and thereby the Eſtate ſhall be veſted in him. *Co. Lit.* 245. a.

17. If a Copyholder in Borough-Engliſh ſurrenders to the Uſe of his Will, and having three Sons, deviſes to the middle Son in Fee, upon Condition that he ſhall pay to his Daughters 20 *l.* if the Money is not paid, a Stranger without the Command of the Eldeſt cannot enter for him, becauſe he hath only a Title of Entry. *Hill.* 2 *Jac.* between *Curtis* and *Wolverſton*. *Cro. Jac.* 56, 57. adjudged, where the youngeſt Son, without the Command of the Daughters and Heirs of the eldeſt, (who was dead) entered, and the Daughters after diſaſſented.

Entry to the Uſe of another.

(D) What ſhall be a good Agreement to ſettle the Eſtate.

1. If a Man diſſeiſes another to the Uſe of Baron and Feme, and they agree to this, the Eſtate is in both. (a) 15 E. 4. 15. b. admitted.

(a) Br. Diſſeiſin 12. S. C.

2. If a Man diſſeiſes another to the Uſe of a Feme Covert, the Agreement of the Feme without the Husband will not ſettle the Eſtate in the Feme, becauſe her Agreement is void, for her Will is transferred to the Baron.

3. But in this Caſe, the Agreement of the Baron will ſettle the Eſtate in the Feme, though ſhe is no Diſſeiſoreſs thereby, for the (b) whole Will of the Feme is put in the Baron during the Coverture, and he may agree to the Feoffment made to the Wife, ergo. (c) 12 E. 4. 9. b. Curia.

(b) In the Original 'tis tout le agree.

(c) Br. Diſſeiſin 66. S. C. Fitz. 3. S. C. 1 Rol. Abr. 660. E. 4. S. C.

4. If the Baron diſſeiſes another to the Uſe of the Feme, this ſhall ſettle the Eſtate in the Feme, for the Baron upon a Diſſeiſin by another by his Agreement might have ſettled the Eſtate in the Feme, and this Diſſeiſin to the Uſe of the Feme is an Agreement in Law, ergo. (d) 44 E. 3. 9. admitted. 44 Aſſ. 26. admitted. Contra, (e) 14 H. 6. 25. b. 7 E. 4. 7. b.

(d) Fitz. Entry Congeable 33. S. C.

(e) Br. Entry Congeable 41. S. C. Br. Continual Claim 6. S. C.

5. If Baron and Feme enter into Land in the Right of the Feme, where the Feme hath not any Right, the Feme is Tenant of the Land thereby. (f) 35 Aſſ. 5. adjudged.

(f) Fitz. Aſſiſe 321. S. C.

Br. Coverture 41. S. C. 1 Rol. Abr. 660. F. 5.

6. If

6. If the Baron ſeiſed in the Right of the Feme aliens in Fee, and after diſſeiſes the Diſcontinuee, claiming his firſt Eſtate, without ſaying any thing of the Feme, this ſhall veſt nothing of the Tenancy in the Feme, becauſe he does not claim by expreſs Words in the Name of the Feme. (g) 44 E. 3. 9. adjudged per Curiam. 44 Aſſ. 26. the ſame Caſe.

(g) Fitz. Entry Congeable 33. S. C.

7. If a Man enfeoffs Baron and Feme of a Manor, and after the Baron and Feme, by Colour of this Feoffment, enter into certain Lands which are not Parcel of the Manor, but they thought they were Parcel, yet the Feme ſhall gain nothing in the Land by this, but the whole Eſtate is in the Baron. Quære, 22 Aſſ. 1.

8. If the Guardian enters and diſſeiſes a Man, claiming the Freehold to the Uſe of the Heir, this ſhall ſettle the Freehold in the Heir. 27 Aſſ. 68. ſaid to be ſo adjudged.

9. If a Man leaſes Lands for Years to J. S. and delivers the Deed to J. D. to the Uſe of J. S. and after J. D. enters into the Land to the Uſe of J. S. without Commandment of J. S. and is ejected, and after J. S. aſſents thereto, he ſhall have an Ejectione Firmæ upon the ſaid Ejectment. P. 44 El. B. R. Biſhop's Caſe, per Curiam.

Fol. 740.

(E) What ſhall be ſaid an Entry into Land to reduce his Eſtate.

1. If the Diſſeiſee enters into the Land, and continues in the Land with the Diſſeiſor, and manures the ſame Land with the Diſſeiſor, claiming nothing of his firſt Eſtate, yet this is an Entry that will reduce his firſt Eſtate. 40 Aſſ. 38. Curia.

2. If the Diſſeiſee enters, and takes the Profits as Leſſee at Will of the Diſſeiſor, or in any Manner, this will be an Entry, and reduce his Eſtate. (a) 28 Aſſ. 42. adjudged; but quære.

(a) This is miſpainted in the Original as here, and Br. Seiſin 23. I ſuppoſe ſhould be 26. which vid. Br. Entry Congeable 61. S. C. Br. Damages 159.

(b) Co. Lit. 245. b. S. P.

3. (b) If the Diſſeiſee commands a Stranger to put in the Cattle of the Stranger in the Land to feed there, this is an Entry in Law into the Land. 1 E. 4. 3.

4. If A. leaſes to B. for Years, the Remainder to C. in Fee, and A. and B. come upon the Land of Purpoſe, ſcilicet, A. to make Livery, and B. to take it, this ſhall not be ſaid any Entry of B. to veſt the actual Poſſeſſion in him till Livery made, for then the Remainder would be void, which would be againſt the Intention of the Parties. Co. Lit. 49. b.

5. If it be agreed between the Diſſeiſor and Diſſeiſee, That the Diſſeiſee ſhall releaſe all his Right to the Diſſeiſor upon the Land, and accordingly the Diſſeiſee enters upon the Land, and delivers the Releaſe to the Diſſeiſor upon the Land, this is a good Releaſe, for the Entry of the Diſſeiſee being for this Purpoſe, ſhall not avoid the Diſſeiſin, for his Intent in this Caſe guides his Entry to a ſpecial Purpoſe. Co. Lit. 49. cited. P. 19 El. B. per Curiam, reſolved.

6. (c) But if the Diſſeiſor makes a Feoffment to the Diſſeiſee and others, there though the Diſſeiſee comes to take the Livery, yet when the Livery is made, the Diſſeiſee is remitted. Co. Lit. 49. b.

(c) Co. Lit. 368 b. S. P. But for this, vid. poſt, under Title Remitter.

7. If the Diſſeiſee comes upon the Land, and puts his Foot in, but takes no Profits, but the Diſſeiſor ouſts him, this Entry ſhall not ſettle any Eſtate in him, (at the Election of the Diſſeiſee, as it ſeems) for the Diſſeiſee may have an Aſſiſe of the firſt Diſſeiſin. (d) 26 Aſſ. 42. adjudged.

(d) Br. Entry Congeable 61. S. C. Br. Damages 159 S. C. Br. Seiſin 23. S. C.

8. If I have an Houſe and Land adjoining to the Plot of Land in queſtion between me and another, and I ſtand upon one Piece of the Stone-Wall, which is mine own Soil, and put my Hand through a Wall made of Lime and Laths which ſtands upon the Land in Queſtion and there deliver a Leaſe ſealed to try the Title, this is a good Entry, though I do not come within the Plot in Queſtion. M. 11 Ja. B. between Ballard and Richardſon, per Curiam.

2. If Baſtard-Eigne after the Death of his Father enters, and invites Mulier-Puiſne to ſee the Houſe, Pictures, *&c.* (e) or to dine with him, or to hawk, hunt, or ſport with him, or the like, upon the Land deſcended, and the Mulier comes upon the Land accordingly, this is no Interruption of the Poſſeſſion of the Baſtard, (f) becauſe he came by his Conſent, ſo that the coming upon the Land could be no Treſpaſs. *Co. Lit.* 245. b.

(e) Co. Lit. 368. a. S. P.

(f) If the Diſſeiſor requeſts the Diſſeiſee to go to the Cellar, and ſee the Antiquity of, &c. this is no Entry to abate an Aſſize brought by the Diſſeiſee. Pl. Com. 93. —So if the Diſſeiſee ſeeing ſeveral cutting Wood upon the Land, goes upon the Land, and admoniſhes them at their Peril to deſiſt, this is no Entry to abate his Writ. Pl. Com. 93. a, b. 1 Bulſ. 9. 2 Brownl. 231, 239. Such Entry as will abate a Writ ought to be unto the Thing demanded, and with an Intent to have the Thing demanded. 2 Bulſ. 9. 2 Brownl. 231, 235. —Where the Beaſts of him that had a Right ſtrayed of their own Accord into the Land, and it was held no Entry, vid. 1 Leon. 110.

10. But if the Mulier of his own Head comes upon the Ground, and cuts down a Tree, or digs the Soil, or takes the Profits, theſe ſhall be Interruptions, for rather than the Baſtard ſhall puniſh him in an Action of Treſpaſs, theſe Acts ſhall in Law amount to an Entry. *Co. Lit.* 245. b.

41. So if the Mulier puts his Beaſts into the Grounds, (g) or commands a Stranger to put on his Beaſts, theſe Acts without Words amount to an Entry, for Acts without Words may make an Entry, but Words without an Act, *viz.* Entry on the Land, *&c.* cannot. *Co Lit.* 245. b.

(g) Vide 3 Leon. 144.

12. If the Office of Keeper of a Park is granted to one, who is thereof diſſeiſed, and he brings an Aſſiſe, and pending this Aſſiſe, enters into the Park, kills a Stag, and takes a Shoulder of it for his Fee, this is no ſuch Entry as to abate his Writ, for that his Entry was not as an Officer *ad cuſtodiend'*, but as a Wrong-doer, to kill, *&c.* *Hill.* 7 *Jac.* between (h) the Earl of *Shrewsbury* and the Earl of *Rutland*, 1 *Bulſ.* 4, 8, 9. adjudged.

(h) 2 Brownl. 231, 335, 237. S. C. adjudged; and ſaid by Fleming Chief Juſtice, That every Entry which abates a Writ ought to be in the Thing demanded, for if a Man brings an Aſſiſe of Rent or Common, and hanging the Aſſiſe, he enters into the Land, this is not any Entry that will abate the Writ; and he ſaid, the Park and keeping the Park are two diſtinct Things, and the Entry into the Park will not abate the Writ for keeping of it; and the taking a Shoulder for a Fee makes no Difference, for that it was not ſhewed he had a Warrant to kill the Buck; or if he had, the taking the Fee is no Entry into the Office, but the Exerciſing of it.

13. If a Man have Common in the Lands of *J. S.* between the Annunciation of our Lady and *Michaelmas*, and he brings an Aſſiſe for it, and at *Chriſtmas* puts in his Beaſts, this ſhall be no Entry to abate his Writ, for it cannot be intended for the ſame Common. *Paſch.* 8 *Jac.* 2 *Brownl.* 238. in the ſaid Caſe of the Earl of *Shrewsbury*, by *Fleming* Chief Juſtice cited to have been adjudged.

14. If Tenant for Life levies a Fine with Proclamations, and he in the Remainder within 5 Years after the Death of Tenant for Life directs one to deliver a Declaration in Ejectment to the Tenant in Poſſeſſion, which is done accordingly, yet this is no Entry to avoid the Fine. *Mich.* 21 *Car.* 2. between (i) *Clark* and *Pywell*, 1 *Saund.* 319. adjudged. though it was the Declaration which contained the Leaſe upon which the Ejectment was brought.

(i) Clarke and Phillips S. C. 1 Vent. 42. adjudged.

1 Mod. 10. ruled upon a Trial at Bar, and the Plaintiff accordingly Nonſuit. —But whether the Confeſſion of a Leaſe, Entry, and Ouſter, would ſupply an Entry for a Condition broke, 1 Vent. 332. dubitatur.

(F) In what Caſes the Entry of one ſhall be for another.

1. If a Rent deſcends to an Aunt and Neece as Coparceners, and the Aunt hath the Neece in Ward, (ſcilicet, as Guardian in Soccage, as it ſeems) and takes the Rent to her own Uſe, and never claims to the Uſe of the Neece, yet this Seiſin of the Aunt ſhall be an actual Seiſin for the Neece, for in Law the general Seiſin of one is of both, and here is not any expreſs Act that her Entry was to her own Uſe. (a) 36 Aſſ. 1.

(a) Br. Brief 307. S. C.

2. (b) If Lands deſcend to (c) two Coparceners, and a Stranger abates, and after one enters generally into the Land, this ſhall be an Entry for both, and ſettle the Poſſeſſion in both. 26 Aſſ. (d) 1. admitted.

(b) Dal. 62. S. P. per Meſton.

(c) When one Parcener enters generally, and takes the Profits, this ſhall be accounted in Law the Entry of both, and no diveſting of the Moiety of her Siſter. Co. Lit. 243. b. Co. Lit. 273. b. —So where the Husband of one of the Parceners enters. Dal. 62. Moor 59. Pl. 268. (d) This is miſprinted here as in the Original, and I ſuppoſe ſhould be Pl. 2. which vid. Br. Aſſiſe 258. Br. Entry Congeable 59.

3. If Lands come to Two in Common, and one enters into it generally, this ſhall be an Entry for both. M. 40, 41 El. B. R. between (e) Hempſley and Brice, per Curiam. Hobert's Reports 166. between (f) Smales and Dales, adjudged.

(e) Cro. El. 639. S. C. adjudged.

Moor 546. Pl. 729. S. C. adjudged. (f) Hob. 120. S. C. adjudged; and ſaid, a general Entry ſhall always be taken according to Right, as being under Conſtruction of Law, and therefore ever conſtrued lawful, Moor 868. Pl. 1201. S. C. adjudged.

4. If a Man deviſes Lands held in Capite by Knight's Service to * his younger Son, by which the Deviſe is void for a third Part, and the Deviſee enters generally into the whole, this ſhall be an Entry in Law for the eldeſt Son alſo. M. 40, 41 El. B. R. between (g) Hempſley and Brice, per Curiam. Hobert's Reports 166. between (h) Smales and Dales, adjudged.

* Fol. 741.

(g) Cro. El. 639. S. C. adjudged.

Moor 546. Pl. 729. S. C. (h) Hob. 120. S. C. adjudged. Moor 868. Pl. 1201. S. C. adjudged.

(i) 4. So if the Deviſee after his Entry makes a Leaſe for Years of the whole, yet this ſhall not be any ſuch Explanation of his Entry, but that his Entry ſhall be ſaid an Entry for both. M. 40, 41 El. B. R. between (k) Hempſley and Brice.

(i) This is miſprinted as in the Original, where there are two 546. Pl 729.

Placita 4 as here. (k) Cro. El. 639. S. C. adjudged by all except Fenner. Moor S. C. adjudged. Et vid. ante 624. Pl. 2. and the Notes there.

5. So if the Deviſee (l) levies a Fine of the whole. M. 40, 41 El. B. R. between (m) Hempſley and Brice.

(l) Otherwiie if a Parcener after

ſuch general Entry makes a Feoffment of the whole with Warranty, for this ſubſequent Act explains the Entry precedent into the whole, and by Conſtruction of Law ſhe only was ſeiſed of the whole. Co. Lit. 374. a. Et vid. Cro. El. 615. Cort. 176. (m) Cro. El. 639. S. C. & S. P. arguendo.

6. If a Man ſeiſed of Lands held by Knight's Service in Fee, deviſes the whole to B. in Fee, and B. after his Death enters into the whole, claiming the whole to himſelf, (n) yet this is an Entry for the Heir, who is Tenant in common with him for a third Part, the Deviſe being void for a third Part, for one Tenant in Common cannot diſſeiſe his Companion without an actual Ouſter. Hobert's Reports 167.

(n) Vid. Hob. Fol. 120. and Q. whether it muſt not be intended the Heir was in

Poſſeſſion before, or that B. made his Entry firſt, and afterwards being in Poſſeſſion, claimed the whole; for by Co. Lit. 243. b. 373. b. where one Parcener enters ſpecially, claiming the whole, and takes the whole Profits, ſhe gains the Moiety of her Siſter by Abatement: But vid. Cart. 176. Hob. taken as here abridged.

7. If a Man deviſes certain Annuities to his four Sons out of certain Lands, and deviſes further, That if his Heir does not pay the ſaid Annuities, then his ſaid Sons ſhall have the Land to them, and the Survivor of them, and after the ſaid Annuities are not paid, (o) upon which one of the Sons enters generally, this ſhall be an Entry for all the four Sons, inaſmuch as they are Jointenants. H. 42 El. B. R. between Purſlowe and Parker, adjudged.

(o) Hainſworth and Petty, Moor 645. Pl 891. Noy 51.

8. If a Man deviſes to J. S. Lands held by Knight's Service, and dies, his Heir within Age, and a Stranger enters upon the Deviſee, and diſſeiſes him, and after the Lord in Chivalry enters upon the Diſſeiſor, and upon a Re-entry by the Diſſeiſor, brings Treſpaſs againſt him, this is maintainable, for the Entry of the Lord into his third Part (the Deviſe being void for that) is an Entry for the Deviſee for the other two Parts, and ſo the Lord and Diſſeiſor are no Tenants in Common. P. 3 Car. between Rogers and Blynman, per Curiam, reſolved upon Evidence at the Bar.

(G) Special

(G) Special Entry.

(a) Where one Parcener after the Death of their Anceſtor enters ſpecially,

1. If Lands (a) deſcend to two Coparceners, and a Stranger abates, and after one Coparcener enters into the Whole to her own Uſe, this ſhall not ſettle any Poſſeſſion in the other, but (b) all the Eſtate ſhall be in her ſelf by the ſpecial Entry. 26 Aſſ. (c) 1. adjudged.

claiming the whole Land, and taking the whole Profits, ſhe gains the Moiety of her Siſter by Abatement. Co. Lit. 243. b. Co. Lit. 373. b. Dal. 62. (b) But where one Parcener is in Poſſeſſion, and the other enters, and claims all expreſly, this will not diſpoſſeſs her Fellow, for her Poſſeſſion is over all lawful as well before ſuch Claim as after, ſo that there is no Poſſeſſion altered by ſuch Claim, and one Parcener, Jointenant or Tenant in Common, cannot diſſeiſe his Fellow but by an actual Ouſter. But for this, vid. ante 624. Pl. 2. and the Notes there, and Cro. El. 640. (c) This is miſprinted here as in the Original, and I ſuppoſe ſhould be Pl. 2. which vid. Br. Aſſiſe 258. Br. Entry Congeable 59.

Of what Things Advantage may be taken without an Entry.

1. If a Man is diſſeiſed of Lands whereunto a Common is appendant, the Diſſeiſee cannot uſe the Common till he enters into the Land to which it is appendant, becauſe it might be a Prejudice to the Tenant of the Soil, for if the Diſſeiſee might do it, ſo might the Diſſeiſor, which would be a double Charge to the Tenant. *Co. Lit.* 122. b.

2. But if a Man is diſſeiſed of a Manor to which there is an Advowſon appendant, he may preſent to the Advowſon before he enters into the Manor. *Co. Lit.* 122. b.

(a) Tail Entail.

(a) But by what Words an Eſtate Tail may be created by Deviſe, vid. 1 Rol. Abr. 835.

(H) At what Time, how, and by what Words, it may be made by Deviſe.

By what Words.

1. If a Deviſe be to one and his Heirs of his Body for 100 Years, this is no Tail but for Years, for it is ſo expreſſed.

(b) Cro. Jac. 63. S. C. &

(b) Co. 10. Loveis 87.

S. P. debated, the Judges differing in their Opinion, it appearing by the Proviſo in the Will, and other Circumſtances in the Caſe, That the Deviſor intended the Deviſee ſhould have a Tail. Moor 773. Pl. 1067. S. C. agreed by all the Judges, that it was an Eſtate Tail, and the Limitation for Years void, becauſe of the apparent Intention of the Deviſor; and if it ſhould be a Term, the Deviſee being Heir to the Deviſor, it would by the Diſcent of the Inheritance merge in the Inſtant it was created, which could never be the Intention of the Deviſor. 1 Rol. Abr. 831. Pl. 2. S. C. 847. Pl. 3. S. C. Et vid. 2 Brownl. 104.

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FINIS.

FH
MVSEVM
BRITANNICVM